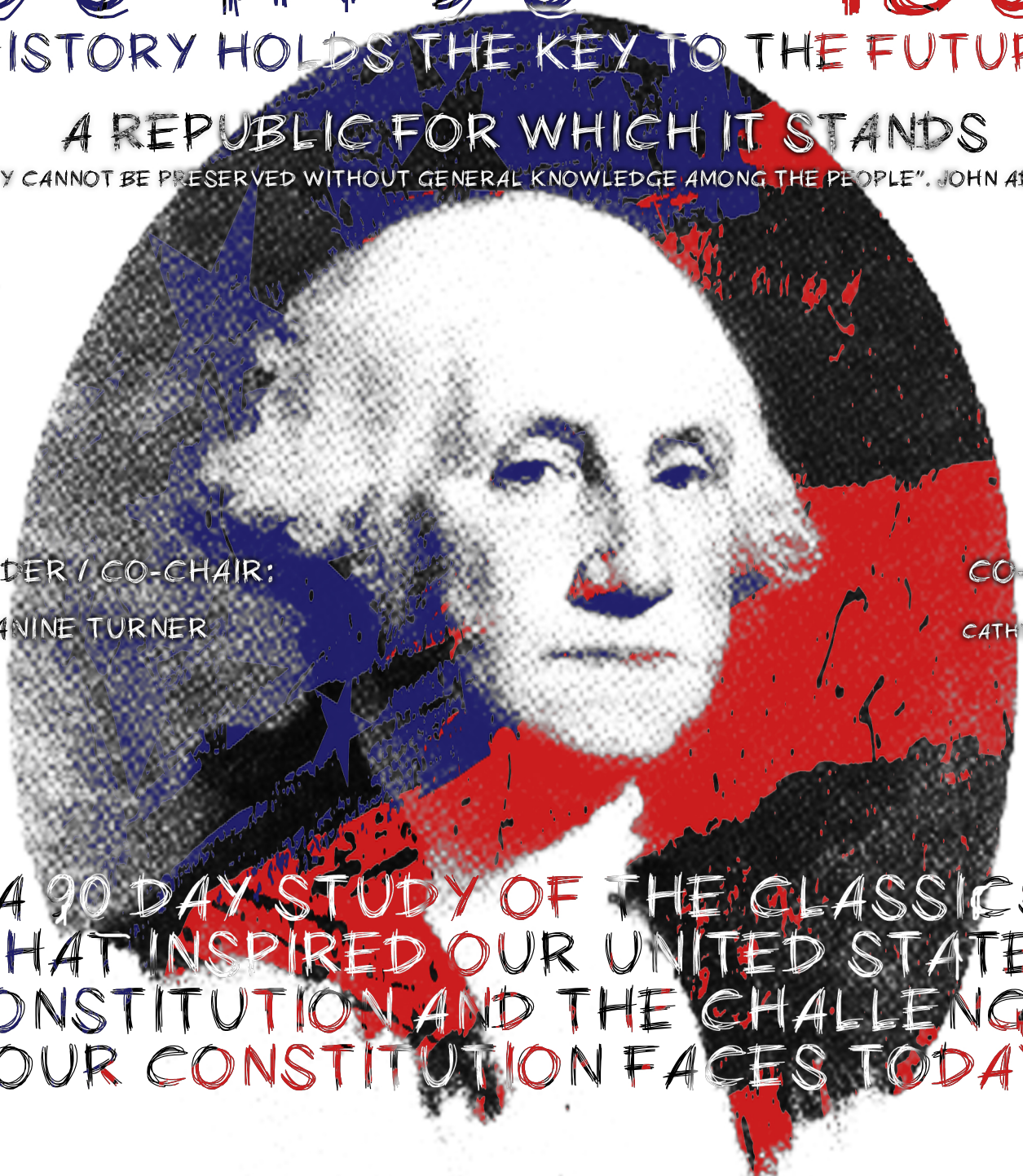
90 IN 90 = 180

HISTORY HOLDS THE KEY TO THE FUTURE

A REPUBLIC FOR WHICH IT STANDS

"LIBERTY CANNOT BE PRESERVED WITHOUT GENERAL KNOWLEDGE AMONG THE PEOPLE". JOHN ADAMS, 1765



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A 90 DAY STUDY OF THE CLASSICS THAT INSPIRED OUR UNITED STATES CONSTITUTION AND THE CHALLENGES OUR CONSTITUTION FACES TODAY

FEBRUARY 18, 2013 – JUNE 21, 2013

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A 90 Day Study
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Featuring essays by Constituting America's

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Senior Counsel and Vice President of the Center for Life at Alliance Defending Freedom

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Dean Emeritus, James Madison College; Emeritus Professor of Political Science, Michigan State University

Logan Beirne,
Olin Scholar at Yale Law School and author of Blood of Tyrants: George Washington & the Forging of the Presidency

James D. Best,
Author of Tempest at Dawn, a novel about the 1787 Constitutional Convention, and Principled Action, Lessons from the Origins of the American Republic

David J. Bobb, PhD.,
Director, Allan P. Kirby, Jr. Center for Constitutional Studies and Citizenship, Hillsdale College, Washington, D.C.

The Honorable John Boehner,
53rd Speaker of the U.S. House of Representatives

Justin Butterfield,
Religious Liberty Attorney at the Liberty Institute

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Paul Schwennesen,
Southern Arizona rancher and Director of the Agrarian Freedom Project

Kyle Scott,
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Julie Silverbrook,
Executive Director of The Constitutional Sources Project

Nathaniel Stewart,
Attorney in Washington, D.C.

Gennie Westbrook,
Director of Curriculum and Professional Development, The Bill of Rights Institute

Tony Williams,
Program Director of the Washington-Jefferson-Madison Institute

J. Eric Wise,
Partner at Gibson Dunn & Crutcher LLP, New York City

The Unanimous Declaration of the Thirteen United States of America

July 4, 1776

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,-That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to 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. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.

He has affected to render the Military independent of and superior to the Civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

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In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Nor have We been wanting in attentions to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

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William Hooper, Joseph Hewes, John Penn

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Caesar Rodney, George Read, Thomas McKean

New York
William Floyd, Philip Livingston, Francis Lewis, Lewis Morris

New Jersey
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New Hampshire
Josiah Bartlett, William Whipple, Matthew Thornton

Massachusetts
John Hancock, Samuel Adams, John Adams, Robert Treat Paine, Elbridge Gerry

Rhode Island
Stephen Hopkins, William Ellery

Connecticut
Roger Sherman, Samuel Huntington, William Williams, Oliver Wolcott

Introductory Essay by Dr. David Bobb, Director, Allan P. Kirby, Jr. Center for Constitutional Studies and Citizenship, Hillsdale College

When in 1863 Abraham Lincoln began his address at Gettysburg battlefield with the phrase, "Four score and seven years ago," he reminded his fellow citizens that their cause in the Civil War was also the cause of 1776. In the year of America's birth, Lincoln stated, "Our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal."

America's principles are liberty and equality, and our Founding understanding of their relationship was revolutionary.

The Declaration affirms the idea that all human beings are created equal in their possession of "certain unalienable rights." These rights include "life, liberty, and the pursuit of happiness." They are given to human beings by "Nature's God"—not government.

These natural rights are an individual's most precious property, America's Founders argued. Government's primary purpose is to protect these fundamental rights. The Declaration of Independence is an indictment of a government that had betrayed its purpose. Instead of protecting his subjects' rights, King George III routinely violated them. Rejecting their status as subjects to a king who had become a "tyrant," Americans declared to the world that they now stood proudly as *citizens* of a new nation.

Citizenship requires self-government. Americans, James Madison wrote, "rest all our political experiments on the capacity of mankind for self-government." The readings in this series, drawn from Hillsdale College's *The U.S. Constitution: A Reader*, are direct or indirect reflections on the American experiment.

The United States Constitution is the written result of America's early political experiments. Drawing from their own colonial experience and the history of other regimes through the ages, the framers of the Constitution rejected the Articles of Confederation as a failed experiment, and launched a new one that was based upon a "new science of politics."

That new regime, or form of government, was republican. The people do not rule directly; rather, they are responsible for electing their representatives. These representatives, in turn, are responsible *to* the Constitution, and to the people. Our government was designed to be limited, but not weak. Its strength is necessary so that the rights of American citizens are protected, and the purposes of the Constitution upheld.

In the late nineteenth and early twentieth centuries, Progressive thinkers challenged the Founders' experiment in self-government with what they saw as a new-and-improved model of experimentation led by experts. Instead of relying upon popular virtue and the institutional arrangements of separation of powers, federalism, and limited government, Progressives put their faith in the prospect of political perfectibility of mankind.

The U.S. Constitution: A Reader is a dialogue across the ages about the most important political questions. By pointing us back to the classics of political thought that have defined our successful experiment in self-government, this forum will also reveal the major challenges to the Constitution.

We invite your participation in this constitutional conversation, and welcome the contribution you will make to the renewed success of the American experiment in self-government.

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Tuesday, February 19, 2013 – Essay #2 – The Declaration of Independence Part II – Guest Essayist: W.B. Allen, Dean Emeritus, James Madison College; Emeritus Professor of Political Science, Michigan State University

Reading the Declaration of Independence

The Declaration of Independence bears the heading, "in Congress, July 4, 1776, a declaration by the representatives of the United States of America, in general Congress assembled." At the outset we see the practice of a "congress" — it reads: "in Congress July 4, 1776." This act taken in a solemn assembly was called for specific purposes "by the representatives of the United States of America." This is ambiguous, for the American states were previously colonies, not states. Nor was there something called the United States as a single entity (although in 1775 George Washington — who had been appointed commander of the "Army of the United States" — had begun to speak of the United States as a single Union and of developing, strengthening and perpetuating it).

Nevertheless, if the Declaration makes united states in America the United States of America, then the title expresses the end accomplished through these very words. Moreover, the Americans democratically *appointed* representatives to enunciate these principles.

Thus "in a general Congress" they wrote:

When in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

"In the course of human events" invokes the fact that things happen; people undergo the various accidents and sometimes deliberate effects that unfold in the course of history. And in the course of such specifically *human events* — not world history or local events, not geological events, not astrophysical events –there arose a parochial moment in which a part of the British Empire (which may be called British North America) proceeded to dissolve existing *political bands*. The words "political" and "bands" convey a very significant and special meaning; they did not "dissolve all human connection," they did not "dissolve moral connections," they did not "dissolve commercial or economic connections," they did not "dissolve religious connections." They dissolved the rules, the principles, the practices, the operations, the procedures and the institutions through which they governed themselves.

While they acted self-consciously, they did so on the basis of lawful rights or claims. Their rights derived from the laws of nature and of nature's God. Further, "a decent *respect to the opinions of mankind* requires that they should declare the causes which impel them to the separation." In other words, they have a duty –referred to here as "a decent respect to the opinions of mankind" — to declare these principles and to state their case before a jury of all mankind. Any objective intellect will understand the justice of their claims. Finally, not only are they entitled to revolt, but it was necessary for them so to do. Moreover, if it were not necessary, it would have been imprudent to separate.

We readily understand how it could be imprudent. Any people, deciding suddenly to separate from the superintending and protecting care of a larger entity that had protected and secured them against the dangers of the world, while also themselves lacking resources sufficient to obtain like security, would act most imprudently.

Continuing, "We hold these truths to be *self evident*." That is only the first clause of the second sentence! We hold certain things as truths and these truths do not require proof. Self evidence does not mean obvious to every self. It is a term that is borrowed from the language of geometric axioms, definitions and propositions. Self evident means that the truth of the axioms is contained within the terms of the axioms themselves. When we say that two things each equal to a third are equal to each other that is an axiom that is not subject to demonstration (which does not bar pedants (PED-nts) from laboriously re-enacting the truth!).[i]

"We hold these truths to be self evident, that all *men* are created equal". They used the term "men" in the general sense, which means therefore all human beings. This refers to all human beings, because it is based on an universal axiom; but we do not depend on that logical and grammatical distinction in order to see the relevant significance of this. We remember that the term "equal" already appeared in the first paragraph when we referred to a people assuming a separate and *equal* station. That equal station or nationhood is not the same equality that is invoked when we say all men are created equal. The first paragraph refers specifically to peoples or nations as equal. In the second paragraph we say rather that all *men* are created equal. The authors of this document understood when they wrote "men" that they intended human beings and not this or that particular grouping of humans. We have many testimonies to this effect from the era itself. Elected representatives in the State of New Jersey[ii] refer to these words and their universal significance.

"They are endowed by their *Creator* with certain unalienable rights; that among these are life liberty and the pursuit of happiness." Followed by a dash, the sentence has not yet finished. What *unalienable rights* derive from human equality? "*Among* these are life, liberty and the pursuit of happiness." It is not necessary to list them all; it is only necessary to establish that reasonable and rational human beings will agree that what makes human beings human conveys upon them title to certain rights. If we could shed our humanity and be something else, something not human, then we would not have these rights.

That first sentence of the second paragraph continues, "to secure these rights governments are instituted among *men.*" Notice the passive voice; "among men" has precisely the same value as "that all men are created equal." Certainly nobody means to say that women, children, slaves or

any particular subsections are ungoverned. It may be, as the exordium makes clear, that the governments are instituted among groupings of human beings; so that differing groupings have differing governments; but everywhere that there are human beings governments are instituted among them.

That governments are instituted among men is a passive construction, because there are differing ways in which governments may come to be. Some of the ways are legitimate and some not. We can not move from the passive voice to the active voice, where we actually identify who institutes the government, until we understand what the rule of legitimacy is. The first sentence of the second paragraph continues, "deriving their just powers from the *consent of the governed*." Observe the direction; the process works through time and it works through moral authority. Those subject to the government are the men among whom the government comes to exist. They have a right to consent (the moral dimension) and it becomes just *when* they consent (the temporal dimension). Only at that point may we then switch voices and, instead of speaking passively, say that men institute government. For their consent is the agency, the power, that creates the government.

The Declaration next reads, "whenever any form of government becomes destructive of these ends," any people may "alter the government" or "abolish it" – i.e., withdraw consent — thereby stigmatizing powers exercised without their agreement as powers unjustly exercised. Moreover, it continues, "and to *Institute new government*."

Here emerges the active voice; these men — the consenting individuals, the people of the nation, — will institute new government just as they had a right to institute the prior government, "laying its foundation on such principles" — i.e. they do not act arbitrarily. They act rationally; they have preferences to be sure, but the preferences consult the principles; the principles guarantee the unalienable rights.

Once they proclaim such principles they are able to continue "organizing" the government's powers "in such form as to them shall seem most likely to effect their safety and happiness". There the sentence ends.

All previous political arrangements that assert the superior claim of some few to rule the many (whether those few were monarchs or feudal barons or despots or tyrants or any kind of minority rule) are "illegitimate and therefore based on some kind of superstition."[iii] The unalienable rights mentioned in the Declaration are those from which obligations can be inferred or deduced. [iv] For the Declaration is a statement of when some men might and might not be rightfully regarded as the rulers of other men.

We understand man and his rights as much by understanding what he is not as by understanding what he is. In fact, we understand the latter only by understanding the former, for man is neither beast nor God. To prove that God exists is not necessary to the argument; it suffices that divine nature would be of a certain sort. Such a nature would carry to absolute perfection those potential perfections perceivable in man, such as reason, justice and mercy, without the corresponding imperfections, such as the passionate self-love that corrupts the perfections. The conception of a being in whom reason is not or cannot be affected by desire is the conception of

a being in whom just power naturally resides. It is a conception of a being in whom the different powers of government can safely be collected. Thus the God of the Declaration combines three roles besides that of creator: legislator; supreme judge; and finally, executive power or divine Providence.

It is an absolutely necessary condition of the rule of law that these three powers of government never be united in the same human hands – legislative, executive, and judicial. For them to be so united, whether in a singular or collective body, is the very definition of tyranny. For the equality of mankind is an equality of defect as well as an equality of rights.

These fundamental questions of political life go into determining whether any particular institutions, operations or practices can not only be received as legitimate but also actually accomplish their ends. The body politic arises from fundamental rights and claims that give scope to the greatest potential of human enlightenment. [v]

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[i] Cf., "Political Arithmetic: Social Science, Scientific Revolution, Political Innovation," in *Statistics Science and Public Policy. IX. Government, Science and Politics*. edited by A. M. Herzberg and R. W. Oldford (Kingston, ONT: Queens University, 2005).

[ii] Merrill Jensen, ed., *The Documentary History of the Ratification of the Constitution*. Vol. I "Constitutional Documents and Records, 1776-1787," (Madison: State Historical Society of Wisconsin, 1976). p. 116.

[iii] Ibid.

[iv] Harry V. Jaffa. *The Conditions of Freedom: Essays in Political Philosophy*. Baltimore, The Johns Hopkins University Press, 1975. Chapter 7, pp. 151-152.

[v] W. B. Allen. "Machiavelli and Modernity." In Niccolo Machiavelli, *The Prince*. Translated by Angelo Codevilla. New Haven: Yale University Press, 1997. edition translation of Machiavelli's *Prince*]

Letter to Henry Lee by Thomas Jefferson (1743-1826)

May 8, 1825

Dear Sir:

…That George Mason was the author of the bill of rights, and of the constitution founded on it, the evidence of the day established fully in my mind. Of the paper you mention, purporting to be instructions to the Virginia delegation in Congress, I have no recollection. If it were anything more than a project of some private hand, that is to say, had any such instructions been ever given by the convention, they would appear in the journals, which we possess entire. But with respect to our rights, and the acts of the British government contravening those rights, there was but one opinion on this side of the water. All American whigs thought alike on these subjects. When forced, therefore, to resort to arms for redress, an appeal to the tribunal of the world was deemed proper for our justification. This was the object of the Declaration of Independence. Not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are compelled to take. Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc. The historical documents which you mention as in your possession, ought all to be found, and I am persuaded you will find, to be corroborative of the facts and principles advanced in that Declaration. Be pleased to accept assurances of my great esteem and respect.

1. Thomas Jefferson, "To Henry Lee," May 8, 1825, in Paul Leicester Ford, ed., *The Works of Thomas Jefferson,* "Federal Edition," Vol. 10 (New York: G.P. Putnam's Sons, 1904-5), 342-43.

Wednesday, February 20, 2013 – Essay #3 – The Letter to Henry Lee by Thomas Jefferson – Guest Essayist: William C. Duncan, Director of the Marriage Law Foundation

Letter to Henry Lee (May 8, 1825)

In his 1825 letter to Henry Lee, Thomas Jefferson lays out the "object" of the Declaration, the origins of the "self-evident" principles it outlines, and the nature of its authority.

The "object of the Declaration of Independence," he explains, was to "appeal to the tribunal of the world" with a justification of the decision "to resort to arms for redress" in response to "the acts of the British government contravening" the rights of Americans. This purpose is clear in the vast bulk of the Declaration that carefully lists these abuses and explains the means, short of war, Americans took to gain redress.

In contrast to the revolutionary movements that followed, the Declaration did not propose to

"find out new principles, or new arguments, never before thought or, not merely to say things which had never been said before."

The Declaration was not a charter for remaking society according to a utopian model ("copied from any particular and previous writing"). It merely

"placed before mankind the common sense of the subject, in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are compelled to take."

Rather than proposing a new ideology, the Declaration laid out "an expression of the American mind." It was not "aiming at originality of principle or sentiment." Its authority rests on "the harmonizing sentiments of the day" drawn from sources going back to antiquity (reflecting the remarkable learning of the Founders). In this it reflected the experience of Americans and experience, as Federalist 20 explains, "is the oracle of truth."

This is important. The Declaration reflected a unique American innovation, a sundering of previous political ties not on a whim or to promote a project of social regeneration which would forcibly bring into existence a "new man" but to vindicate a long experience of self-government which included the exercise of "unalienable rights" granted to men and women "by their Creator." When these rights were no longer secured by the previous arrangement and government was exercised absent "the consent of the governed," a people would be justified in instituting a new government. England had not respected the equality of Americans in regards to the rights government was instituted to secure so a change was not only justified but necessary and prudent.

Because the Declaration's asserted rights derive from common sense and widely shared assumptions, they are not likely to support the more expansive claims of a "living constitution" through which courts pursue extra-constitutional aims like perfect equality of outcomes. These would be "new principles" Thomas Jefferson specifically disclaimed.

Later the Constitution would give legal status to some of the common sense principles invoked by the Declaration, most importantly providing a vehicle to make "secure" the foundation of republican government by the consent of the governed. Through the Constitution, the sentiments of the Declaration gained real force in the institutions of representative government.

The "plain and firm" statement of truths in the Declaration of Independence still animate our continuing effort to protect what we inherited from those who pledged their lives, fortune and sacred honor in its support.

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Nicomachean Ethics by Aristotle (384-322 B.C.)

C. 350 B.C.

Book 1

Chapter 1. Every art and every inquiry, and likewise every action and choice, seems to aim at some good, and hence it has been beautifully said that the good is that at which all things aim. But a certain difference is apparent among ends, since some are ways of being at work, while others are certain kinds of works produced, over and above the being-at-work. And in those cases in which there are ends of any kind beyond the actions, the works produced are by nature better things than the activities. And since there are many actions and arts and kinds of knowledge, the ends also turn out to be many: of medical knowledge the end is health, of shipbuilding skill it is a boat, of strategic art it is victory, of household management it is wealth. But in as many such pursuits as are under some one capacity—in the way that bridle making and all the other skills involved with implements pertaining to horses come under horsemanship, while this and every action pertaining to war come under strategic art, and in the same way other pursuits are under other capacities—in all of them the ends of all the master arts are more worthy of choice than are the ends of the pursuits that come under them, since these latter are pursued for the sake of those arts. And it makes no difference whether the ends of the actions are the ways of being at work themselves, or something else beyond these, as they are with the kinds of knowledge mentioned.

Chapter 2. If, then, there is some end of the things we do that we want on account of itself, and the rest on account of this one, and we do not choose everything on account of something else (for in that way the choices would go beyond all bounds, so that desire would be empty and pointless), it is clear that this would be the good, and in fact the highest good. Then would not an awareness of it have great weight in one's life, so that, like archers who have a target, we would be more apt to hit on what is needed? But if this is so, one ought to try to get a grasp, at least in outline, of what it is and to what kind of knowledge or capacity it belongs.

And it would seem to belong to the one that is most governing and most a master art, and politics appears to be of this sort, since it prescribes which kinds of knowledge ought to be in the cities, and what sorts each person ought to learn and to what extent; also, we see that the most honored capacities, such as generalship, household economics, and rhetorical skill, are under this one. Since this capacity makes use of the rest of the kinds of knowledge, and also lays down the law about what one ought to do and from what one ought to refrain, the end of this capacity should include the ends of the other pursuits, so that this end would be the human good. For even if the good is the same for one person and for a city, that of the city appears to be greater, at least, and more complete both to achieve and to preserve; for even if it is achieved for only one person that is something to be satisfied with, but for people or for cities it is something more beautiful and more divine. So our pursuit aims at this, and is in a certain way political.

Chapter 3. One would speak adequately if one were to attain the clarity that goes along with the underlying material, for precision ought not to be sought in the same way in all kinds of discourse, any more than in things made by the various kinds of craftsmen. The things that are beautiful and just, about which politics investigates, involve great disagreement and inconsistency, so that they are thought to belong only to convention and not to nature. And the things that are good also involve some inconsistency of this sort, because harm results from them for many people, for before now some people have been ruined by wealth, and others by courage. So one ought to be content, when speaking about such things and reasoning from such things, to point out the truth roughly and in outline, and when speaking about things that are so for the most part, and reasoning from things of that sort, to reach conclusions that are also of that sort. And it is necessary also to take each of the things that are said in the same way, for it belongs to an educated person to look for just so much precision in each kind of discourse as the nature of the thing one is concerned with admits; for to demand demonstrations from a rhetorician seems about like accepting probable conclusions from a mathematician.

All people are good at making distinctions about the things they are acquainted with, and each is a good judge of those things. Therefore, good judgment goes along with the way each one is educated, and the one who has been educated about everything has it in an unqualified way. For this reason, it is not appropriate for a young person to be a student of politics, since the young are inexperienced in the actions of life, while these are the things about which politics speaks and from which it reasons. Also, since the young are apt to follow their impulses, they would hear such discourses without purpose or benefit, since their end is not knowing but action. And it makes no difference whether one is young in age or immature in character, for the deficiency doesn't come from the time, but from living in accord with feeling and following every impulse. For knowledge comes to such people without profit, as it does to those who lack self-restraint; but to those who keep their desires in proportion and act in that way, knowing about these things would be of great benefit.

About the one who is to hear this discourse, and how it ought to be received, and what task we have set before ourselves, let these things serve as a prelude.

Chapter 4. Now taking up the thread again, since every kind of knowing and every choice reach toward some good, let us say what it is that we claim politics aims at, and what, of all the goods aimed at by action, is the highest. In name, this is pretty much agreed about by the majority of people, for most people, as well as those who are more refined, say it is happiness, and assume that living well and doing well are the same thing as being happy. But about happiness—what it is—they are in dispute, and most people do not give the same account of it as the wise. Some people take it to be something visible and obvious, such as pleasure or wealth or honor, and different ones say different things, and even the same person often says different things; when sick one thinks it is health, but when poor, that it is wealth, and when they are conscious of ignorance in themselves, people marvel at those who say it is something grand and above them. And some people believe that, besides these many good things, there is some other good, by itself, which is also responsible for the being good of all these other things.

Now to review all the opinions is perhaps rather pointless, and it would be sufficient to review the ones that come most to prominence or seem to have some account to give. And let it not

escape our notice that arguments from first principles differ from those that go up toward first principles. For Plato rightly raised this question, and used to inquire whether the road is from first principles or up to first principles, just as, on a race course, the run is either from the judges to the boundary or back again. One must begin from what is known, but this has two meanings, the things known to us and the things that are known simply. Perhaps then we, at any rate, ought to begin from the things that are known to us. This is why one who is going to listen adequately to discourse about things that are beautiful and just, and generally about things that pertain to political matters, needs to have been beautifully brought up by means of habits. For the primary thing is that something is so, and if this is sufficiently evident, there is no additional need for the reason why. And such a person either has or easily gets hold of the things that come first. If one neither has them nor has it in him to get hold of them, let him harken to Hesiod:

Altogether best is he who himself has insight into all things, But good in his turn is he who trusts one who speaks well. But whoever neither himself discerns, nor, harkening to another, Lays to heart what he says, that one for his part is a useless man.

Chapter 5. For our part, let us speak from the point where we digressed.Most people and the crudest people seem, not without reason, to assume from people's lives that pleasure is the good and is happiness. For this reason they are content with a life devoted to enjoyment. For there are three ways of life especially that hold prominence: the one just now mentioned, and the political life, and third, the contemplative life. Now most people show themselves to be completely slavish by choosing a life that belongs to fatted cattle, but they happen to get listened to because most people who have power share the feeling of Sardanapalus. But refined and active people choose honor, for this is pretty much the goal of political life. Now this appears to be too superficial to be what is sought, for it seems to be in the ones who give honor rather than in the one who is honored, but we divine that the good is something of one's own and hard to take away. Also, people seem to pursue honor in order to be convinced that they themselves are good. At any rate they seek to be honored by the wise and by those who know them, and for virtue; it is clear, then, that at least according to these people, virtue is something greater, and one might perhaps assume that this, rather than honor, is the end of the political life.

But even this seems too incomplete, since it seems possible, while having virtue, even to be asleep or to be inactive throughout life, and on top of these things, to suffer evils and the greatest misfortunes. No one would consider one who lived in that way to be happy, except when defending a hypothesis. And this is enough about these things, since they are spoken of sufficiently in the current popular writings. And the third way of life is the contemplative one, about which we shall make an investigation in what follows. The life of money making is a type of compulsory activity, and it is clear that wealth is not the good being sought, since it is instrumental and for the sake of something else. For this reason one might suppose that the things spoken of before are more properly ends, since they provide contentment on account of themselves, though it appears that even they are not what is sought, even though many arguments connected with them are tossed around. So let these things be put aside.

Chapter 6. No doubt the better thing to do is to examine the universal good and go through the difficulties in the way it is spoken of, and yet such an inquiry becomes like trudging uphill because the men who introduced the forms were my friends. But no doubt it would be admitted

to be better, indeed to be necessary when keeping the truth safe is at stake, even to abandon the things that are one's own, both for other reasons and because we are philosophers; for while both [the truth and one's friends] are loved, it is a sacred thing to give the higher honor to the truth.

Now those who brought in this opinion did not make forms within which a primary and a derivative instance were spoken of (which is why they did not construct a form of number), but the good is attributed to what something is and also to the sort of thing it is and to a relation it has, while the thinghood of something, which is something on its own, by nature has priority over a relation it has (for this is like an offshoot and incidental attribute of what is), so that there could not be any form common to these. Further, since *good* is meant in just as many ways as *being* is (for in the sense of what something is, the good is spoken of as, for instance, the good or the intellect; in the sense of being of a certain sort, it is spoken of as the excellences; in the sense of being a certain amount, it is spoken of as the proper limit; in the sense of being related to something, it is spoken of as the useful; in the sense of being some time, it is spoken of as an opportune moment; and in the sense of place, it is spoken of as a dwelling or other things of that sort), it is clear that there could not be any common good that is one and universal, for if there were it could not have been meant in all the ways of attributing being but only in one.

Further, since, of the things that come under one form, there is also one kind of knowledge, there would also be some one kind of knowledge of all things that are good, but as it is there are many, even of the good things that come under one way of attributing being; for example, of the opportune moment, in war, the knowledge of it is the general's art, while in disease it is the physician's art, and of the proper limit in food, the knowledge is the physician's art, while in exercises it is the art of the gymnastic trainer. And one might raise the question even of what in the world they mean by speaking of each whatever-itself, seeing as how there is one and the same meaning for both a human being and the human-being-itself, namely the meaning of human-ness. For insofar as something is a human being, there will be no difference, and if that is the way it is, there will be no difference either insofar as something is good. Surely it will not be any more good by being everlasting, inasmuch as a long-lasting thing is no more white than one that lasts only a day. The Pythagoreans seem to speak in a more credible way about the good, when they place one-ness in the column of good things, and Speusippus seems to have followed them. But about these things let there be some other discussion.

But a certain debatable point in the things that have been said comes to light, on the grounds that the arguments were not meant to be about every sort of good, but that the goods spoken of as coming under one form are those that are pursued, and with which people are satisfied, for their own sake, while the things that tend to produce these, or to preserve them in some way, or to prevent their opposites are spoken of as good by derivation from these and in a different way. It is clear, then, that good things would be meant in two ways, some on account of themselves and others derived from these. Then separating the things that are good in themselves from the useful things, let us examine whether the former are meant in accordance with one form. But what sort of things should one set down as good in themselves? Are they not those things that one pursues even when they are isolated from everything else, such as having good sense, or seeing, or certain pleasures and honors? For even if we pursue these things by reason of some other thing, one would still place them among things good in themselves. Or is there nothing else except the form that is good in itself? But then the form would be of no use. But if the things

mentioned are among things good on account of themselves, the meaning of the good in all of these would have to show itself as the same, just as the meaning of whiteness is the same in snow and in lead paint. But of honor and good sense and pleasure there are distinct and divergent meanings of that by which they are good. Therefore there is not any good that is shared and comes under one form.

But then in what way is good meant? For these things certainly do not seem to have the same name by chance. But do they have the same name by being derived from one thing, or by all adding up together into one thing, or rather by analogy? For as sight is in relation to the body, intellect is in relation to the soul, and some other thing is in relation to something else. But perhaps these things ought to be let go for now, since to be precise about them would be more at home in another kind of philosophic inquiry. And it is similar with the form, for even if there is some one good that is attributed in common, or is something separate itself by itself, it is clear that it is not a thing done or possessed by a human being, and something of that sort is being looked for now. But perhaps it might seem to someone that it would be better to be acquainted with it with a view to those good things that can be possessed or done; for having this as a sort of pattern, we would also know the things that are good for us better, and if we know them, we will hit upon them.

Now while the argument has a certain plausibility, it seems to be discordant with the kinds of knowledge we have, for all of them leave aside an acquaintance with the good itself in order to aim at some particular good and hunt for what they lack. And surely it is not reasonable that all those skilled in arts should be ignorant of, and not even look for, something of such great assistance. And it is impossible to say in what respect a weaver or a carpenter will be benefitted in relation to his art by knowing this good itself, or how one who has beheld the form itself will be a better doctor or general. For it appears that the doctor does not consider health in that way, but the health of a human being, or perhaps rather that of this particular person, since he heals them each by each. So let these things have been spoken of just this much.

Chapter 7. And let us go back again to the good that is being sought, whatever it may be. For it seems to be a different thing in the medical art and the general's art, since it is a different thing in each different action and art, and similarly with the rest. What then is the good in each of them? Or is it that for the sake of which they do everything else? In the medical art this is health, in the general's art it is victory, in the housebuilder's art it is a house, and in a different art it is something else, and in every action and choice it is the end, since everyone does everything else for the sake of this. And so, if there is some end for all actions, this would be the good that belongs to action, and if there is more than one such end, these would constitute that good. So the argument, in transforming itself, has reached the same place; and one must try to make this still more clear.

Now since the ends seem to be more than one, while we choose some of them on account of something else, such as wealth, flutes, and instrumental things generally, it is clear that they are not all complete, but it is manifest that the highest good is something complete. So if there is some one thing alone that is complete, this would be what is being sought, but if there are more than one of them, it would be the most complete of these. And we say that a thing that is pursued on account of itself is more complete than a thing pursued on account of something else, and that

what is never chosen on account of anything else is more complete than things chosen both for themselves and on account of something else, and hence that, in an unqualified sense, the complete is what is chosen always for itself and never on account of anything else. And happiness seems to be of this sort most of all, since we choose this always on account of itself and never on account of anything else, while we choose honor and pleasure and intelligence and every virtue indeed on account of themselves (for even if nothing resulted from them we would choose each of them), but we choose them also for the sake of happiness, supposing that we will be happy by these means. But no one chooses happiness for the sake of these things, nor for the sake of anything else at all.

And the same thing appears to follow from its self-sufficiency, for the complete good seems to be self-sufficient. And by the self-sufficient we mean not what suffices for oneself alone, living one's life as a hermit, but also with parents and children and a wife, and friends and fellow citizens generally, since a human being is by nature meant for a city. But one must take some limit for these connections, since by stretching out to ancestors and descendants and friends of one's friends they go beyond all bounds; but this must be examined later. But we set down as self-sufficient that which, by itself, makes life choiceworthy and lacking in nothing, and such a thing we suppose happiness to be. What's more, we suppose happiness to be the most choiceworthy of all things while not counting it as one of those things, since if it were counted among them it is clear that it would be more choiceworthy together with the tiniest amount of additional good, for the thing added becomes a preeminence of good, and of good things, the greater is always more worthy of choice. So happiness appears to be something complete and self-sufficient, and is, therefore, the end of actions.

But perhaps to say that the highest good is happiness is obviously something undisputed, while it still begs to be said in a more clear and distinct way what happiness is. Now this might come about readily if one were to grasp the work of a human being. For just as with a flute player or sculptor or any artisan, and generally with those to whom some work or action belongs, the good and the doing it well seem to be in the work, so too it would seem to be the case with a human being, if indeed there is some work that belongs to one. But is there some sort of work for a carpenter or a leather worker, while for a human being there is none? Is a human being by nature idle? Or, just as for an eye or a hand or a foot or generally for each of the parts, there seems to be some sort of work, ought one also to set down some work beyond all these for the human being? But then what in the world would this be? For living seems to be something shared in even by plants, but something peculiarly human is being sought. Therefore, one must divide off the life that consists in nutrition and growth. Following this would be some sort of life that consists in perceiving, but this seems to be shared in by a horse and a cow and by every animal. So what remains is some sort of life that puts into action that in us that has articulate speech; of this capacity, one aspect is what is able to be persuaded by reason, while the other is what has reason and thinks things through. And since this is still meant in two ways, one must set it down as a life in a state of being-at-work, since this seems to be the more governing meaning.

And if the work of a human being is a being-at-work of the soul in accordance with reason, or not without reason, while we say that the work of a certain sort of person is the same in kind as that of a serious person of that sort, as in the case of a harpist and of a serious harpist, and this is simply because in all cases the superiority in excellence is attached to the work, since the work

of a harpist is to play the harp and the work of a serious harpist is the play the harp well—if this is so and we set down that the work of a human being is a certain sort of life, while this life consists of a being-at-work of the soul and actions that go along with reason, and it belongs to a man of serious stature to do these things well and beautifully, while each thing is accomplished well as a result of the virtue appropriate to it—if this is so, the human good comes to be disclosed as a being-at-work of the soul in accordance with virtue, and if the virtues are more than one, in accordance with the best and most complete virtue. But also, this must be in a complete life, for one swallow does not make a Spring, nor one day, and in the same way one day or a short time does not make a person blessed and happy.

So let the good have been sketched in outline in this way, for presumably one needs to rough it in first and then inscribe the details later. And it would seem to be in the power of anyone to carry forward and articulate things that are in good shape in the outline, and that time is a good discoverer of such things, or makes the work easier; in fact the advances in the arts have come from this, since it is in anyone's power to add what is left out. But it behooves one to remember the things that were said before, and not to look for precision in the same way in all things, but in accordance with the underlying material in each case, and to the extent that it is appropriate to that course of inquiry. For both a carpenter and a geometrician look for a right angle, but in different ways, for the one seeks it to the extent that it is useful to the work, while the other seeks for what it is or what it is a property of, since he is someone who beholds the truth. So one ought to do the same in other things, so that side issues do not become greater than the work being done.

And one ought not to demand a reason in all things alike, either, but it is sufficient in some cases for it to be shown beautifully that something is so, in particular such things as concern first principles; that something is so comes first and is a first principle. And of first principles, some are beheld by way of examples, others by sense perception, others by becoming experienced in some habit, and others in other ways. So one must try to go after each of them by the means that belong to its nature, and be serious about distinguishing them rightly, since this has great weight in what follows. For the beginning seems to be more than half of the whole, and many of the things that are inquired after become illuminated along with it.

Aristotle, *Nicomachean Ethics,* trans. Joe Sachs (Newbury, MA: Focus Publishing/R. Pullins, 2002), 1-12. Reproduced with permission of Focus Publishing in the format Textbook via Copyright Clearance Center.

Thursday, February 21, 2013 – Essay #4 – Nicomachean Ethics – Aristotle – Guest Essayist: Tony Williams, Program Director, Washington-Jefferson-Madison Institute

Aristotle's Nicomachean Ethics & American Republican Government

After George Washington was sworn-in as the first president of the new American republic on April 30, 1789, he delivered his First Inaugural Address to the people's representatives in Congress. He started the speech with his characteristic humility, stating that although he wished to retire to Mount Vernon and did not have the requisite skill to govern a country, he was nevertheless answering the call of his country. The address struck a distinctly Aristotelian chord in Washington's wishes for his country.

In his *Nicomachean Ethics*, the ancient Greek philosopher, Aristotle, describes his understanding of the basic nature of man. Humans are rational creatures, he maintains, and must use that reason to exercise self-restraint over their passions. That same rationality allows humans to be ethical, choosing between good and evil, right and wrong.
Over time, these decisions become habits of vice or virtue that shape character.

Since the end of human life is happiness, Aristotle holds that true happiness is rooted in the well-ordered, good, and virtuous life. Self-government becomes possible when each individual literally governs himself and controls his passions. It is a liberty governed by natural law.

Aristotle's ethics laid the foundation of his political views. He held that man is a political animal who finds his highest end in civil society. The goal of the art of politics is to promote human happiness through just governance. Because of the fact that politics deals with truths that are not always absolute or clearly discoverable by reason, the rightly-ordered state allows rational citizens to deliberate and attempt to persuade each other through rhetoric based upon right principles.

When attempting to measure the relative influence of any particular philosopher on the American founders, it is sometimes more subtle than adding up references in an index or looking at the personal libraries of the founders. It is clear that Aristotle's ethical and political views profoundly shaped the founders' understanding of the nature of man and government.

Aristotle's political philosophy was plainly evident in the new republican state constitutions. The 1776 Virginia Declaration of Rights stated in Article XV that, "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 1780 Massachusetts Constitution argued in Aristotelian terms that, "Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people." The Northwest Ordinance later established schools because, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind." Republican self-government was founded upon a virtuous citizenry.

Coming back to President Washington's First Inaugural, we see that he was expressing several Aristotelian sentiments. Washington stated 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." Besides this essential ethical chord, he also struck another about the purposes of government made up of virtuous citizens. He asked that God, the providential author of their rights, might "consecrate to the liberties and happiness of the People of the United States, a Government instituted by themselves for these essential purposes." Washington closely tied the

virtue of American citizens to the success of the new republic, alluding to American exceptionalism and the idea of a "city upon a hill." If the Americans were virtuous, their republic would succeed; if they practiced fall, it would crumble. He averred that,

The foundation of our national policy will be laid in the pure and immutable principles of private morality . . . . we ought to be no less persuaded that the propitious smiles of Heaven can never be expected on a nation that disregards the eternal rules of order and right which Heaven itself has ordained: and since the preservation of the sacred fire of liberty and the destiny of the republican model of government are justly considered, perhaps, as deeply, perhaps as finally, staked on the experiment entrusted to the hands of the American people.

Washington finished the speech by neatly summarizing Aristotelian purposes of government. Reason and deliberation would furnish the Americans with tranquility and happiness in just and wise government. God had blessed the American People with "opportunities for deliberating in perfect tranquility, and dispositions for deciding with unparalleled unanimity on a form of government for the security of their union, and the advancement of their happiness, so his divine blessing may be equally conspicuous in the enlarged views, the temperate consultations, and the wise measures on which the success of this Government must depend."

In his Farewell Address, Washington gave his advice to his country for their future success with their republican experiment in liberty. He told them in Aristotelian terms that religion and morality were indispensable supports for "the dispositions and habits which lead to political prosperity." The great duties of man were the "great pillars of human happiness." He clearly and strongly believed in Aristotle's idea that virtue was necessary for self-government. "Tis substantially true, that virtue or morality is a necessary spring of popular government." Aristotle's vision of a well-ordered republic of free, virtuous individuals shaped the founding and should inform our discussion of the duties of citizens today.

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The Politics by Aristotle

The Politics 1

C. 335-322 B.C.

Book 1

Chapter 1. (1) Since we see that every city is some sort of partnership, and that every partnership is constituted for the sake of some good (for everyone does everything for the sake of what is held to be good), it is clear that all partnerships aim at some good, and that the partnership that is most authoritative of all and embraces all the others does so particularly, and aims at the most authoritative good of all. This is what is called the city or the political partnership.

(2) Those who suppose that the same person is expert in political [rule], kingly [rule], managing the household and being a master [of slaves] do not argue rightly. For they consider that each of these differs in the multitude or fewness [of those ruled and not in kind—for example, [the ruler] of a few is a master, of more a household manager, and of still more an expert in political or kingly [rule]—the assumption being that there is no difference between a large household and a small city; and as for the experts in political and kingly [rule], they consider an expert in kingly [rule] one who has charge himself, and in political [rule] one who, on the basis of the precepts of this sort of science, rules and is ruled in turn. But these things are not true. (3) This will be clear to those investigating in accordance with our normal sort of inquiry. For just as it is necessary elsewhere to divide a compound into its uncompounded elements (for these are the smallest parts of the whole), so too by investigating what the city is composed of we shall gain a better view concerning these [kinds of rulers] as well, both as to how they differ from one another and as to whether there is some expertise characteristic of an art that can be acquired in connection with each of those mentioned.

Chapter 2. (1) Now in these matters as elsewhere it is by looking at how things develop naturally from the beginning that one may best study them. (2) First, then, there must of necessity be a conjunction of persons who cannot exist without one another: on the one hand, male and female, for the sake of reproduction (which occurs not from intentional choice but—as is also the case with the other animals and plants—from a natural striving to leave behind another that is like oneself); on the other, the naturally ruling and ruled, on account of preservation. For that which can foresee with the mind is the naturally ruling and naturally mastering element, while that which can do these things with the body is the naturally ruled and slave; hence the same thing is advantageous for the master and slave. (3) Now the female is distinguished by nature from the slave. For nature makes nothing in an economizing spirit, as smiths make the Delphic knife, but one thing with a view to one thing; and each instrument would perform most finely if it served one task rather than many. (4) The barbarians, though, have the same arrangement for female and slave. The reason for this is that they have no naturally ruling element; with them, the partnership [of man and woman] is that of female slave and male slave. This is why the poets say "it is fitting for Greeks to rule barbarians"—the assumption being that barbarian and slave are by nature the same thing.

(5) From these two partnerships, then, the household first arose, and Hesiod's verse is rightly spoken: "first a house, and woman, and ox for plowing"—for poor persons have an ox instead of a servant. The household is the partnership constituted by nature for [the needs of] daily life; Charondas calls its members "peers of the mess," Epimenides of Crete "peers of the manger." The first partnership arising from [the union of] several households and for the sake of nondaily needs is the village. (6) By nature the village seems to be above all an extension of the household. Its members some call "milk-peers"; they are "the children and the children's children." This is why cities were at first under kings, and nations are even now. For those who joined together were already under kings: every household was under the eldest as king, and so also were the extensions [of the household constituting the village] as a result of kinship. (7) This is what Homer meant when he says that "each acts as law to his children and wives"; for [men] were scattered and used to dwell in this manner in ancient times. And it is for this reason that all assert that the gods are under a king—because they themselves are under kings now, or were in ancient times. For human beings assimilate not only the looks of the gods to themselves, but their

ways of life as well.

(8) The partnership arising from [the union of] several villages that is complete is the city. It reaches a level of full self-sufficiency, so to speak; and while coming into being for the sake of living, it exists for the sake of living well. Every city, therefore, exists by nature, if such also are the first partnerships. For the city is their end, and nature is an end: what each thing is—for example, a human being, a horse, or a household—when its coming into being is complete is, we assert, the nature of that thing. (9) Again, that for the sake of which [a thing exists], or the end, is what is best; and self-sufficiency is an end and what is best.

From these things it is evident, then, that the city belongs among the things that exist by nature, and that man is by nature a political animal. He who is without a city through nature rather than chance is either a mean sort or superior to man; he is "without clan, without law, without hearth," like the person reproved by Homer; (10) for the one who is such by nature has by this fact a desire for war, as if he were an isolated piece in a game of chess. That man is much more a political animal than any kind of bee or any herd animal is clear. For, as we assert, nature does nothing in vain; and man alone among the animals has speech. (11) The voice indeed indicates the painful or pleasant, and hence is present in other animals as well; for their nature has come this far, that they have a perception of the painful and pleasant and indicate these things to each other. But speech serves to reveal the advantageous and the harmful, and hence also the just and the unjust. (12) For it is peculiar to man as compared to the other animals that he alone has a perception of good and bad and just and unjust and other things [of this sort]; and partnership in these things is what makes a household and a city.

The city is thus prior by nature to the household and to each of us. (13) For the whole must of necessity be prior to the part; for if the whole [body] is destroyed there will not be a foot or a hand, unless in the sense that the term is similar (as when one speaks of a hand made of stone), but the thing itself will be defective. Everything is defined by its task and its power, and if it is no longer the same in these respects it should not be spoken of in the same way, but only as something similarly termed. (14) That the city is both by nature and prior to each individual, then, is clear. For if the individual when separated [from it] is not self-sufficient, he will be in a condition similar to that of the other parts in relation to the whole. One who is incapable of participating or who is in need of nothing through being self-sufficient is no part of a city, and so is either a beast or a god.

(15) Accordingly, there is in everyone by nature an impulse toward this sort of partnership. And yet the one who first constituted [a city] is responsible for the greatest of goods. For just as man is the best of the animals when completed, when separated from law and adjudication he is the worst of all. (16) For injustice is harshest when it is furnished with arms; and man is born naturally possessing arms for [the use of] prudence and virtue which are nevertheless very susceptible to being used for their opposites. This is why, without virtue, he is the most unholy and the most savage [of the animals], and the worst with regard to sex and food. [The virtue of] justice is a thing belonging to the city. For adjudication is an arrangement of the political partnership, and adjudication is judgment as to what is just.

Chapter 3. (1) Since it is evident out of what parts the city is constituted, it is necessary first to

speak of household management; for every city is composed of households. The parts of household management correspond to the parts out of which the household itself is constituted. Now the complete household is made up of slaves and free persons. Since everything is to be sought for first in its smallest elements, and the first and smallest parts of the household are master, slave, husband, wife, father, and children, three things must be investigated to determine what each is and what sort of thing it ought to be. (2) These are expertise in mastery, in marital [rule] (there is no term for the union of man and woman), and thirdly in parental [rule] (this too has not been assigned a term of its own). (3) So much, then, for the three we spoke of. There is a certain part of it, however, which some hold to be [identical with] household management, and others its greatest part; how the matter really stands has to be studied. I am speaking of what is called business expertise.

Let us speak first about master and slave, so that we may see at the same time what relates to necessary needs and whether we cannot acquire something in the way of knowledge about these things that is better than current conceptions. (4) For some hold that mastery is a kind of science, and that managing the household, mastery, and expertise in political and kingly [rule] are the same, as we said at the beginning. Others hold that exercising mastery is against nature; for [as they believe] it is by law that one person is slave and another free, there being no difference by nature, and hence it is not just, since it rests on force.

Chapter 4. (1) Now possessions are a part of the household, and expertise in acquiring possessions a part of household management (for without the necessary things it is impossible either to live or to live well); and just as the specialized arts must of necessity have their proper instruments if their work is to be performed, so too must the expert household manager. (2) Now of instruments some are inanimate and others animate—the pilot's rudder, for example, is an inanimate one, but his lookout an animate one; for the subordinate is a kind of instrument for the arts. A possession too, then, is an instrument for life, and one's possessions are the multitude of such instruments; and the slave is a possession of the animate sort. Every subordinate, moreover, is an instrument that wields many instruments, (3) for if each of the instruments were able to perform its work on command or by anticipation, as they assert those of Daedalus did, or the tripods of Hephaestus (which the poet says "of their own accord came to the gods' gathering"), so that shuttles would weave themselves and picks play the lyre, master craftsmen would no longer have a need for subordinates, or masters for slaves. (4) Now the instruments mentioned are productive instruments, but a possession is an instrument of action. For from the shuttle comes something apart from the use of it, while from clothing or a bed the use alone. Further, since production and action differ in kind and both require instruments, these must of necessity reflect the same difference. (5) Life is action, not production; the slave is therefore a subordinate in matters concerning action.

A possession is spoken of in the same way as a part. A part is not only part of something else, but belongs wholly to something else; similarly with a possession. Accordingly, while the master is only master of the slave and does not belong to him, the slave is not only slave to the master but belongs wholly to him.

(6) What the nature of the slave is and what his capacity, then, is clear from these things. For one who does not belong to himself by nature but is another's, though a human being, is by nature a

slave; a human being is another's who, though a human being, is a possession; and a possession is an instrument of action and separable [from its owner].

Chapter 5. (1) Whether anyone is of this sort by nature or not, and whether it is better and just for anyone to be a slave or not, but rather all slavery is against nature, must be investigated next. It is not difficult either to discern [the answer] by reasoning or to learn it from what actually happens. (2) Ruling and being ruled belong not only among things necessary but also among things advantageous. And immediately from birth certain things diverge, some toward being ruled, others toward ruling. There are many kinds both of ruling and ruled [things], and the better rule is always that over ruled [things] that are better, for example over a human being rather than a beast; (3) for the work performed by the better is better, and wherever something rules and something is ruled there is a certain work belonging to these together. For whatever is constituted out of a number of things—whether continuous or discrete—and becomes a single common thing always displays a ruling and a ruled element; (4) this is something that animate things derive from all of nature, for even in things that do not share in life there is a sort of rule, for example in a harmony. But these matters perhaps belong to a more external sort of investigation. But an animal is the first thing constituted out of soul and body, of which the one is the ruling element by nature, the other the ruled. (5) It is in things whose condition is according to nature that one ought particularly to investigate what is by nature, not in things that are defective. Thus the human being to be studied is one whose state is best both in body and in soul—in him this is clear; for in the case of the depraved, or those in a depraved condition, the body is often held to rule the soul on account of their being in a condition that is bad and unnatural.

(6) It is then in an animal, as we were saying, that one can first discern both the sort of rule characteristic of a master and political rule. For the soul rules the body with the rule characteristic of a master, while intellect rules appetite with political and kingly rule; and this makes it evident that it is according to nature and advantageous for the body to be ruled by the soul, and the passionate part [of the soul] by intellect and the part having reason, while it is harmful to both if the relation is equal or reversed. (7) The same holds with respect to man and the other animals: tame animals have a better nature than wild ones, and it is better for all of them to be ruled by man, since in this way their preservation is ensured. Further, the relation of male to female is by nature a relation of superior to inferior and ruler to ruled. The same must of necessity hold in the case of human beings generally.

(8) Accordingly, those who are as different [from other men] as the soul from the body or man from beast—and they are in this state if their work is the use of the body, and if this is the best that can come from them—are slaves by nature. For them it is better to be ruled in accordance with this sort of rule, if such is the case for the other things mentioned. (9) For he is a slave by nature who is capable of belonging to another—which is also why he belongs to another—and who participates in reason only to the extent of perceiving it, but does not have it. (The other animals, not perceiving reason, obey their passions.) Moreover, the need for them differs only slightly: bodily assistance in the necessary things is forthcoming from both, from slaves and from tame animals alike.

(10) Nature indeed wishes to make the bodies of free persons and slaves different as well [as their souls]—those of the latter strong with a view to necessary needs, those of the former

straight way of life (which is itself divided between the needs of war and those of peace); yet the opposite often results, some having the bodies of free persons while others have the souls. It is evident, at any rate, that if they were to be born as different only in body as the images of the gods, everyone would assert that those not so favored merited being their slaves. (11) But if this is true in the case of the body, it is much more justifiable to make this distinction in the case of the soul; yet it is not as easy to see the beauty of the soul as it is that of the body. That some persons are free and others slaves by nature, therefore, and that for these slavery is both advantageous and just, is evident.

1. Aristotle, *The Politics,* trans. Carnes Lord (Chicago: University of Chicago Press, 1984), 35–41. Reproduced with permission of University of Chicago Press–Books in the format Textbook via

Friday, February 22, 2013 – Essay #5 – The Politics-Aristotle – Guest Essayist: Kyle Scott, Professor of Constitutional Law, University of Houston

Aristotle studied under Plato and tutored Alexander the Great. If only because of his pedigree he should be read and understood by anyone who is interested in politics. But those who want to understand politics in general, and American politics in particular, would do well to study the works of Aristotle for the insight they provide on human nature and the nature of politics.

According to Aristotle, a person can be truly human only within a community. Aristotle wrote in the *Politics* that any man who exists outside of a community is either a beast or a god (*Politics* 1253a2, 1253a25; see also *NE* 1097b10). For man is by nature a political animal which means if he is to act according to his nature he must live among others.

In Aristotelean terms one would say that in order to reach his *telos*—his purpose, or end—man must live among other men. Only when among others can man reason and communicate in a manner that is natural. Simply stated: It is unnatural for man to live alone and natural for him to live in community with others.

For politics this means that the political entity in which men live has the obligation to see that it functions in such a way that men can reach their *telos* within it. Since men join together in order to be fulfilled, the community which they join is only justified to the degree to which it allows them to do so.

Men cannot exist outside of the political community, but the political community exists only for man's happiness. Therefore, any political community that exists for a reason other than man's fulfillment is unjust and should be reformed or abandoned.

One should not confuse Aristotle for being a revolutionary however. Aristotle is a conservative in the way Edmund Burke and Russell Kirk were conservatives. Aristotle recognizes that men

are in need of boundaries and laws but that those laws exist to help guide man to a more just life. "There is therefore a natural impulse in all men towards an association of this sort…Man, when perfected, is the best of animals; but if he is isolated from law and justice he is the worst of all…The virtue of justice belongs to the city; for justice is an ordering of the political association, and the virtue of justice consists in the determination of what is just" (*Politics* 1253a25).

Through Aristotle we see a justification for the American colonists' war for Independence from England as well as a defense of the U.S. Constitution. If we take the U.S. Declaration of Independence at its face we see that the colonists felt the end of their existence—those things that they required to be fulfilled—were being denied to them by the British. It is common sense that if your current situation denies to you life, liberty, and the pursuit of happiness that you have every right to break away. But, common sense is flimsy ground on which to base a war. One needs a sophisticated normative justification for one's actions in that instance. Such a justification can be found in Aristotle which is simply that while man needs the political, the political exists for the sake of man's well being. Therefore, when man's well being is not being facilitated by a political entity man is free to break away for the political has then lost its legitimacy.

This understanding of the political is further embodied by the U.S. Constitution which was created for the explicit purpose of facilitating man's quest for fulfillment. In no way does Aristotle say that the government is the source of man's happiness. Quite to the contrary in fact. Man does not turn to the state or the government for happiness. Rather, man's happiness is found within himself and in cooperation with other men. The government exists to help balance competing interests when one interest may unjustifiably infringe upon another's quest for happiness, but the government does not guarantee happiness to anyone much less everyone. This is what the Constitution guarantees as well. The U.S. Constitution was put in place to make sure that we can all pursue those things that will fulfill us while guaranteeing that no person, and no government, can prevent us from doing so in an unjust manner. The Constitution does not guarantee happiness to anyone but it sets up an environment where we can all pursue our happiness as much as we are willing and able so long as we do not act unjustly upon others.

Reading Aristotle may not seem to be the best way to understand our Constitution. But our Founders were well versed in the classics which means if we want to understand them we must understand what they understood. Moreover, our Founders were in conversation with the greatest minds in political intellectual history. They did not write in a vacuum and we should not consider them within a vacuum either. We must consider the intellectual lineage within which our Founders fall if we want to understand and appreciate them and what we have inherited from them.

Kyle Scott teaches political science and constitutional law at the University of Houston and has just published his fourth book, The Federalist Papers: A Reader's Guide. In addition to his academic writing Kyle's work has appeared in The Washington Times, Christian Science Monitor, Houston Chronicle, Huffington Post, and Foxnews.com. Kyle is also a member of Constituting America's College Level Advisory Board and has contributed to the Constitution in 90 Days and the Federalist Papers in 90 Days.

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On the Commonwealth by Marcus Tullius Cicero

C. 54-51 B.C.

…[33] True law is right reason, consonant with nature, spread through all people. It is constant and eternal; it summons to duty by its orders, it deters from crime by its prohibitions. Its orders and prohibitions to good people are never given in vain; but it does not move the wicked by these orders or prohibitions. It is wrong to pass laws obviating this law; it is not permitted to abrogate any of it; it cannot be totally repealed. We cannot be released from this law by the senate or the people, and it needs no exegete or interpreter like Sextus Aelius. There will not be one law at Rome and another at Athens, one now and another later; but all nations at all times will be bound by this one eternal and unchangeable law, and the god will be the one common master and general (so to speak) of all people. He is the author, expounder, and mover of this law; and the person who does not obey it will be in exile from himself. Insofar as he scorns his nature as a human being, by this very fact he will pay the greatest penalty, even if he escapes all the other things that are generally recognized as punishments….

2. Marcus Tullius Cicero, "On the Commonwealth

Monday, February 25, 2013 – Essay #6 – Cicero's De Republica (On the Commonwealth) – Guest Essayist: Robert Frank Pence, Founder, The Pence Group

Cicero's *De Republica*
by Robert Frank Pence

Cicero's *De Republica*

Robert Frank Pence

Gone, gone for ever is that valour that used to be found in this Republic and caused brave men to suppress a citizen traitor with keener punishment than the most bitter foe.[1]

Marcus Tullius Cicero (106-43 B.C.E.) had a decision to make. Catiline and his fellow conspirators were going to assassinate Cicero and other Roman senators within hours. What should he do? Knowing that Rome had its enemies, domestic as well as foreign, Cicero immediately had several of the conspirators arrested, taken to prison, and executed, all without extending to them the right of trial. Cicero announced their deaths to the crowd with the word *vixerunt* ("they had lived," meaning, euphemistically, "they are dead"). For saving Rome,

Cicero was hailed by Quintus Catullus as *Pater Patriae*, the "father of the country." In 1779 Francis Baily would become the first to call George Washington (in print) the "Father of His Country."

Our forefathers brought to America's shores their hopes, their virtues, their religions, and their industry. They brought their fears of monarchs, oligarchy, and anarchy. They sought happiness and liberty. Ultimately, they sought a new republic founded on justice, one employing the ideal that there was a higher 'natural law' (common to different peoples and races without regional modifications) guiding human affairs.[2] They also brought books. Fortunately, they brought Cicero.

Copies of *De Republica*[3] have long been as prized as they were difficult to find. Gerbert of Aurillac (c. 950-1003, later Pope Silvester II), wrote to his friends in search of Cicero's works, including *De Republica.*[4] Roger Bacon (c. 1214-1294) lamented that the works of Cicero, Aristotle, and other ancients could not be found except at great cost; Bacon looked unsuccessfully for a copy of *De Republica* for more than twenty years.[5] Notwithstanding that Cicero's books were considered pagan texts, many Church fathers, including St. Augustine and St. Jerome, avidly read them. Augustine actually credited Cicero's *Hortensius* with turning his thoughts to God. We are indebted to Augustine for providing many quotations from *De Republica* (later lost). In his *City of God* Augustine wrote that those accused of crimes should not "be exposed to vilification without the right to reply and to make defense in court" and that "the agreement that musicians call harmony in singing is known as concord in the body politic. This is the tightest and best rope of safety in every state, and it cannot exist at all without justice."[6] Fortunately, Book VI of *De Republica*, the "*Dream of Scipio*," continued to be known throughout the middle ages thanks to Macrobius' commentary on that text. Cicero's impact on the likes of John Locke, David Hume, Edmund Burke, and Montesquieu, to name but a few, was wide and deep.[7] With Macrobius' work in hand, and with the fragmentary references to *De Republica* contained in the works of the Church Fathers and classical and medieval writers, our founders were, with the availability of other Ciceronian texts, ready, willing, and able to plant Cicero's ideas on American soil.[8] What a crop they produced!

In 1744 Benjamin Franklin printed the first translation of a classical text in the colonies. It was James Logan's translation of Cicero's *De Senectute* with a preface written by Mr. Franklin himself (in which he expressed his confidence "that the Publick would not unfavorably receive it").[9] Later, Thomas Jefferson would prove to be a devoted student of Cicero. After the British destroyed the Library of Congress in the War of 1812, Jefferson sold his library to the government in 1815.[10] In a letter to Henry Lee dated May 8, 1825, Thomas Jefferson wrote with his usual clarity:

BUT WITH RESPECT TO OUR RIGHTS, and the acts of the British government contravening those rights, there was but one opinion on this side of the water. . . .When forced, therefore, to resort to arms for redress, an appeal to the tribunal of the world was deemed proper for our justification. This was the object of the Declaration of Independence. Not to find out new principles, or new arguments, never before thought of. . . .Neither aiming at originality of principle or sentiment. . . .All its authority rests then on the harmonizing sentiments of the day,

whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc.[11]

Cicero unequivocally identified the one crucial element without which States could neither be founded nor maintained: there must be men to defend them (V, I, 1-2). That required active patriotism (I, I, 1); "it is not enough to possess virtue, as if it were an art of some sort, unless you make use of it. . . ." (I, II, 2). The issue of public and private safety permeates the *De Republica* and the larger Ciceronian canon. Cicero speaks from his heart on the subject: "I took my oath before an assembly of the people, and the Roman people took the same oath, that the republic was safe. . . ."(I, IV, 7). He was equally firm in his belief that there was nothing so harmful to a State as injustice; and that justice cannot exist at all except where the government is just. Justice, for Cicero, was more valuable than all the gold in the world: it "instructs us to spare all men, consider the interests of the whole human race, to give everyone his due, not to touch sacred or public property, or that which belongs to others" (III, XV, 24). Yet, he knew that "one man's vices can overthrow [a monarchy] and turn it easily toward utter destruction. . . .a nation [is thereby] deprived of many things, and particularly of liberty, which does not consist in serving a just master, but in [serving] no [master at all]" (II, XXIII, 43).[12] Our Roman senator has seen much and offers us good advice. In some states

. . .[t]his extreme liberty gives birth to a tyrant [an unjust king] and the utterly unjust and cruel servitude of the tyranny. For out of such an ungoverned, or rather, untamed, populace someone is usually chosen as leader against those leading citizens who have already been subjected to persecution and cast down from their leadership–some bold and depraved man, who shamelessly harasses oftentimes even those who have deserved well of the State, and curries favour with the people by bestowing upon them the property of others as well as his own. . . .and finally emerges as a tyrant over the very people who have raised him to power. If the better citizens overthrow such a tyrant, as often happens, then the State is reestablished. (I, XLIV, 68, emphasis added)

Res publica signifies "the property of a people"[13] (just as the term "commonwealth" does). For Cicero *republica* also signifies a three branch system of republicanism in which the best aspects of the three forms of government (monarchy, oligarchy [which Cicero saw as just another kind of tyranny], and democracy) are blended together.[14] But liberty being his goal, that is the result "if the people hold the supreme power and everything is administered according to their desires" (III, XIII, 23).[15] To be sure, Cicero was a champion of the sanctity of private property. Even when acting as prosecutor in criminal cases, he often argued against the confiscation of the defendant's property.

Cicero had learned, from hard experience, that citizens "must see to it that [they are] always armed against those influences which disturb the stability of the State. . . .[he called this] "a dissension among the citizens, in which one party separates from the rest. . .sedition" (VI, I,1). But Cicero, great politician that he was, foresaw what was required: a united people and senate who would make the lives of Romans better and happier (I, XIX, 32). But Cicero, even in his most republican of moments, saw dangers. He offered two solutions and a terrifying conclusion; "no magistrate not subject to appeal shall be elected"; "no act of a popular assembly should be valid unless ratified by the Fathers" (the patrician senators); and, "unless there is in the State an even balance of rights, duties, and functions, so that the magistrates have enough power, the

counsels of the eminent citizens enough influence, and the people enough liberty, this kind of government cannot be safe from revolution" (II, XXX, 54; II, XXXII, 56; and II, XXXIII, 57-8, respectively). If such occurs, two of Cicero's greatest concerns are for 'our' descendants and the permanent stability of 'our' republic (III, XXIX, 41).

The conclusion of *De Republica* should be of little surprise: all ". . .who have preserved, aided or enlarged their fatherland have a special place prepared for them in the heavens. . . .For nothing of all that is done on earth is more pleasing to that Supreme God. . .than the assemblies and gatherings of men associated in justice. . . .Their rules come from [heaven] and to that place they will return" (VI, XIII, 13). For those of us "still below," America will continue as long as we have patriots willing to defend both it and the principles enunciated in the Declaration of Independence and the Constitution (with a little support from Cicero's *De Republica*).

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Mr. Pence's wife Suzy serves on the National Advisory Board of Constituting America. The Pences are generous contributors to Constituting America, and their support has helped make our 90 Day Study of the Classics That Inspired the Constitution possible. We thank you, Mr. Pence!

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[1]Cicero, Marcus Tullius. *In Catilanam* I-IV, *Pro Murena*, *Pro sulla*, *Pro Flacco*. Trans. C. MacDonald. Cambridge, Mass. and London: Harvard UP, 1977. I, 3. Catiline and his surviving army were ultimately defeated near Fiesole. Survivors of that battle descended to the nearby river to found a new city among the flowers: Florence.

[2] Alas, we must admit, Cicero differentiated between just and unjust forms of slavery (III, XXV, 37-8).

[3]All references herein to *De Republica* are taken from Cicero, Marcus Tullius. *De Re Publica; De Legibus*. trans. Clinton Walker Keyes. Cambridge, Mass. and London: Harvard UP, 1928. Rpt. 2000 (hereinafter cited as "*De Republica*"). Except as otherwise indicated, all parenthetical notes in my text are to *De Republica*. Cicero is, of course, writing in the shadow of Plato's *Republic*. Those portions of *De Republica* upon which I have principally drawn include: Book I: I,1,2; IV,7, 12; XVII, 26,28; XIX, 32; XXV, 39; XLIV, 68; XLV, 69; Book II: III,I,2; 7-8; XV, 27; XVII,31; XXIII, 41; XXXI, 54; XXXII, 56; XXXIII, 57; XLII, 69; Book III: XIII,23; XV,24; XVI, 27, XXII, 33; XXIII, 34; XXIX, 41; XXXI, 43; XXXIII, 34; Book IV: III,3; VII, 7; Book V:I,1; III,4; VI, 8; and Book VI: I,1; XIII, 13; XXIII, 25; XXIV; 26; XXVI, 29.

[4]Sandys, John Edwin, *A History of Classical Scholarship*. 3 vols. New York and London: Hafner Publishing, 1967. I, 509 (hereinafter cited as "*HCS*").

[5]Sandys, *HCS*, I, 590-1, referring to Roger Bacon's *Opus Tertium*, p. 55.

[6]Augustine, *City of God* Books I-III, trans. George McCracken. ed. Jeffrey Henderson (1957; rpt., Cambridge, Mass. and London: Harvard UP, 2000. II, ix, xxi, and 170, n.1, 173, citing *De Rep*. IV, X, 12; and 218, n. 2, citing *De Rep*. II, XLII, 69.

[7]An excellent summary of Cicero's influence on Western political thought is found in Jim Powell's *The Triumph of Liberty* (New York and London: The Free Press, 2000). 3-10. See, also, Jürgen Gebhardt's *Americanism*: *Revolutionary Order and Societal Self-Interpretation in the American Republic*. trans. Ruth Hein (Baton Rouge and London: Louisiana State UP, 1976), especially his discussion of Cicero "as a model of social regeneration of political ethics that can continuously be updated by imitating moral-political examples" (40) and the proposition that "John Adams' civic humanism once again proves the significant influence of the Roman stoic, Cicero. . . ." (123).

[8]It was not until 1820 that larger fragments, constituting about one-third of *De Republica*, were discovered in the Vatican library.

[9]Cicero, Marcus Tullius. *On a Life Well Spent*. trans. James Logan; pref. by Benjamin Franklin. Delray Beach, Fla.: Levanger Press, 2006, (ix). Cicero's *De Officiis* was the second book printed (after the Gutenberg Bible). *De Officiis* advanced the notion that there is a law of nature beyond the will of the stronger, dominant class.

[10]Among the Ciceronian titles transferred to the Library of Congress were *De Officiis*, *De Divinatione*, *De Fato*, *De Natura Deorum*, *De Finibus*, *Academia*, *Tusculan Disputations*, *De Senectute*, five copies of the *Epistles* (*Ad Atticus* and *Ad Familiares*), the *Somnium Scipionis* (Book VI of *De Republica*), and Middleton's *Life of Cicero*.

[11]Jefferson, Thomas, "Letter to Henry Lee, May 8,1825," in *The Political Thought of American Statesmen*. eds. Morton J. Frisch and Richard G. Stevens. Itasca, Ill.: F. E. Peacock Publishers, 1973. 12.

[12]Cicero wants a ruler who "considers the good of his people rather than their desires" (V, VI, 8); and, "as in the case of an efficient head of a family, some experience in the cultivation of the land, the construction of buildings, and the keeping of accounts is necessary. . . ." (V, III, 4).

[13]*De Rep*. I, XXV, 39.

[14]"[A] commonwealth is the property of a people. But a people is not any collection of human beings brought together in any sort of way, but an assemblage of people in large numbers associated in an agreement with respect to justice and a partnership for the common good" (I, XXV, 39). To implement such a state ". . .there should be a supreme and royal element in the State, some power also ought to be granted to the leading citizens, and certain matters should be

left to the judgment and desires of the masses" (I, XLV, 69). Cicero elsewhere excludes from his definition of 'commonwealth' a government in which every decision is left to the power of the masses. Such a government will seize and retain what it will, plunder and waste as it wishes.

[15]Cicero also fears anarchy in which fathers feared their sons, shames disappears, there is no distinction between aliens and citizens, and teachers fear their students. Or, as Cicero writes, "An insane multitude should not be left in uncontrolled possession of the 'property of the people.'" (III, XXXIII, 45). How prescient (on both counts)! Cicero postulates ". . .The two elements which most conspicuously contribute to the stability of a State are religion and the spirit of tranquility" (II, XV, 27).

The Second Treatise of Government by John Locke

1690

Chapter II. Of the state of nature.

4. To understand political power right, and derive it from its original, we must consider what state all men are naturally in, and that is, a state of perfect freedom to order their actions and dispose of their possessions, and persons, as they think fit, within the bounds of the law of nature; without asking leave, or depending upon the will of any other man.

A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident, than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection; unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty….

6. But though this be a state of liberty, yet it is not a state of license: though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it. The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions: for men being all the workmanship of one omnipotent and infinitely wise Maker; all the servants of one sovereign master, sent into the world by his order, and about his business; they are his property, whose workmanship they are, made to last during his, not another's pleasure: and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any such subordination among us, that may authorize us to destroy another, as if we were made for one another's uses, as the inferior ranks of creatures are for ours. Every one, as he is bound to preserve himself, and not to quit his station willfully, so by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve

the rest of mankind, and may not, unless it be to do justice to an offender, take away or impair the life, or what tends to the preservation of life, the liberty, health, limb, or goods of another.

7. And that all men may be restrained from invading others' rights, and from doing hurt to one another, and the law of nature be observed, which willeth the peace and preservation of all mankind, the execution of the law of nature is, in that state, put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree as may hinder its violation: for the law of nature would, as all other laws that concern men in this world, be in vain, if there were nobody that in the state of nature had a power to execute that law, and thereby preserve the innocent and restrain offenders. And if any one in the state of nature may punish another for any evil he has done, every one may do so: for in that state of perfect equality, where naturally there is no superiority or jurisdiction of one over another, what any may do in prosecution of that law, every one must needs have a right to do.

8. And thus, in the state of nature, "one man comes by a power over another;" but yet no absolute or arbitrary power, to use a criminal, when he has got him in his hands, according to the passionate heats, or boundless extravagancy of his own will; but only to retribute to him, so far as calm reason and conscience dictate, what is proportionate to his transgression; which is so much as may serve for reparation and restraint: for these two are the only reasons, why one man may lawfully do harm to another, which is that we call punishment. In transgressing the law of nature, the offender declares himself to live by another rule than that of reason and common equity, which is that measure God has set to the actions of men, for their mutual security; and so he becomes dangerous to mankind, the tie, which is to secure them from injury and violence, being slighted and broken by him. Which being a trespass against the whole species, and the peace and safety of it, provided for by the law of nature; every man upon this score, by the right he hath to preserve mankind in general, may restrain, or, where it is necessary, destroy things noxious to them, and so may bring such evil on any one, who hath transgressed that law, as may make him repent the doing of it, and thereby deter him, and by his example others, from doing the like mischief. And in this case, and upon this ground, "every man hath a right to punish the offender, and be executioner of the law of nature."…

Chapter VI. Of paternal power.

54. Though I have said above…"That all men by nature are equal," I cannot be supposed to understand all sorts of equality: age or virtue may give men a just precedency: excellency of parts and merit may place others above the common level: birth may subject some, and alliance or benefits others, to pay an observance to those whom nature, gratitude, or other respects, may have made it due: and yet all this consists with the equality, which all men are in, in respect of jurisdiction or dominion one over another; which was the equality I there spoke of, as proper to the business in hand, being that equal right, that every man hath, to his natural freedom, without being subjected to the will or authority of any other man….

Chapter VII. Of political or civil society.

87. Man being born, as has been proved, with a title to perfect freedom, and uncontrolled enjoyment of all the rights and privileges of the law of nature, equally with any other man, or

number of men in the world, hath by nature a power, not only to preserve his property, that is, his life, liberty, and estate, against the injuries and attempts of other men; but to judge of and punish the breaches of that law in others, as he is persuaded the offense deserves, even with death itself, in crimes where the heinousness of the fact, in his opinion, requires it. But because no political society can be, nor subsist, without having in itself the power to preserve the property, and, in order thereunto, punish the offenses of all those of that society; there and there only is political society, where every one of the members hath quitted his natural power, resigned it up into the hands of the community in all cases that excludes him not from appealing for protection to the law established by it. And thus all private judgment of every particular member being excluded, the community comes to be umpire by settled standing rules, indifferent, and the same to all parties; and by men having authority from the community, for the execution of those rules, decides all the differences that may happen between any members of that society concerning any matter of right; and punishes those offenses which any member hath committed against the society, with such penalties as the law has established, whereby it is easy to discern, who are, and who are not, in political society together. Those who are united into one body, and have a common established law and judicature to appeal to, with authority to decide controversies between them, and punish offenders, are in civil society one with another: but those who have no such common appeal, I mean on earth, are still in the state of nature, each being, where there is no other, judge for himself, and executioner: which is, as I have before showed, the perfect state of nature.

88. And thus the commonwealth comes by a power to set down what punishment shall belong to the several transgressions which they think worthy of it, committed amongst the members of that society, (which is the power of making laws) as well as it has the power to punish any injury done unto any of its members, by any one that is not of it, (which is the power of war and peace,) and all this for the preservation of the property of all the members of that society, as far as is possible. But though every man who has entered into civil society, and is become a member of any commonwealth, has thereby quitted his power to punish offenses against the law of nature, in prosecution of his own private judgment; yet with the judgment of offenses, which he has given up to the legislative in all cases, where he can appeal to the magistrate, he has given a right to the commonwealth to employ his force, for the execution of the judgments of the commonwealth, whenever he shall be called to it; which indeed are his own judgments, they being made by himself, or his representative. And herein we have the original of the legislative and executive power of civil society, which is to judge by standing laws, how far offenses are to be punished, when committed within the commonwealth; and also to determine, by occasional judgments founded on the present circumstances of the fact, how far injuries from without are to be vindicated; and in both these to employ all the force of all the members, when there shall be need.

89. Whenever therefore any number of men are so united into one society, as to quit every one his executive power of the law of nature, and to resign it to the public, there and there only is a political, or civil society. And this is done, wherever any number of men, in the state of nature, enter into society to make one people, one body politic, under one supreme government; or else when any one joins himself to, and incorporates with any government already made: for hereby he authorizes the society, or, which is all one, the legislative thereof, to make laws for him, as the public good of the society shall require; to the execution whereof, his own assistance (as to his

own degrees) is due. And this puts men out of a

state of nature into that of a commonwealth, by setting up a judge on earth, with authority to determine all the controversies, and redress the injuries that may happen to any member of the commonwealth: which judge is the legislative, or magistrate appointed by it. And wherever there are any number of men, however associated, that have no such decisive power to appeal to, there they are still in the state of nature….

Chapter VIII. Of the beginning of political societies.

95. Men being, as has been said, by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way, whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community, for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it. This any number of men may do, because it injures not the freedom of the rest; they are left as they were in the liberty of the state of nature. When any number of men have so consented to make one community or government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest.

96. For when any number of men have, by the consent of every individual, made a community, they have thereby made that community one body, with a power to act as one body, which is only by the will and determination of the majority: for that which acts any community, being only the consent of the individuals of it, and it being necessary to that which is one body to move one way; it is necessary the body should move that way whither the greater force carries it, which is the consent of the majority: or else it is impossible it should act or continue one body, one community, which the consent of every individual that united into it, agreed that it should; and so every one is bound by that consent to be concluded by the majority. And therefore we see, that in assemblies, empowered to act by positive laws, where no number is set by that positive law which empowers them, the act of the majority passes for the act of the whole, and of course determines; as having, by the law of nature and reason, the power of the whole.

97. And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation, to every one of that society, to submit to the determination of the majority, and to be concluded by it; or else this original compact, whereby he with others incorporate into one society, would signify nothing, and be no compact, if he be left free, and under no other ties than he was in before in the state of nature. For what appearance would there be of any compact? What new engagement if he were no farther tied by any decrees of the society, than he himself thought fit, and did actually consent to? This would be still as great a liberty, as he himself had before his compact, or any one else in the state of nature hath, who may submit himself, and consent to any acts of it if he thinks fit.

98. For if the consent of the majority shall not, in reason, be received as the act of the whole, and conclude every individual; nothing but the consent of every individual can make any thing to be the act of the whole but such a consent is next to impossible ever to be had, if we consider the

infirmities of health, and avocations of business, which in a number, though much less than that of a commonwealth, will necessarily keep many away from the public assembly. To which if we add the variety of opinions, and contrariety of interest, which unavoidably happen in all collections of men, the coming into society upon such terms would be only like Cato's coming into the theatre, only to go out again. Such a constitution as this would make the mighty leviathan of a shorter duration, than the feeblest creatures, and not let it outlast the day it was born in: which cannot be supposed, till we can think, that rational creatures should desire and constitute societies only to be dissolved; for where the majority cannot conclude the rest, there they cannot act as one body, and consequently will be immediately dissolved again.

99. Whosoever therefore out of a state of nature unite into a community, must be understood to give up all the power, necessary to the ends for which they unite into society, to the majority of the community, unless they expressly agreed in any number greater than the majority. And this is done by barely agreeing to unite into one political society, which is all the compact that is, or needs be, between the individuals, that enter into, or make up a commonwealth. And thus that, which begins and actually

constitutes any political society, is nothing, but the consent of any number of freemen capable of a majority, to unite and incorporate into such a society. And this is that, and that only, which did, or could give beginning to any lawful government in the world….

Chapter IX. Of the ends of political society and government.

123. If man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to nobody, why will he part with his freedom? Why will he give up his empire, and subject himself to the dominion and control of any other power? To which it is obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others; for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without reason, that he seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties, and estates, which I call by the general name, property.

124. The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property. To which in the state of nature there are many things wanting.

First, There wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them: for though the law of nature be plain and intelligible to all rational creatures; yet men being biased by their interest, as well as ignorant for want of studying it, are not apt to allow of it as a law binding to them in the application of it to their particular cases.

125. Secondly, In the state of nature there wants a known and indifferent judge, with authority to

determine all differences according to the established law: for every one in that state being both judge and executioner of the law of nature, men being partial to themselves, passion and revenge is very apt to carry them too far, and with too much heat, in their own cases; as well as negligence, and unconcernedness, to make them too remiss in other men's.

126. Thirdly, In the state of nature there often wants power to back and support the sentence when right, and to give it due execution. They who by any injustice offend, will seldom fail, where they are able, by force to make good their injustice; such resistance many times makes the punishment dangerous, and frequently destructive, to those who attempt it.

127. Thus mankind, notwithstanding all the privileges of the state of nature, being but in an ill condition, while they remain in it, are quickly driven into society. Hence it comes to pass that we seldom find any number of men live any time together in this state. The inconveniencies that they are therein exposed to, by the irregular and uncertain exercise of the power every man has of punishing the transgressions of others, make them take sanctuary under the established laws of government, and therein seek the preservation of their property. It is this makes them so willingly give up every one his single power of punishing, to be exercised by such alone, as shall be appointed to it amongst them; and by such rules as the community, or those authorized by them to that purpose, shall agree on. And in this we have the original right of both the legislative and executive power, as well as of the governments and societies themselves.

128. For in the state of nature, to omit the liberty he has of innocent delights, a man has two powers.

The first is to do whatsoever he thinks fit for the preservation of himself and others within the permission of the law of nature: by which law, common to them all, he and all the rest of mankind are one community, make up one society, distinct from all other creatures. And, were it not for the corruption and viciousness of degenerate men, there would be no need of any other; no necessity that men should separate from this great and natural community, and by positive agreements combine into smaller and divided associations.

The other power a man has in the state of nature, is the power to punish the crimes committed against that law. Both these he gives up, when he joins in a private, if I may so call it, or particular politic society, and incorporates into any commonwealth, separate from the rest of mankind.

129. The first power, viz. "of doing whatsoever he thought fit for the preservation of himself," and the rest of mankind, he gives up to be regulated by laws made by the society, so far forth as the preservation of himself and the rest of that society shall require; which laws of the society in many things confine the liberty he had by the law of nature.

130. Secondly, The power of punishing he wholly gives up, and engages his natural force, (which he might before employ in the execution of the law of nature, by his own single authority, as he thought fit) to assist the executive power of the society, as the law thereof shall require: for being now in a new state, wherein he is to enjoy many conveniencies, from the labor, assistance, and society of others in the same community, as well as protection from its whole strength; he is

to part also, with as much of his natural liberty, in providing for himself, as the good, prosperity, and safety of the society shall require; which is not only necessary, but just, since the other members of the society do the like….

Chapter XI. Of the extent of the legislative power.

134. The great end of men's entering into society being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society; the first and fundamental positive law of all commonwealths is the establishing of the legislative power; as the first and fundamental natural law, which is to govern even the legislative itself, is the preservation of the society, and (as far as will consist with the public good) of every person in it. This legislative is not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have once placed it; nor can any edict of any body else, in what form soever conceived, or by what power soever backed, have the force and obligation of a law, which has not its sanction from that legislative which the public has chosen and appointed; for without this the law could not have that, which is absolutely necessary to its being a law, the consent of the society; over whom nobody can have a power to make laws, but by their own consent, and by authority received from them. And therefore all the obedience, which by the most solemn ties any one can be obliged to pay, ultimately terminates in this supreme power, and is directed by those laws which it enacts; nor can any oaths to any foreign power whatsoever, or any domestic subordinate power, discharge any member of the society from his obedience to the legislative, acting pursuant to their trust; nor oblige him to any obedience contrary to the laws so enacted, or farther than they do allow; it being ridiculous to imagine one can be tied ultimately to obey any power in the society, which is not supreme….

142. These are the bounds which the trust, that is put in them by the society and the law of God and nature, have set to the legislative power of every commonwealth, in all forms of government.

First, they are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court, and the countryman at plow.

Secondly, These laws also ought to be designed for no other end ultimately, but the good of the people.

Thirdly, they must not raise taxes on the property of the people, without the consent of the people, given by themselves or their deputies. And this properly concerns only such governments where the legislative is always in being, or at least where the people have not reserved any part of the legislative to deputies, to be from time to time chosen by themselves.

Fourthly, The legislative neither must nor can transfer the power of making laws to any body else, or place it any where, but where the people have…

Chapter XIX. Of the dissolution of government.

211. He that will with any clearness speak of the dissolution of government, ought in the first place to distinguish between the dissolution of the society and the dissolution of the government. That which makes the community, and brings men out of the loose state of nature into one politic society, is the agreement which every one has with the rest to incorporate, and act as one body, and so be one distinct commonwealth. The usual, and almost only way whereby this union is dissolved, is the inroad of foreign force making a conquest upon them….

212. Besides this overturning from without, governments are dissolved from within….

222. The reason why men enter into society, is the preservation of their property; and the end why they choose and authorize a legislative, is, that there may be laws made, and rules set, as guards and fences to the properties of all the members of the society: to limit the power, and moderate the dominion, of every part and member of the society: for since it can never be supposed to be the will of the society, that the legislative should have a power to destroy that which every one designs to secure by entering into society, and for which the people submitted themselves to legislators of their own making; whenever the legislators endeavor to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge, which God hath provided for all men, against force and violence. Whensoever therefore the legislative shall transgress this fundamental rule of society; and either by ambition, fear, folly or corruption, endeavor to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties, and estates of the people; by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and, by the establishment of a new legislative, (such as they shall think fit) provide for their own safety and security, which is the end for which they are in society. What I have said here, concerning the legislative in general, holds true also concerning the supreme executor, who having a double trust put in him, both to have a part in the legislative, and the supreme execution of the law, acts against both, when he goes about to set up his own arbitrary will as the law of the society. He acts also contrary to his trust, when he either employs the force, treasure, and offices of the society, to corrupt the representatives, and gain them to his purposes; or openly pre-engages the electors, and prescribes to their choice, such, whom he has, by solicitations, threats, promises, or otherwise, won to his designs: and employs them to bring in such, who have promised beforehand, what to vote, and what to enact….

223. To this perhaps it will be said, that the people being ignorant, and always discontented, to lay the foundation of government in the unsteady opinion and uncertain humor of the people, is to expose it to certain ruin; and no government will be able long to subsist, if the people may set up a new legislative, whenever they take offense at the old one. To this I answer, quite the contrary. People are not so easily got out of their old forms, as some are apt to suggest. They are hardly to be prevailed with to amend the acknowledged faults in the frame they have been accustomed to. And if there be any original defects, or adventitious ones introduced by time, or corruption: it is not an easy thing to get them changed, even when all the world sees there is an opportunity for it. This slowness and aversion in the people to quit their old constitutions, has in

the many revolutions which have been seen in this kingdom, in this and former ages, still kept us to, or, after some interval of fruitless attempts, still brought us back again to, our old legislative of king, lords, and commons: and whatever provocations have made the crown be taken from some of our princes' heads, they never carried the people so far as to place it in another line.

224. But it will be said, this hypothesis lays a ferment for frequent rebellion. To which I answer,

First, No more than any other hypothesis: for when the people are made miserable, and find themselves exposed to the ill-usage of arbitrary power, cry up their governors as much as you will, for sons of Jupiter; let them be sacred or divine, descended, or authorized from heaven; give them out for whom or what you please, the same will happen. The people generally ill-treated, and contrary to right, will be ready upon any occasion to ease themselves of a burden that sits heavy upon them. They will wish, and seek for the opportunity, which in the change, weakness, and accidents of human affairs, seldom delays long to offer itself. He must have lived but a little while in the world, who has not seen examples of this in his time; and he must have read very little, who cannot produce examples of it in all sorts of governments in the world.

225. Secondly, I answer, such revolutions happen not upon every little mismanagement in public affairs. Great mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty, will be borne by the people without mutiny or murmur. But if a long train of abuses, prevarications and artifices, all tending the same way, make the design visible to the people, and they cannot but feel what they lie under, and see whither they are going; it is not to be wondered, that they should then rouse themselves, and endeavor to put the rule into such hands which may secure to them the ends for which government was at first erected; and without which, ancient names, and specious forms, are so far from being better, that they are much worse, than the state of nature, or pure anarchy; the inconveniences being all as great and as near, but the remedy farther off and more difficult.

226. Thirdly, I answer, That this doctrine of a power in the people of providing for their safety anew, by a new legislative, when their legislators have acted contrary to their trust, by invading their property, is the best fence against rebellion, and the probablest means to hinder it: for rebellion being an opposition, not to persons, but authority, which is founded only in the constitutions and laws of the government; those, whoever they be, who by force break through, and by force justify their violation of them, are truly and properly rebels: for when men, by entering into society and civil government, have excluded force, and introduced laws for the preservation of property, peace, and unity amongst themselves; those who set up force again in opposition to the laws, do rebellare, that is, bring back again the state of war, and are properly rebels; which they who are in power, (by the pretence they have to authority, the temptation of force they have in their hands, and the flattery of those about them) being likeliest to do; the properest way to prevent the evil, is to show them the danger and injustice of it, who are under the greatest temptation to run into it….

240. Here, it is like, the common question will be made, "Who shall be judge, whether the prince or legislative act contrary to their trust?" This, perhaps, ill-affected and factious men may spread amongst the people, when the prince only makes use of his due prerogative. To this I reply, "The people shall be judge;" for who shall be judge whether his trustee or deputy acts well, and

according to the trust reposed in him, but he who deputes him, and must by having deputed him, have still a power to discard him, when he fails in his trust? If this be reasonable in particular cases of private men, why should it be otherwise in that of the greatest moment, where the welfare of millions is concerned, and also where the evil, if not prevented, is greater, and the redress very difficult, dear, and dangerous?…

1. John Locke, "Book II," in *Two Treatises of Government* (London: C. and J. Rivington, 1824), 131–34, 159–61, 175, 179–81, 186–88, 203–6, 208–9, 215–16, 256–57, 261–65, 275–76.

Tuesday, February 26, 2013 – Essay # 7 – Second Treatise of Government – John Locke – Guest Essayist: Eric Mack Ph.D., University of Rochester, Professor of Philosophy and the author of John Locke (London: Continuum Press, 2009)

John Locke's *Second Treatise* is the much better known half of his *Two Treatises of Government*. Although the *Treatises* were not published until 1689, they were composed during the decade that culminated in the Glorious Revolution of 1688. During that decade Locke was deeply involved in opposition to the authoritarian ambitions of Charles II and James II; and the *Two Treatises* were written to provide intellectual support for resistance against over-reaching monarchical power.

The Stuart Monarchs (James I and Charles I prior to the Civil Wars of the 1640s and Charles II and James II after the Restoration of 1660) and their intellectual apologists claimed that all legal authority was grounded in the will of the Sovereign (and the Sovereign was the Monarch). On this view, ultimately the law was whatever the Monarch commanded. Hence, there was no way that any command of the Monarch could be unlawful. There was no way that resistance to the Monarch could be lawful. On this view, Parliament was merely an advisory body; and judges and grand juries were agents of the Monarch who served at his will. It was within the prerogative of the Monarch to dissolve Parliaments that sought to constrain his power and to replace judges and grand juries that would not do his bidding.

A good deal of opposition to this authoritarian perspective invoked the historically evolved legal structure of England – the evolved unwritten law of the land. This law of the land included evolved constitutional rules such as the rule that no new tax could be established without Parliament's approval and time-honored rights such as the right against arbitrary governmental infringements upon one's liberty or property. Much opposition to the Stuart doctrine of top-down legal authority was based on this alternative picture according to which law grows piecemeal from the ground up. This, however, was *not* the form that Locke's opposition to unchecked governmental power took. Nor did Locke propose a written constitution as a check on that power. Rather, especially in the *Second Treatise*, Locke offered deeper reasons for radical constraints on governmental power – reasons that would be an important influence on the written constitutions that appeared on the other side of the Atlantic about 100 years after the composition of the *Second Treatise*.

In that work, Locke in effect offers a third theory of law. Locke held that those who appealed to the evolved law of the land were correct to say that true law preceded the will of political rulers, binds those rulers, and limits what they can lawfully do. But Locke took this moral law to be based on human nature and to be discoverable by human reason. Thus, this law holds for all human beings – not just for Englishmen; and it is a standard for assessing the conduct of all those who exercise political power. It is a standard that all human beings have access to and can apply through the use of their reason.

For Locke, the crucial and politically relevant part of this natural law is the moral claim that each individual has to freedom. Freedom is what each individual can demand from each other and from any government that aspires to authority. Locke argued that we each have a right – a natural right – to freedom because we are each by nature equal and independent beings, i.e., beings who have rational ends of our own and who are neither natural masters nor natural slaves of others. Locke thought that if one recognizes the standing of each other person as an equal and independent being, one will see that in one's pursuit of one's purposes, one may not treat other individuals as though they were made for one's own purposes.

For Locke, this basic claim to freedom takes the form of rights to discretionary control over one's own person, rights to acquire property and exercise discretionary control over it, rights to the fulfillment of one's agreements, and rights to defend one's rights and punish violators of those rights. As is well-known, Locke thought that legitimate governments are established by individuals transferring the rights of defense and punishment to political society. According to Locke, people bring their fundamental rights of life, liberty, and property to the table, these rights are not granted to people by the state, and the creation of political society involves no surrender these rights. Indeed, the core legitimizing purpose of government is the further articulation of and protection of those rights. And this purpose may only be advanced in ways that are respectful of people's retained rights of life, liberty, and property.

The Founders largely shared Locke's vision of the moral background for and the role of government; and the written Constitution that they created is best understood as embodying that vision. Speaking very generally, it embodies that vision in three major ways – all of which we ignore at our peril. First, the Constitution establishes a government of limited, enumerated powers. The government only has those powers that are explicitly granted to it by the written constitution or can be readily inferred from explicitly granted powers. Second, many of the structural features of constitutional government are not supposed to facilitate governmental action but, rather, to impede it. The Founders recognized the profound value of gridlock. Third, constitutional government is in the service of individual rights that are not themselves gifts of the state. The rights enumerated in the Bill of Rights are not created by but, rather, are recognized by the Constitution. Most telling here is the language of the Ninth Amendment that reminds us that we have many non-enumerated rights – not because the state may someday get around to bestowing more rights upon us but, rather, because all rights except those essential to the establishment of limited government are retained by the people.

Eric Mack (Ph.D., University of Rochester) is a Professor of Philosophy and the author of John Locke (London: Continuum Press, 2009). Professor Mack's primary philosophical interests are in the foundation of moral rights, property rights and distributive justice, and the legitimate

scope of coercive institutions. He has related interests in doctrines of negative responsibility, just war theory, anti-positivist conceptions of law, retributivism, philosophical anarchism, and the history of libertarian thought. He has received grants from NEH, the Earhart Foundation, the Center for Social Philosophy and Policy, and the Bradley Foundation

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Discourses Concerning Government by Algernon Sidney (1623-1683)

1698

Chapter One

Section 17. *God having given the Government of the World to no one Man, nor declared how it should be divided, left it to the Will of Man.*

…But if the dominion of the whole world cannot belong to any one man, and every one have an equal title to that which should give it; or if it did belong to one, none did ever exercise it in governing the whole, or dividing it; or if he did divide it, no man knows how, when, and to whom; so that they who lay claim to any parcels can give no testimony of that division or show any better title than other men derived from his first progenitor, to whom 'tis said to have been granted; and that we have neither a word, nor the promise of a word from God to decide the controversies arising thereupon, nor any prophet giving testimony of his mission that takes upon him to do it, the whole fabric of our author's patriarchical dominion falls to the ground; and they who propose these doctrines, which (if they were received) would be a root of perpetual and irreconcilable hatred in every man against every man, can be accounted no less than ministers of the Devil, tho they want the abilities he has sometimes infused into those who have been employed upon the like occasions. And we may justly conclude that God having never given the whole world to be governed by one man, not prescribed any rule for the division of it; nor declared where the right of dividing or subdividing that which every man has should terminate; we may safely affirm that the whole is forever left to the will and discretion of man: We may enter into, form, and continue in greater or lesser societies, as best pleases ourselves: The right of paternity as to dominion is at an end, and no more remains, but the love, veneration, and obedience, which proceeding from a due sense of the benefits of birth and education, have their root in gratitude, and are esteemed sacred and inviolable by all that are sober and virtuous. And as 'tis impossible to transfer these benefits by inheritance, so 'tis impossible to transfer the rights arising from them. No man can be my father but he that did beget me; and 'tis as absurd to say I

owe that duty to one who is not my father, which I owe to my father, as to say, he did beget me, who did not beget me; for the obligation that arises from benefits can only be to him that conferred them. 'Tis in vain to say the same is due to his heir; for that can take place only when he has but one, which in this case signifies nothing: For if I being the only son of my father, inherit his right, and have the same power over my children as he had over me; if I had one hundred brothers, they must all inherit the same; and the law of England, which acknowledges one only heir, is not general, but municipal, and is so far from being general, as the precept of God and nature, that I doubt whether it was ever known or used in any nation of the world

beyond our island. The words of the Apostle, *If we are children, we are therefore heirs and co-heirs with Christ,* are the voice of God and nature; and as the universal law of God and nature is always the same, every one of us who have children have the same right over them, as Abraham, Isaac, and Jacob had over theirs; and that right which was not devolved to any one of them, but inherited by them all (I mean the right of father as father) not the peculiar promises, which were not according to the law of nature, but the election of grace, is also inherited by every one of us, and ours, that is, by all mankind. But if that which could be inherited was inherited by all, and it be impossible that a right of dominion over all can be due to everyone, then all that is or can be inherited by everyone is that exemption from the dominion of another, which we call liberty, and is the gift of God and nature….

Chapter Three

Section 21. *It cannot be for the good of the People that the Magistrate have a power above the Law: and he is not a Magistrate who has not his power by Law.*

…But nothing can be more absurd than to say, that one man has an absolute power above law to govern according to his will, *for the people's good, and the preservation of their liberty….*

…And as 'tis folly to suppose that princes will always be wise, just and good, when we know that few have been able alone to bear the weight of a government, or to resist the temptations to ill, that accompany an unlimited power, it would be madness to presume they will for the future be free from infirmities and vices….

…If the public safety be provided, liberty and propriety secured, justice administered, virtue encouraged, vice suppressed, and the true interest of the nation advanced, the ends of government are accomplished; and the highest must be contented with such a proportion of glory and majesty as is consistent with the public; since the magistracy is not instituted, nor any person placed in it for the increase of his majesty, but for the preservation of the whole people, and the defence of the liberty, life and estate of every private man….

1. Algernon Sidney, *Discourses Concerning Government,* Thomas G. West, ed. (Indianapolis, IN: Liberty Fund, 1996), 53, 56-57, 439-40, 442, 444. This material appears on the Online Library of Liberty [http://app.libraryofliberty.org] hosted by Liberty Fund, Inc.

Wednesday, February 27, 2013 – Essay #8 – Discourses Concerning Government – Algernon Sidney – Guest Essayist: Professor Joerg Knipprath, Professor of Law at Southwestern Law School

Algernon Sidney, the author of the *Discourses*, was a man of the 17th century's Age of Reason. He was skeptical of organized religion though not by that measure doubting of God. He was firmly convinced of the inherent rationality of the human will and the essential equality of all humans as children of God, from which he deduced the ultimate sovereignty of individuals and the basis of the ethical state in the consent of the governed. That made him a foundational figure

in the emerging English Whig republicanism, but one about whom history has given a divided verdict.

He was executed in 1683 for plotting to instigate rebellion against Charles II. Many historians believe that the evidence for that particular charge was procured. It is clear, however, that for many years he was supported in his machinations and plotting against the English government by generous support from the French king, Louis XIV.

The sections of the *Discourses* presented here have an overtly Biblical tone. Theological arguments were a staple in political disputations for centuries in Christendom. Despite the shattering of Christian unity in the Reformation, the increasingly secularized metaphysics of emerging Modernity, and the gradual fading of an active God as the catalyst for human social organization, old habits of discourse persisted even among the educated elite well into the Age of Enlightenment.

Sidney was responding at length to Sir Robert Filmer's posthumously-published defense of royal absolutism, *Patriarcha*. (Sidney's reference to "our author" is to Filmer). Filmer, who died in 1653, defended the position typical of early-Modern Era European monarchs that they governed "by divine right." He based this on the analogy of the king to a father, who is the unquestioned head of the family. Filmer saw the family as the basis of government, and the entire structure as the creation of God, who made Adam the ruler of all his descendants. Adam's authority passed to Noah and from him to his sons. From them, in turn, all kings obtained their authority to rule, and to do so through unquestioning obedience from the governed.

Filmer's king-as-absolute-father found support not only in God's order recounted in the Old Testament, but also in Roman law. There, too, the *paterfamilias* had unquestioned control, even—at least theoretically—over the life and death of his minor children. As well, Filmer borrowed from Roman constitutional law the principle that, to be sovereign, the ruler must be above the law. Laws cannot exist without a lawmaker. The authority to make law must rest somewhere, in a king, various noblemen, or the people, depending on the system of government. The king cannot be subject to the law, or else whoever is placed above the king is the true lawmaker and sovereign and must then be above the law. This also meant that whatever pleased the king was law, although Filmer pulled his punches by agreeing that a proper law would only be one that benefited the governed. Being above the law only made the king immune from having his actions questioned by earthly judges. Just as everyone, the king was still subject to God's judgment. Therefore, Filmer rejected the authority of Parliament to try King Charles I, echoing the king's argument that the "people" were sitting as judges in their own cause, contrary to basic natural rights.

The secular defense of royal absolutism came from Thomas Hobbes, who lived around the same time as Filmer. Unlike the latter's argument from a divine ordinance that reflected the natural order of things, Hobbes relied on the voluntary assent of the governed. Prodded by the intolerable conditions of a "war of all against all" in a state of nature that rendered life "solitary, poor, nasty, brutish, and short," men agreed with each other in a social contract to surrender to a sovereign all but their right to life. This "Leviathan"—again the Old Testament reference—could act in any manner needed to provide security. The sovereign was not a party to the contract. If he

were, it would mean that he could be hauled before a judge who could enforce a remedy against him for breach. In that case, the latter would be the true Leviathan. As did Filmer, Hobbes argued that the king was morally constrained, however, to further the goals of the social contract among the governed, that is, their personal security.

Neither Filmer nor Hobbes countenanced a right to revolution or other change to government from disaffected elements of society. Sidney rejected both versions of royal absolutism. For him, there was no historical proof to support Filmer's claim that current kings descended from Noah's sons or that God had given rule over the entire world to a particular individual, since God would not expect such a creature of limited capability to rule what he could not possibly know. Nor can one have a father who did not beget him, and therefore one cannot owe a duty of filial obedience to a ruler. Instead, Sidney asserted, we are all heirs and co-heirs with Christ, and we inherit the world equally. From that equality found in the universal law of God and nature, he concluded that all share the liberty of being free from the dominion of others. The ruler governs by consent and through earned respect, not birthright.

As to Hobbes, Sidney rejected the writer's claim that the suffocating security of a totalitarian state's peace ("the peace of death") was preferable to the alternative, even if that alternative was rebellion. Sidney declared that it is the people ("for whom and by whom the constitutions are made") who have the absolute sovereignty to judge what is the right government for them. This was a radical sentiment for the time, too radical for Sidney's contemporary, John Locke, who described a much more conditional and ambiguous right of the people to alter their form of government. For Locke, a government, once constituted under the foundational social contract, had a right to continue unaltered unless it engaged in systematic, continuous, and egregious usurpations.

For interested Americans of the Revolutionary Era, their hearts were with Sidney, but their minds were with the more cautious Locke. The Declaration of Independence was a carefully crafted indictment of the king's constitutional transgressions that provided a Lockean justification for revolution. For Sidney, that indictment, and the extended series of petitions and remonstrances that preceded it would have been unnecessary to justify the break. However, within a decade, American constitutional theory fully embraced Sidney's views, as reflected in Alexander Hamilton's feigned disgust in Federalist 78 that the opponents of the Constitution supposedly questioned "that fundamental principle of republican government, which admits the right of the people to alter or abolish the established constitution whenever they find it inconsistent with their happiness."

An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

The Constitution of the United States of America

September 17, 1787

Preamble

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be

divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall choose their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian

Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union;

suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice-President chosen for the same Term, be elected as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately choose by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner choose the President. But in choosing the President, the Votes shall be taken by States, the Representation from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall choose from them by Ballot the Vice President.

The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and

he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizensthereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labor in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labor, but shall be delivered up on Claim of the Party to whom such Service or Labor may be due.

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth In witness whereof We have hereunto subscribed our Names.

George Washington— President and deputy from Virginia

Delaware
George Read, Gunning Bedford, Jr., John Dickinson, Richard Bassett, Jacob Broom

Maryland
James McHenry, Daniel of St. Thomas Jenifer, Daniel Carroll

Virginia
John Blair, James Madison, Jr.

North Carolina
William Blount, Richard Dobbs Spaight, Hugh Williamson

South Carolina
John Rutledge, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler

Georgia
William Few, Abraham Baldwin

New Hampshire
John Langdon, Nicholas Gilman

Massachusetts
Nathaniel Gorham, Rufus King

Connecticut
William Samuel Johnson, Roger Sherman

New York
Alexander Hamilton

New Jersey
William Livingston, David Brearley, William Paterson, Jonathan Dayton

Pennsylvania
Benjamin Franklin, Thomas Mifflin, Robert Morris, George Clymer, Thomas FitzSimmons, Jared Ingersoll, James Wilson, Gouverneur Morris

Attest William Jackson Secretary

Amendments to the Constitution of the United States of America

Amendment I *Ratified December 15, 1791*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II *Ratified December 15, 1791*

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III *Ratified December 15, 1791*

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV *Ratified December 15, 1791*

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V *Ratified December 15, 1791*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI *Ratified December 15, 1791*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment VII *Ratified December 15, 1791*

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of

trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII *Ratified December 15, 1791*

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX *Ratified December 15, 1791*

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X *Ratified December 15, 1791*

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XI *Ratified February 7, 1795*

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII *Ratified June 15, 1804*

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors

appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII *Ratified December 6, 1865*

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted,

shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV *Ratified July 9, 1868*

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims

shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV *Ratified February 3, 1870*

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XVI *Ratified February 3, 1913*

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII *Ratified April 8, 1913*

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII *Ratified January 16, 1919*

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XIX *Ratified August 18, 1920*

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XX *Ratified January 23, 1933*

Section 1. The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3rd day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October

following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI *Ratified December 5, 1933*

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United

States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII *Ratified February 27, 1951*

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII *Ratified March 29, 1961*

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV *Ratified January 23, 1964*

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not

be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV *Ratified February 10, 1967*

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI *Ratified July 1, 1971*

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXVII *Ratified May 7, 1992*

No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened.

Thursday, February 28, 2013 – Essay #9 – The Constitution of the USA – Guest Essayist: Tony Williams, Program Director, Washington-Jefferson-Madison Institute

The Constitution

When Thomas Jefferson and James Madison were creating the University of Virginia, they decided that the three American documents that would best illuminate the meaning of the Constitution when teaching future statesmen were the Declaration of Independence (along with the ideas of John Locke and Algernon Sidney), George Washington's Farewell Address, and the *Federalist*.

Thomas Jefferson's Declaration of Independence expressed the universal principle that all men were endowed by a Creator with natural, unalienable rights. Influenced by the ideas of John Locke's social compact theory, the purpose of government was to protect those natural rights.

If any government became tyrannical, or destructive of the ends for which it was created, the people had a right to overthrow that government and to institute a government that would protect their rights.

In Abraham Lincoln's estimation, the Declaration of Independence was an "apple of gold" in the "picture of silver" of the Constitution. The Constitution established a limited government that would provide for the rule of law and good governance based upon just laws that would provide for the happiness of the people, namely that their rights and liberties would be safely secured. Thus, the Declaration of Independence and Constitution were inextricably linked in the American natural rights republic.

In his Farewell Address, President George Washington upheld the Constitution and Union as the basis for wise laws, the happiness of the American people, and the preservation of liberty. Washington prayed that:

Your Union and brotherly affection may be perpetual; that the free constitution, which is the work of your hands, may be sacredly maintained; that its Administration in every department may be stamped with wisdom and Virtue; that, in fine, the happiness of the people of these States, under the auspices of liberty, may be made complete by so careful a preservation and so prudent a use of this blessing as will acquire to them the glory of recommending it to the applause, the affection, and adoption of every nation which is yet a stranger to it.

In 1787 and 1788, James Madison, Alexander Hamilton, and John Jay wrote *Federalist* essays in defense of the new Constitution. Thomas Jefferson would call them "the best commentary on the principles of government which ever was written." Their genius was most obvious in their explanation of the principles on which the new government was founded.

In *Federalist* #51, Madison assumed a classical and Christian understanding of the flawed nature of man. "If men were angels, no government would be necessary." But, since men are not angels, government is necessary and even good as it secures their natural rights and provides a

rule of law for civil society. In *Federalist* #55, Madison believes that humans are capable of goodness and virtue that allows them to govern themselves in a republic: "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 that 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 *Federalist* #39, Madison describes the nature of republican form of government. He defines a republic as a "government which derives all its powers directly or indirectly from the great body of the people." This basic principle of popular sovereignty is most clearly evidenced in the Constitution in the Preamble, "We the People of the United States, in Order to form a more perfect Union."

Tying the Constitution back to the social compact of the Declaration of Independence in *Federalist* #51, Madison posits that a "dependence on the people, is, no doubt, the primary control on the government." Nevertheless, social order and constitutionalism would best be preserved by a limited government with enumerated powers and a good framework rather than a frequent recurrence to the right of rebellion. Therefore, Madison wrote that, "Experience has taught mankind the necessity of auxiliary precautions."

In the same essay, Madison explains the auxiliary precautions that limited the government and protected the inalienable rights of the American people. The constant aim, Madison writes, is to divide power because of human nature in a government administered by men over men. First, the Constitution divided the national government into three distinct and separate branches: legislative, executive, and judicial. In a republic, Madison states, the "legislative authority necessarily predominates" because it writes the laws with majority rule and represents the sovereign people. Therefore, the bicameral Congress would be divided into a House of Representatives and a Senate. Second, those branches then have checks and balances over each other such as the presidential veto over legislation or the power of impeachment. Third, in the compound, or federal, republic of the United States, power is divided among different levels of government: local, state, and national. "Hence," Madison writes, "a double security arises to the rights of the people." All of these devices were placed in the Constitution to create a durable and lasting republic that would fulfill the purposes of government under the Declaration of Independence.

In *Federalist* #51, James Madison stated the simple truth that, "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." This is the essential purpose of the American Constitution. As Jefferson would later say of the Declaration of Independence, it was a truth that could be found in the "elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc." The same is no less true of the Constitution.

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Marbury vs. Madison by John Marshall (1755-1835)

1803

Mr. Chief Justice Marshall delivered the Opinion of the Court:

…1st. Has the applicant a right to the commission he demands?

2nd. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3rd. If they do afford him a remedy, is it a mandamus issuing from this court?…

It is...the opinion of the Court,

1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the county of Washington, in the District of Columbia; and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2nd. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3rd. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for; and,

2nd. The power of this court.

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court…

The act to establish the judicial courts of the United States authorizes the Supreme Court "to issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The Secretary of State, being a person holding an office under the authority of the United States, is precisely within the letter of the description, and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport

to confer and assign.

The constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and, consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the Supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the Supreme Court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance….

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and, is consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that “no tax or duty shall be laid on articles exported from any state.” Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares "that no bill of attainder or ex post facto law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!…

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

Friday, March 1, 2013 – Essay #10 – Marbury v. Madison – John Marshall – Guest Essayist: Steven H. Aden, Senior Counsel and Vice President of the Center for Life at Alliance Defending Freedom

"It is emphatically the province and duty of the judicial department to say what the law is." With those understated words, Supreme Court Chief Justice John Marshall ushered in the modern era of judicial review – the notion that it is up to judges, not legislators or presidents, to finally interpret and give meaning to the nation's Constitution and laws.

During the founding era, Alexander Hamilton had written Federalist 78, to assure those wary of a strong federal judiciary that "[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution," because it holds neither the power of the sword, as the Executive (Presidential) Branch does, nor the power of the purse strings, as the

Legislative Branch (Congress) does. “It may truly be said to have neither force nor will,” Hamilton said, “but merely judgment.”

The first real test of that judgment came in the form of the new nation’s first constitutional crisis at the close of the century, just fifteen years after the ratification of the Constitution. Fifty-eight Federalists – those in favor of a strong central government for America - including the named plaintiff in the case, William Marbury, had been nominated by outgoing President John Adams to judicial posts, and upon the requisite “advice and consent” of the Senate they were confirmed. Incoming Anti-Federalist President Thomas Jefferson ordered his acting Secretary of State not to deliver their commissions, and when James Madison took the office of Secretary of State, he followed suit, perhaps a bit too zealously – no one seemed to be able to tell the Justices where the commission papers were.

The Court waded into this dispute warily. First, Chief Justice Marshall observed, Marbury was clearly entitled to the commission, since the appointment was operative upon the President’s signature and seal with the consent of the Senate; delivery of the commission papers was unnecessary. There was a wrong, but was there a remedy, even against an agent of the President? Yes, Justice Marshall affirmed; “The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.” The Court would echo the principle that “No one is above the law” two hundred years later in Paula Jones v William J Clinton, by holding that the President himself had to answer charges of sexual harassment brought against him by a lowly file clerk.

Having troubled the waters of the relationship between the three powers in the new Republic, the Court now moved to cast oil upon them. The federal statute that purported to give the Supreme Court jurisdiction to issue a “writ of mandamus” to compel the Secretary of State to perform a function of his office could not comport with the Constitution, said Chief Justice Marshall. Article III, Section 2 of that document granted the Supreme Court jurisdiction over cases involving public ministers only in cases of original jurisdiction. Since Marbury’s claim for mandamus was a case of appellate jurisdiction – meaning it came up from the lower courts, and didn’t originate in the High Court – the Constitution precluded Congress from giving the Court jurisdiction over it. Thus, the Supreme Court was powerless to act in the case.

Depending upon your political views on the role of the Judiciary in the system of separate but co-equal branches of government the Framers established, Marbury v. Madison was either the signal and greatest power grab in the history of American politics or a brilliant moment in political theory that has endowed the country with untold benefits, not the least of which is the salutary blessing of a robust judicial review. Certainly, as it is often said, the truth lies somewhere in between; but it may also be that the truth in this case is simpler and less complicated than politics. At the end of the day, someone has to have the last say on every matter, including the meaning of the Constitution. That someone, Chief Justice Marshall said in Marbury, is federal judges, and ultimately the Supreme Court. “The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only

necessary to recognize certain principles, supposed to have been long and well established, to decide it."

In the end, William Marbury, and the other fifty-seven Federalists John Adams commissioned, did not get their writ of mandamus. But the American Experiment in coequal powers of government endured its first, and probably most important, crisis. The Supreme Court didn't say in Marbury that it was the only Branch entitled to interpret the Constitution and laws of the United States, just that it was the special responsibility of the Judiciary to act as the final arbiter on such questions. And by demurring on the ultimate question of the Judiciary's direct authority to order the Executive to do something, the Court husbanded the political capital it had secured for itself through its ruling that the Judiciary was the primary interpretive authority under the constitutional scheme. "Judgment," indeed, as Hamilton had promised.

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Fragment on the Constitution and the Union by Abraham Lincoln (1809-1865)

January 1861

All this is not the result of accident. It has a philosophical cause. Without the *Constitution* and the *Union,* we could not have attained the result; but even these, are not the primary cause of our great prosperity. There is something back of these, entwining itself more closely about the human heart. That something, is the principle of "Liberty to all"—the principle that clears the *path* for all—gives *hope* to all—and, by consequence, *enterprise,*and *industry* to all.

The *expression* of that principle, in our Declaration of Independence, was most happy, and fortunate. *Without* this, as well as *with* it, we could have declared our independence of Great Britain; but *without* it, we could not, I think, have secured our free government, and consequent prosperity. No oppressed, people will *fight,* and *endure,* as our fathers did, without the promise of something better, than a mere change of masters.

The assertion of that *principle,* at *that time,* was *the* word, *"fitly spoken"*which has proved an "apple of gold" to us. The *Union,* and the *Constitution,* are the *picture* of *silver,* subsequently framed around it. The picture was made, not to *conceal,* or *destroy* the apple; but to *adorn,* and *preserve* it. The *picture* was made *for* the apple—*not* the apple for the picture.

So let us act, that neither *picture,* or *apple* shall ever be blurred, or bruised or broken.

That we may so act, we must study, and understand the points of danger

1. Abraham Lincoln, "Fragment on the Constitution and the Union," January 1861, in Roy P. Basler, ed., *The Collected Works of Abraham Lincoln,* Vol. 4 (New Brunswick, NJ: Rutgers University Press, 1953), 168-69. Reprinted with the permission of the Abraham Lincoln Association, Springfield, IL.

Monday, March 4, 2013 – Essay #11 – Fragment on the Constitution and the Union by Abraham Lincoln – Guest Essayist: Hadley Heath, Senior Policy Analyst at the Independent Women's Forum

Modern people argue about the importance of the Constitution asking: Should we strictly adhere to its words, or should we view it as a living document? The Founders penned it more than 200 years ago. Is it still relevant today?

In his short piece, "Fragment on the Constitution and the Union," Abraham Lincoln asserts that it is not the founding document that bears the greatest importance, but the principle that undergirds it. Namely, the principle upon which America was founded: liberty for all. So long as we are true to this principle, we are honoring the essence of the American idea.

Lincoln explains that the United States of America could have been formed as a new nation without the principle of liberty for all. Given the circumstances – mass immigration to the New World, frustration with a foreign government, and boiling rebellion over oppressive taxation – America was bound to separate from its European roots. But independence was more than that. The new nation intentionally – not as "an accident" – laid its political foundation on an idea, on the expressed principle that Lincoln calls "a word fitly spoken."

This is a Biblical reference to Proverbs 25:11: "A word fitly spoken is like apples of gold in pictures of silver." The best translation of the word "fitly" applies to circumstances of time. In other words, "A word spoken at the right time…"

In terms of time, the Declaration preceded the Constitution. (And a long history of political philosophy preceded the Declaration, including ideas such as social contract theory and natural law.)

The expression of liberty for all is clear in the Declaration of Independence: "All men are…endowed by their Creator… with…Life, Liberty, and the Pursuit of Happiness." In his "Fragment," Lincoln compares this to a clear path. Each person deserves a clear path to enterprise, industry, and as the Founders wrote, happiness. Whether or not he reaches his destination is not the government's concern, but no ruler should lay down obstacles in the paths of the people.

Fidelity to this concept of liberty, according to Lincoln, is the cause of America's prosperity. With it, we constantly carry on toward something better – individually and corporately. Without it, we are no different from other governments like the one we shook off in the American Revolution, and the people have done no more than "changed masters."

The Constitution and the Union formed upon it are simply a setting for the golden apple – the Declaration's principle of liberty for all. Just as a beautiful gem depends on its setting to become a useful piece of jewelry, so the principle of liberty depends on the Constitution and the Union to persist. The principle might have been lost in history if it had not been set down, by pen and paper, into the Constitution, and lived out in the creation and sustenance of the Union.

So too a setting depends on its apple. Imagine a beautiful ring that has lost its pearl, or an ornate frame with no canvas to showcase. The words in the Constitution can easily become hollow if the ideas they represent are abandoned or warped. And the Union has no hope of standing on hollow words.

In his brief thoughts, Lincoln's "Fragment on the Constitution and the Union" represents both thankfulness for America's great founding principle and a warning against its abandonment. The Constitution is relevant today only insofar as its interpretation remains true to the principle it frames: For our country, liberty for all. For each person, a clear path. No more, no less.

Hadley Heath is a Senior Policy Analyst at the Independent Women's Forum.

Rights of the British Colonies Asserted and Proved by James Otis (1725-1783)

1764

Let no Man think I am about to commence advocate for *despotism,* because I affirm that government is founded on the necessity of our natures; and that an original supreme Sovereign, absolute, and uncontrollable, *earthly* power *must* exist in and preside over every society; from whose final decisions there can be no appeal but directly to Heaven. It is therefore *originally* and *ultimately* in the people. I say this supreme absolute power is *originally* and *ultimately* in the people; and they never did in fact *freely,* nor can they *rightfully* make an absolute, unlimited renunciation of this divine right. It is ever in the nature of the thing given in *trust,* and on a condition, the performance of which no mortal can dispence with; namely, that the person or persons on whom the sovereignty is conferred by the people, shall *incessantly* consult *their* good. Tyranny of all kinds is to be abhorred, whether it be in the hands of one, or of the few, or of the many.—And though "in the last age a generation of men sprung up that would flatter Princes with an opinion that *they* have a *divine right* to absolute power;" Yet "slavery is so vile and miserable an estate of man, and so directly opposite to the generous temper and courage of our nation, that it is hard to be conceived that an *Englishman,* much less a *gentleman,* should plead for it"….

But let the *origin* of government be placed where it may, the *end* of it is manifestly the good of *the whole. Salus populi suprema lex esto,* is of the law of nature, and part of that grand charter given the human race (though too many of them are afraid to assert it) by the only monarch in the universe, who has a clear and indisputable right to *absolute* power; because he is the *only* one who is *omniscient* as well as *omnipotent*….

The *British* constitution in theory and in the present administration of it, in general comes nearest the idea of perfection, of any that has been reduced to practice; and if the principles of it are adhered to, it will, according to the infallible prediction of *Harrington,* always keep the *Britons* uppermost in *Europe,* 'till their *only* rival nation shall either embrace that perfect model of a commonwealth given us by that author, or come as near it as *Great-Britain*is. Then indeed, and not 'till then, will that rival and our nation either be eternal confederates, or contend in greater earnest than they have ever yet done, till one of them shall sink under the power of the other, and rise no more….

Every British Subject born on the continent of America, or in any other of the British dominions, is by the law of God and nature, by the common law, and by act of parliament, (exclusive of all charters from the crown) entitled to all the natural, essential, inherent and inseparable rights of our fellow subjects in Great-Britain. Among those rights are the following, which it is humbly conceived no man or body of men, not excepting the parliament, justly, equitably and consistently with their own rights and the constitution, can take away.

1st. *That the supreme and subordinate powers of legislation should be free and sacred in the hands where the community have once rightfully placed them.*

2ndly. *The supreme national legislative cannot be altered justly till the commonwealth is dissolved, nor a subordinate legislative taken away without forfeiture or other good cause.*Nor then can the subjects in the subordinate government be reduced to a state of slavery, and subject to the despotic rule of others. A state has no right to make slaves of the conquered. Even when the subordinate right of legislature is forfeited, and so declared, this cannot effect the natural persons either of those who were invested with it, or the inhabitants, so far as to deprive them of the rights of subjects and of men.—The colonists will have an equitable right, notwithstanding any such forfeiture of charter, to be represented in parliament, or to have some new subordinate legislature among themselves. It would be best if they had both. Deprived, however of their common rights as subjects, they cannot lawfully be, while they remain such….

3rdly. *No legislative, supreme or subordinate, has a right to make itself arbitrary.*

It would be a most manifest contradiction, for a free legislative, like that of Great-Britain, to make itself arbitrary.

4thly. *The supreme legislative cannot justly assume a power of ruling by extempore arbitrary decrees, but is bound to dispense justice by known settled rules, and by duly authorized independent judges.*

5thly. *The supreme power cannot take from any man any part of his property, without his consent in person or by representation.*

6thly. *The legislative cannot transfer the power of making laws to any other hands.*

These are their bounds, which by God and nature are fixed, hitherto have they a right to come, and no further.

2. *To govern by stated laws.*
3. *Those laws should have no other end ultimately, but the good of the people.*
4. *Taxes are not to be laid on the people, but by their consent in person, or by deputation.*
5. *Their whole power is not transferable*

These are the first principles of law and justice, and the great barriers of a free state, and of the British constitution in particular. I ask, I want no more—Now let it be shown how it is reconcileable with these principles, or to many other fundamental maxims of the British constitution, as well as the natural and civil rights, which by the laws of their country, all British subjects are entitled to, as their best inheritance and birth-right, that all the northern colonies, who are without one representative in the house of commons, should be taxed by the British parliament.

That the colonists, black and white, born here, are free born British subjects, and entitled to all the essential civil rights of such, is a truth not only manifest from the provincial charters, from the principles of the common law, and acts of parliament; but from the British constitution which was re-established at the revolution, with a professed design to secure the liberties of all the subjects to all generations….

…[T]he liberties of the subject are spoken of as their best birth-rights—No one ever dreamed, surely, that these liberties were confined to the realm. At that rate, no British subjects in the dominions could, without a manifest contradiction, be declared entitled to all the privileges of subjects born within the realm, to all intents and purposes, which are rightly given foreigners, by parliament, after residing seven years. These expressions of parliament, as well as of the charters, must be vain and empty sounds, unless we are allowed the essential rights of our fellow-subjects in Great-Britain.

Now can there be any liberty, where property is taken away without consent? Can it with any color of truth, justice or equity, be affirmed, that the northern colonies are represented in parliament? Has this whole continent, of near three thousand miles in length, and in which, and his other American dominions, his Majesty has, or very soon will have, some millions of as good, loyal and useful subjects, white and black, as any in the three kingdoms, the election of one member of the house of commons?

Is there the least difference, as to the consent of the Colonists, whether taxes and impositions are laid on their trade, and other property, by the crown alone, or by the parliament? As it is agreed on all hands, the crown alone cannot impose them, we should be justifiable in refusing to pay them, but must and ought to yield obedience to an act of parliament, though erroneous, till repealed.

I can see no reason to doubt, but that the imposition of taxes, whether on trade, or on land, or houses, or ships, on real or personal, fixed or floating property, in the colonies, is absolutely irreconcilable with the rights of the Colonists, as British subjects, and as men. I say men, for in a state of nature, no man can take my property from me, without my consent: If he does, he deprives me of my liberty, and makes me a slave. If such a proceeding is a breach of the law of nature, no law of society can make it just.—The very act of taxing, exercised over those who are not represented, appears to me to be depriving them of one of their most essential rights, as

freemen; and if continued, seems to be in effect an entire disfranchisement of every civil right. For what one civil right is worth a rush, after a man's property is subject to be taken from him at pleasure, without his consent? If a man is not his *own assessor* in person, or by deputy, his liberty is gone, or lays entirely at the mercy of others.

I think I have heard it said, that when the Dutch are asked why they enslave their colonies, their answer is, that the liberty of Dutchmen is confined to Holland; and that it was never intended for Provincials in America, or any where else. A sentiment this, very worthy of modern Dutchmen; but if their brave and worthy ancestors had entertained such narrow ideas of liberty, seven poor and distressed provinces would never have asserted their rights against the whole Spanish monarchy, of which the present is but a shadow. It is to be hoped, none of our fellow subjects of Britain, great or small, have borrowed this Dutch maxim of plantation politics; if they have, they had better return it from whence it came; indeed they had. Modern Dutch or French maxims of state, never will suit with a British constitution. It is a maxim, that the King can do no wrong; and every good subject is bound to believe his King is not inclined to do any. We are blessed with a prince who has given abundant demonstrations, that in all his actions, he studies the good of his people, and the true glory of his crown, which are inseparable. It would therefore be the highest degree of impudence and disloyalty to imagine that the King, at the head of his parliament, could have any, but the most pure and perfect intentions of justice, goodness and truth, that human nature is capable of. All this I say and believe of the King and parliament, in all their acts; even in that which so nearly affects the interest of the colonists; and that a most perfect and ready obedience is to be yielded to it, while it remains in force. I will go further, and really admit, that the intention of the ministry was not only to promote the public good, by this act, but that Mr. Chancellor of the Exchequer had therein a particular view to the "ease, the quiet, and the good will of the Colonies," he having made this declaration more than once. Yet, I hold that it is possible he may have erred in his kind intentions towards the Colonies, and taken away our fish, and given us a stone. With regard to the parliament, as infallibility belongs not to mortals, it is possible *they*may have been misinformed and deceived. The power of parliament is uncontrollable, but by themselves, and we must obey. They only can repeal their own acts. There would be an end of all government, if one or a number of subjects or subordinate provinces should take upon them so far to judge of the justice of an act of parliament, as to refuse obedience to it. If there was nothing else to restrain such a step, prudence ought to do it, for forcibly resisting the parliament and the King's laws, is high treason. Therefore, let the parliament lay what burdens they please on us, we must, it is our duty to submit and patiently bear them, till they will be pleased to relieve us. And it is to be presumed, the wisdom and justice of that august assembly, always will afford us relief by repealing such acts, as through mistake, or other human infirmities, have been suffered to pass, if they can be convinced that their proceedings are not constitutional, or not for the common good….

Every subject has a right to give his sentiments to the public, of the utility or inutility of any act whatsoever, even after it is passed, as well as while it is pending.—The equity and justice of a bill may be questioned, with perfect submission to the legislature. Reasons may be given, why an act ought to be repealed, and yet obedience must be yielded to it till that repeal takes place. If the reasons that can be given against an act, are such as plainly demonstrate that it is against *natural*equity, the executive courts will adjudge such acts void. It may be questioned by some, though I make no doubt of it, whether they are not obliged by their oaths to adjudge such acts

void. If there is not a right of private judgment to be exercised, so far at least as to petition for repeal, or to determine the expediency of risking a trial at law, the parliament might make itself arbitrary, which it is conceived it cannot by the constitution.—I think every man has a right to examine as freely into the origin, spring and foundation of every power and measure in a commonwealth, as into a piece of curious machinery, or a remarkable phenomenon in nature; and that it ought to give no more offense to say, the parliament have erred, or are mistaken, in a matter of fact, or of right, than to say it of a private man, if it is true of both. If the assertion can be proved with regard to either, it is a kindness done them to show them the truth. With regard to the public, it is the duty of every good citizen to point out what he thinks erroneous in the commonwealth….

To say the parliament is absolute and arbitrary, is a contradiction. The parliament cannot make two and two, five: Omnipotency cannot do it. The supreme power in a state, is *jus dicere* only:—*jus dare,* strictly speaking, belongs alone to God. Parliaments are in all cases to *declare* what is for the good of the whole; but it is not the *declaration* of parliament that makes it so: There must be in every instance, a higher authority, *viz*. God. Should an act of Parliament be against any of *his* natural laws, which are *immutably* true, *their*declaration would be contrary to eternal truth, equity and justice, and consequently void: and so it would be adjudged by the parliament itself, when convinced of their mistake. Upon this great principle, parliaments repeal such act, as soon as they find they have been mistaken, in having declared them to be for the public good, when in fact they were not so. When such mistake is evident and palpable, as in the instances in the appendix, the judges of the executive courts have declared the act "of a whole parliament void." See here the grandeur of the British constitution!

See the wisdom of our ancestors! The supreme *legislative,* and the supreme *executive,* are a perpetual check and balance to each other. If the supreme executive errs, it is informed by the supreme legislative in Parliament: if the supreme legislative errs, it is informed by the supreme executive in the King's courts of law. Here, the King appears, as represented by his judges, in the highest luster and majesty, as supreme executor of the commonwealth; and he never shines brighter, but on his throne, at the head of the supreme legislative. This is government! This, is a constitution! to preserve which, either from foreign or domestic foes, has cost oceans of blood and treasure in every age; and the blood and the treasure have upon the whole been well spent….

The sum of my argument is, That civil government is of God: that the administrators of it were originally the whole people: that they might have devolved it on whom they pleased: that this devolution is fiduciary, for the good of the whole: that by the British constitution, this devolution is on the King, lords and commons, the supreme, sacred and uncontrollable legislative power, not only in the realm, but through the dominions: that by the abdication, the original compact was broken to pieces: that by the revolution, it was renewed, and more firmly established, and the rights and liberties of the subject in all parts of the dominions, more fully explained and confirmed: that in consequence of this establishment and the acts of succession and union, His Majesty George III is rightful king and sovereign, and with his parliament, the supreme legislative of Great-Britain, France and Ireland, and the dominions thereunto belonging: that this constitution is the most free one, and by far the best, now existing on earth: that by this constitution, every man in the dominions is a free man: that no parts of his Majesty's dominions can be taxed without their consent: that every part has a right to be represented in the supreme or

some subordinate legislature: that the refusal of this, would seem to be a contradiction in practice to the theory of the constitution: that the colonies are subordinate dominions, and are now in such a state, as to make it best for the good of the whole, that they should not only be continued in the enjoyment of subordinate legislation, but be also represented in some proportion to their number and estates in the grand legislation of the nation: that this would firmly unite all parts of the British empire, in the greatest peace and prosperity; and render it invulnerable and perpetual.

1. James Otis, "The Rights of the British Colonies Asserted and Proved," 1764, in Jack P. Greene, ed., *Colonies to Nation 1763—1789: A Documentary History of the American Revolution* (New York: W. W. Norton & Company, 1975), 28-33. Reprinted from James Otis, *The Rights of the British Colonies,* 1764.

Tuesday, March 5, 2013 – Essay #12 – Rights of the British Colonies Asserted and Proved by James Otis – Guest Essayist: Professor Joerg Knipprath, Professor of Law at Southwestern Law School

Rights of the British Colonies Asserted and Proved-James Otis

The Declaration of Rights of the Stamp Act Congress of 1765 set forth the fundamental principle that no taxes could be imposed on them, "but with their own consent, given personally, or by their representatives." This principle was reduced to the aphorism "taxation without representation is tyranny" and, eventually, "no taxation without representation." One cannot assign this idea to any individual or movement, as it reflects a long historical struggle between King and Parliament that culminated in the Glorious Revolution and the English Bill of Rights of 1689. For the events immediately leading up to the American Revolution, this aphorism is a key component of the writings of James Otis, a leader of the Stamp Act Congress.

Otis was a leading Boston lawyer when he gained prominence throughout the English colonies in 1761 by arguing the Writs of Assistance Case on behalf of Boston merchants who were challenging the legitimacy of the general search warrants issued by the courts to enforce the Navigation Acts. His nearly-five-hours-long oration asserted in a crucial part that an act of Parliament against natural equity was void, and so was one against the constitution. It should be noted that "constitution" here refers not to a particular charter (the Constitution), as the modern usage typically has it, but in the sense of a fixed, broadly-accepted and inherited collection of premises regarding the manner in which government must operate.

His *Rights of the British Colonies Asserted and Proved* raised all three themes, taxation, representation, and the problem of "unconstitutional" laws. Taxation, in the classic English constitutional view, is a taking of a person's property. Such an act is contrary to the law of nature, and does not change its character simply by being done by a political actor. Nor does it matter whether that actor is the one (king), the few (aristocracy), or the many (democracy). Taxation is so dangerous because it has the potential to turn a man into a slave and threatens all other rights. In words that should sound a warning against our own governments' (federal, state, local) incessant demands for more taxes at high levels unimaginable to the colonists, Otis wrote,

“For what one civil right is worth a rush, after a man’s property is subject to be taken from him at pleasure, without his consent?”

As the last phrase indicates, the solution was consent. Unlike certain other revenues received from his own properties or by ancient prerogative, the king could only “ask” for taxes. Just as any individual could consent to “make a contribution,” so could the people as a whole through the agreement by their representatives in the House of Commons. Taxes were a gift from the people to their king, and the mechanism of consent was representation in the Parliament.

The problem for the two sides as they lurched towards open hostilities and American independence was their conflicting assumptions about representation. Several generations of benign neglect of colonial affairs by the British government had got Americans used to only local assemblies voting funds to support only local government. The new post-French and Indian War realities of the British Empire and the attempt in the 1760s of the energetic young king, George III, to streamline (and pay for) imperial administration, clashed with those American habits.

Americans saw representation as actual and direct. Government was based on the consent of the governed: God was supreme; on Earth there was the power of the whole over the whole; from there, the whole gave the actual power to govern in trust to their governors who must exercise it for the benefit of the whole people. While Americans (or at least some of them) could vote for colonial assemblies, they could not vote for members of Parliament. Hence, they were represented in the former, but not in the latter. Therefore, Parliament no more than the king could demand taxes from them.

The British relied on virtual representation. The system was based on classes. The commons as a class, not as a collection of individuals, made a gift of taxes to the king. Therefore, the House of Commons represented all of them collectively. No member of Parliament represented any particular individual or group of discrete individuals, especially since only about 3% of Englishmen were eligible to vote.

Although various proposals were made by British politicians to accommodate American demands about representation, those efforts eventually failed. Some of those proposals focused on providing the colonists with representation in Parliament. Others looked to a revised constitutional relationship between Parliament (Otis’s “supreme legislative” body) and the colonial assemblies (Otis’s “subordinate legislative” bodies), which the colonists would elect and which would tax them. British policy-makers increasingly saw the Americans as intransigent against any taxes and bent on separation from Britain. One piece of evidence the British pointed to was the Stamp Act Congress’ declarations that the problem was not just that Americans were not represented in Parliament, but that they could not be. Instead, those declarations asserted that no taxes could ever be levied on Americans except through their own legislatures. This was far more radical than Otis’s plea for representation in Parliament on the same basis as the residents of the British realm.

Otis also raised the question of what to do in regards to laws that violate the “constitution.” He argued that only omnipotent, omniscient, and perfect God can “make the law” (*jus dare*); the

state sovereign can only "declare the law" that already exists (*jus dicere*). This is an interesting twist on the usual view that the legislature makes the law, while the courts only declare the law as it exists. Otis was saying that God makes the higher law, the natural law that is eternal and immutable, to which all human law must conform. Parliament cannot act contrary to God's natural law (such as by passing a tax on unrepresented persons), and any such "law" would be void. In a preview of our system of constitutional judicial review, he (mistakenly) asserted that the British courts would declare such a law void.

In the meantime, he avowed that there was no right to disobey a bad law. Parliament was uncontrollable by anyone but itself. For both philosophical and pragmatic reasons, individuals and inferior legislatures could not refuse obedience. Instead, British subjects (including Americans) had the right to petition Parliament and the king and to persuade them of the unconstitutionality of governmental policies. This was the cautious approach of the 1760s, to be replaced in the 1770s by more pugnacious claims about the right to revolt against unconstitutional acts. Just contrast Otis's benign view of King George as looking out for the good of his people and possessed of perfect intentions of justice, goodness, and truth, with Jefferson's indictment of that same monarch in the Declaration of Independence little more than a decade later as a monstrous usurper straining to oppress the long-suffering Americans.

Historians have accused Otis of inconsistent reasoning and a failure of conviction in his refusal to take his claim that Parliament's laws are tyrannical and contrary to natural law (and, hence, void) to its conclusion of a right to disobey. But Otis was simply following centuries of similar writers who were repulsed by the dangers of anarchy and the bloodshed of revolutions and saw discretion and delicate maneuvering in such matters as preferable to loud calls for disobedience. Political theory had been incrementally moving towards a right of revolution, but Americans in 1765 did not yet find that acceptable, either ideologically or emotionally. Within a few years, the temper would change and the benefits of revolutionary change and the dangers that had concerned thoughtful writers would manifest themselves, in the American and French experiments, respectively.

An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

A Summary View of the Rights of British America by Thomas Jefferson

July 1774

Resolved, that it be an instruction to the said deputies when assembled in General Congress with the deputies from the other states of British America to propose to the said Congress that an

humble and dutiful address be presented to his majesty begging leave to lay before him as chief magistrate of the British empire the united complaints of his majesty's subjects in America; complaints which are excited by many unwarrantable encroachments and usurpations, attempted to be made by the legislature of one part of the empire, upon those rights which God and the laws have given equally and independently to all. To represent to his majesty that these his states have often individually made humble application to his imperial throne, to obtain through its intervention some redress of their injured rights; to none of which was ever even an answer condescended. Humbly to hope that this their joint address, penned in the language of truth, and divested of those expressions of servility which would persuade his majesty that we are asking favors and not rights, shall obtain from his majesty a more respectful acceptance. And this his majesty will think we have reason to expect when he reflects that he is no more than the chief officer of the people, appointed by the laws, and circumscribed with definite powers, to assist in working the great machine of government erected for their use, and consequently subject to their superintendance. And in order that these our rights, as well as the invasions of them, may be laid more fully before his majesty, to take a view of them from the origin and first settlement of these countries.

To remind him that our ancestors, before their emigration to America, were the free inhabitants of the British dominions in Europe, and possessed a right, which nature has given to all men, of departing from the country in which chance, not choice has placed them, of going in quest of new habitations, and of there establishing new societies, under such laws and regulations as to them shall seem most likely to promote public happiness. That their Saxon ancestors had under this universal law, in like manner, left their native wilds and woods in the North of Europe, had possessed themselves of the island of Britain then less charged with inhabitants, and had established there that system of laws which has so long been the glory and protection of that country. Nor was ever any claim of superiority or dependance asserted over them by that mother country from which they had migrated: and were such a claim made it is believed his majesty's subjects in Great Britain have too firm a feeling of the rights derived to them from their ancestors to bow down the sovereignty

of their state before such visionary pretensions. And it is thought that no circumstance has occurred to distinguish materially the British from the Saxon emigration. America was conquered, and her settlements made and firmly established, at the expense of individuals, and not of the British public. Their own blood was spilt in acquiring lands for their settlement, their own fortunes expended in making that settlement effectual. For themselves they fought, for themselves they conquered, and for themselves alone they have right to hold. No shilling was ever issued from the public treasures of his majesty, or his ancestors, for their assistance, till of very late times, after the colonies had become established on a firm and permanent footing. That then indeed, having become valuable to Great Britain for her commercial purposes, his parliament was pleased to lend them assistance against an enemy who would fain have drawn to herself the benefits of their commerce to the great aggrandisement of herself and danger of Great Britain. Such assistance, and in such circumstances, they had often before given to Portugal and other allied states, with whom they carry on a commercial intercourse. Yet these states never supposed that, by calling in her aid, they thereby submitted themselves to her sovereignty. Had such terms been proposed, they would have rejected them with disdain, and trusted for better to the moderation of their enemies, or to a vigorous exertion of their own force. We do not however

mean to underrate those aids, which to us were doubtless valuable, on whatever principles granted: but we would show that they cannot give a title to that authority which the British parliament would arrogate over us; and that they may amply be repaid, by our giving to the inhabitants of Great Britain such exclusive privileges in trade as may be advantageous to them, and at the same time not too restrictive to ourselves. That settlements having been thus effected in the wilds of America, the emigrants thought proper to adopt that system of laws under which they had hitherto lived in the mother country, and to continue their union with her by submitting themselves to the same common sovereign, who was thereby made the central link connecting the several parts of the empire thus newly multiplied.

But that not long were they permitted, however far they thought themselves removed from the hand of oppression, to hold undisturbed the rights thus acquired at the hazard of their lives and loss of their fortunes. A family of princes was then on the British throne, whose treasonable crimes against their people brought on them afterwards the exertion of those sacred and sovereign rights of punishment, reserved in the hands of the people for cases of extreme necessity, and judged by the constitution unsafe to be delegated to any other judicature. While every day brought forth some new and unjustifiable exertion of power over their subjects on that side the water, it was not to be expected that those here, much less able at that time to oppose the designs of despotism, should be exempted from injury. Accordingly that country which had been acquired by the lives, the labors and the fortunes of individual adventurers, was by these princes at several times parted out and distributed among the favorites and followers of their fortunes; and by an assumed right of the crown alone were erected into distinct and independent governments….

That the exercise of a free trade with all parts of the world, possessed by the American colonists as of natural right, and which no law of their own had taken away or abridged, was next the object of unjust encroachment…. The true ground on which we declare these acts void is that the British parliament has no right to exercise authority over us….

That thus have we hastened through the reigns which preceded his majesty's, during which the violation of our rights were less alarming, because repeated at more distant intervals, than that rapid and bold succession of injuries which is likely to distinguish the present from all other periods of [the] American story. Scarcely have our minds been able to emerge from the astonishment into which one stroke of parliamentary thunder has involved us, before another more heavy and more alarming is fallen on us. Single acts of tyranny may be ascribed to the accidental opinion of a day; but a series of oppressions, begun at a distinguished period, and pursued unalterably through every change of ministers, too plainly prove a deliberate, systematical plan of reducing us to slavery.

That the act passed in the fourth year of his majesty's reign entitled "an act for granting certain duties in the British colonies and plantations in America, etc."; one other act passed in the fifth year of his reign entitled "an act for granting and applying certain stamp duties in the British colonies and plantations in America, etc."; one other act passed in the sixth year of his reign entitled "an act for the better securing the dependency of His Majesty's dominions in America upon the crown and parliament of Great Britain"; and one other act, passed in the seventh year of his reign, entitled "an act for granting duties on paper, tea, etc.," form that connected chain of

parliamentary usurpation which has already been the subject of frequent applications to his majesty and the houses of Lords and Commons of Great Britain; and, no answers having yet been condescended to any of these, we shall not trouble his majesty with a repetition of the matters they contained.

But that one other act passed in the same seventh year of his reign, having been a peculiar attempt, must ever require peculiar mention. It is entitled "an act for suspending the legislature of New York." One free and independent legislature hereby takes upon itself to suspend the powers of another, free and independent as itself, thus exhibiting a phaenomenon, unknown in nature, the creator and creature of its own power. Not only the principles of common sense, but the common feelings of human nature must be surrendered up, before his majesty's subjects here can be persuaded to believe that they hold their political existence at the will of a British parliament. Shall these governments be dissolved, their property annihilated, and their people reduced to a state of nature, at the imperious breath of a body of men whom they never saw, in whom they never confided, and over whom they have no powers of punishment or removal, let their crimes against the American public be ever so great?…

That by "an act to discontinue in such manner and for such time as are therein mentioned the landing and discharging, lading or shipping of Goods wares and merchandise at the town and within the harbor of Boston in the province of Massachusett's bay in North America" which was passed at the last session of British parliament, a large and populous town, whose trade was their sole subsistence, was deprived of that trade, and involved in utter ruin. Let us for a while suppose the question of right suspended, in order to examine this act on principles of justice. An act of parliament had been passed imposing duties on teas to be paid in America, against which act the Americans had protested as inauthoritative. The East India company who till that time had never sent a pound of tea to America on their own account, step forth on that occasion the asserters of parliamentary right, and send hither many ship loads of that obnoxious commodity. The masters of their several vessels however, on their arrival in America, wisely attended to admonition, and returned with their cargoes. In the province of New England alone the remonstrances of the people were disregarded, and a compliance, after being many days waited for, was flatly refused. Whether in this the master of the vessel was governed by his obstinacy or his instructions, let those who know, say. There are extraordinary situations which require extraordinary interposition. An exasperated people, who feel that they possess power, are not easily restrained within limits strictly regular. A number of them assembled in the town of Boston, threw the tea into the ocean and dispersed without doing any other act of violence. If in this they did wrong, they were known, and were amenable to the laws of the land, against which it could not be objected that they had ever in any instance been obstructed or diverted from their regular course in favor of popular offenders. They should therefore not have been distrusted on this occasion. But that ill-fated colony had formerly been bold in their enmities against the house of Stuart, and were now devoted to ruin by that unseen hand which governs the momentous affairs of this great empire. On the partial representations of a few worthless ministerial dependants, whose constant office it has been to keep that government embroiled, and who by their treacheries hope to obtain the dignity of the British knighthood, without calling for a party accused, without asking a proof, without attempting a distinction between the guilty and the innocent, the whole of that ancient and wealthy town is in a moment reduced from opulence to beggary. Men who had spent their lives in extending the British commerce, who had invested in that place the wealth their honest

endeavors had merited, found themselves and their families thrown at once on the world for subsistence by its charities. Not the hundredth part of the inhabitants of that town had been concerned in the act complained of; many of them were in Great Britain and in other parts beyond sea; yet all were involved in one indiscriminate ruin, by a new executive power unheard of till then, that of a British parliament. A property of the value of many millions of money was sacrifised to revenge, not repay, the loss of a few thousands. This is administering justice with a heavy hand indeed! And when is this tempest to be arrested in its course? Two wharfs are to be opened again when his majesty shall think proper: the residue which lined the extensive shores of the bay of Boston are forever interdicted the exercise of commerce. This little exception seems to have been thrown in for no other purpose than that of setting a precedent for investing his majesty with legislative powers. If the pulse of his people shall beat calmly under this experiment, another and another will be tried till the measure of despotism be filled up. It would be an insult on common sense to pretend that this exception was made in order to restore its commerce to that great town. The trade which cannot be received at two wharfs alone, must of necessity be transferred to some other place; to which it will soon be followed by that of the two wharfs. Considered in this light it would be an insolent and cruel mockery at the annihilation of the town of Boston.

By the act for the suppression of riots and tumults in the town of Boston, passed also in the last session of parliament, a murder committed there is, if the governor pleases, to be tried in the court of King's bench in the island of Great Britain, by a jury of Middlesex.

The witnesses too, on receipt of such a sum as the Governor shall think it reasonable for them to expend, are to enter into recognisance to appear at the trial. This is in other words taxing them to the amount of their recognisance; and that amount may be whatever a Governor pleases. For who does his majesty think can be prevailed on to cross the Atlantick for the sole purpose of bearing evidence to a fact? His expenses are to be borne indeed as they shall be estimated by a Governor; but who are to feed the wife and children whom he leaves behind, and who have had no other subsistence but his daily labor? Those epidemical disorders too, so terrible in a foreign climate, is the cure of them to be estimated among the articles of expense, and their danger to be warded off by the almighty power of a parliament? And the wretched criminal, if he happen to have offended on the American side, stripped of his privilege of trial by peers, of his vicinage, removed from the place where alone full evidence could be obtained, without money, without counsel, without friends, without exculpatory proof, is tried before judges predetermined to condemn. The cowards who would suffer a countryman to be torn from the bowels of their society in order to be thus offered a sacrifice to parliamentary tyranny, would merit that everlasting infamy now fixed on the authors of the act! A clause for a similar purpose had been introduced into an act passed in the twelfth. year of his majesty's reign entitled "an act for the better securing and preserving his majesty's dock-yards, magazines, ships, ammunition and stores," against which as meriting the same censures the several colonies have already protested.

That these are the acts of power assumed by a body of men foreign to our constitutions, and unacknowleged by our laws; against which we do, on behalf of the inhabitants of British America, enter this our solemn and determined protest. And we do earnestly intreat his majesty, as yet the only mediatory power between the several states of the British empire, to recommend to his parliament of Great Britain the total revocation of these acts, which however nugatory they

be, may yet prove the cause of further discontents and jealousies among us.

That we next proceed to consider the conduct of his majesty, as holding the executive powers of the laws of these states, and mark out his deviations from the line of duty. By the constitution of Great Britain as well as of the several American states, his majesty possesses the power of refusing to pass into a law any bill which has already passed the other two branches of legislature. His majesty however and his ancestors, conscious of the impropriety of opposing their single opinion to the united wisdom of two houses of parliament, while their proceedings were unbiased by interested principles, for several ages past have modestly declined the exercise of this power in that part of his empire called Great Britain. But by change of circumstances, other principles than those of justice simply have obtained an influence on their determinations. The addition of new states to the British empire has produced an addition of new, and sometimes opposite interests. It is now therefore the great office of his majesty to resume the exercise of his negative power, and to prevent the passage of laws by any one legislature of the empire which might bear injuriously on the rights and interests of another. Yet this will not excuse the wanton exercise of this power which we have seen his majesty practice on the laws of the American legislatures. For the most trifling reasons, and sometimes for no conceivable reason at all, his majesty has rejected laws of the most salutary tendency. The abolition of domestic slavery is the great object of desire in

those colonies where it was unhappily introduced in their infant state. But previous to the infranchisement of the slaves we have, it is necessary to exclude all further importations from Africa. Yet our repeated attempts to effect this by prohibitions, and by imposing duties which might amount to a prohibition, have been hitherto defeated by his majesty's negative: thus preferring the immediate advantages of a few British corsairs to the lasting interests of the American states, and to the rights of human nature deeply wounded by this infamous practice. Nay the single interposition of an interested individual against a law was scarcely ever known to fail of success, tho' in the opposite scale were placed the interests of a whole country. That this is so shameful an abuse of a power trusted with his majesty for other purposes, as if not reformed would call for some legal restrictions.

With equal inattention to the necessities of his people here, has his majesty permitted our laws to lie neglected in England for years, neither confirming them by his assent, nor annulling them by his negative: so that such of them as have no suspending clause, we hold on the most precarious of all tenures, his majesty's will, and such of them as suspend themselves till his majesty's assent be obtained we have feared might be called into existence at some future and distant period, when time and change of circumstances shall have rendered them destructive to his people here. And to render this grievance still more oppressive, his majesty by his instructions has laid his governors under such restrictions that they can pass no law of any moment unless it have such suspending clause: so that, however immediate may be the call for legislative interposition, the law cannot be executed till it has twice crossed the Atlantic, by which time the evil

may have spent its whole force….

One of the articles of impeachment against Tresilian and the other judges of Westminster Hall in the reign of Richard the second, for which they suffered death as traitors to their country, was

that they had advised the king that he might dissolve his parliament at any time: and succeeding kings have adopted the opinion of these unjust judges. Since the establishment however of the British constitution at the glorious Revolution on it's free and ancient principles, neither his majesty nor his ancestors have exercised such a power of dissolution in the island of Great Britain; and when his majesty was petitioned by the united voice of his people there to dissolve the present parliament, who had become obnoxious to them, his ministers were heard to declare in open parliament that his majesty possessed no such power by the constitution. But how different their language and his practice here! To declare as their duty required the known rights of their country, to oppose the usurpation of every foreign judicature, to disregard the imperious mandates of a minister or governor, have been the avowed causes of dissolving houses of representatives in America. But if such powers be really vested in his majesty, can he suppose they are there placed to awe the members from such purposes as these? When the representative body have lost the confidence of their constituents, when they have notoriously made sale of their most valuable rights, when they have assumed to themselves powers which the people never put into their hands, then indeed their continuing in office becomes dangerous to the state, and calls for an exercise of the power of dissolution. Such being the causes for which the representative body should and should not be dissolved, will it not appear strange to an unbiased observer that that of

Great Britain was not dissolved, while those of the colonies have repeatedly incurred that sentence?

But your majesty or your Governors have carried this power beyond every limit known or provided for by the laws. After dissolving one house of representatives, they have refused to call another, so that for a great length of time the legislature provided by the laws has been out of existence. From the nature of things, every society must at all times possess within itself the sovereign powers of legislation. The feelings of human nature revolt against the supposition of a state so situated as that it may not in any emergency provide against dangers which perhaps threaten immediate ruin. While those bodies are in existence to whom the people have delegated the powers of legislation, they alone possess and may exercise those powers. But when they are dissolved by the lopping off one or more of their branches, the power reverts to the people, who may use it to unlimited extent, either assembling together in person, sending deputies, or in any other way they may think proper. We forbear to trace consequences further; the dangers are conspicuous with which this practice is replete.

That we shall at this time also take notice of an error in the nature of our landholdings, which crept in at a very early period of our settlement. The introduction of the Feudal tenures into the kingdom of England, though ancient, is well enough understood to set this matter in a proper light. In the earlier ages of the Saxon settlement feudal holdings were certainly altogether unknown, and very few, if any, had been introduced at the time of the Norman conquest. Our Saxon ancestors held their lands, as they did their personal property, in absolute dominion, disencumbered with any superior, answering nearly to the nature of those possessions which the Feudalists term Allodial: William the Norman first introduced that system generally. The lands which had belonged to those who fell in the battle of Hastings, and in the subsequent insurrections of his reign, formed a considerable proportion of the lands of the whole kingdom. These he granted out, subject to feudal duties, as did he also those of a great number of his new

subjects, who by persuasions or threats were induced to surrender them for that purpose. But still much was left in the hands of his Saxon subjects, held of no superior, and not subject to feudal conditions. These therefore by express laws, enacted to render uniform the system of military defense, were made liable to the same military duties as if they had been feuds: and the Norman lawyers soon found means to saddle them also with all the other feudal burdens. But still they had not been surrendered to the king, they were not derived from his grant, and therefore they were not holden of him. A general principle indeed was introduced that "all lands in England were held either mediately or immediately of the crown": but this was borrowed from those holdings which were truly feudal, and only applied to others for the purposes of illustration. Feudal holdings were therefore but exceptions out of the Saxon laws of possession, under which all lands were held in absolute right. These therefore still form the basis or groundwork of the Common law, to prevail wheresoever the exceptions have not taken place. America was not conquered by William the Norman, nor its lands surrendered to him or any of his successors. Possessions there are undoubtedly of the Allodial nature. Our ancestors however, who migrated hither, were laborers, not lawyers. The fictitious principle that all lands belong originally to the king, they were early persuaded to believe real, and accordingly took grants of their own lands from the crown. And while the crown continued to grant for small sums and on reasonable rents, there was no inducement to arrest the error and lay it open to public view. But his majesty has lately taken on him to advance the terms of purchase and of holding to the double of what they were, by which means the acquisition of lands being rendered difficult, the population of our country is likely to be checked. It is time therefore for us to lay this matter before his majesty, and to declare that he has no right to grant lands of himself. From the nature and purpose of civil institutions, all the lands within the limits which any particular society has circumscribed around itself, are assumed by that society, and subject to their allotment only. This may be done by themselves assembled collectively, or by their legislature to whom they may have delegated sovereign authority: and, if they are allotted in neither of these ways, each individual of the society may appropriate to himself such lands as he finds vacant, and occupancy will give him title.

That, in order to inforce the arbitrary measures before complained of, his majesty has from time to time sent among us large bodies of armed forces, not made up of the people here, nor raised by the authority of our laws. Did his majesty possess such a right as this, it might swallow up all our other rights whenever he should think proper. But his majesty has no right to land a single armed man on our shores; and those whom he sends here are liable to our laws for the suppression and punishment of Riots, Routs, and unlawful assemblies, or are hostile bodies invading us in defiance of law. When in the course of the late war it became expedient that a body of Hanoverian troops should be brought over for the defense of Great Britain, his majesty's grandfather, our late sovereign, did not pretend to introduce them under any authority he possessed. Such a measure would have given just alarm to his subjects in Great Britain, whose liberties would not be safe if armed men of another country, and of another spirit, might be brought into the realm at any time without the consent of their legislature. He therefore applied to parliament who passed an act for that purpose, limiting the number to be brought in and the time they were to continue. In like manner is his majesty restrained in every part of the empire. He possesses indeed the executive power of the laws in every state; but they are the laws of the particular state which he is to administer within that state, and not those of any one within the limits of another. Every state must judge for itself the number of armed men which they may

safely trust among them, of whom they are to consist, and under what restrictions they are to be laid. To render these proceedings still more criminal against our laws, instead of subjecting the military to the civil power, his majesty has expressly made the civil subordinate to the military. But can his majesty thus put down all law under his feet? Can he erect a power superior to that which erected himself? He has done it indeed by force; but let him remember that force cannot give right.

That these are our grievances which we have thus laid before his majesty with that freedom of language and sentiment which becomes a free people, claiming their rights as derived from the laws of nature, and not as the gift of their chief magistrate. Let those flatter, who fear: it is not an American art. To give praise where it is not due, might be well from the venal, but would ill beseem those who are asserting the rights of human nature. They know, and will therefore say, that kings are the servants, not the proprietors of the people. Open your breast Sire, to liberal and expanded thought. Let not the name of George the third be a blot in the page of history. You are surrounded by British counsellors, but remember that they are parties. You have no ministers for American affairs, because you have none taken from among us, nor amenable to the laws on which they are to give you advice. It behooves you therefore to think and to act for yourself and your people. The great principles of right and wrong are legible to every reader: to pursue them requires not the aid of many counsellors. The whole art of government consists in the art of being honest. Only aim to do your duty, and mankind will give you credit where you fail. No longer persevere in sacrificing the rights of one part of the empire to the inordinate desires of another: but deal out to all equal and impartial right. Let no act be passed by any one legislature which may infringe on the rights and liberties of another. This is the important post in which fortune has placed you, holding the balance of a great, if a well poised empire. This, Sire, is the advice of your great American council, on the observance of which may perhaps depend your felicity and future fame, and the preservation of that harmony which alone can continue both to Great Britain and America the reciprocal advantages of their connection. It is neither our wish nor our interest to separate from her. We are willing on our part to sacrifice every thing which reason can ask to the restoration of that tranquility for which all must wish. On their part let them be ready to establish union on a generous plan. Let them name their terms, but let them be just. Accept of every commercial preference it is in our power to give for such things as we can raise for their use, or they make for ours. But let them not think to exclude us from going to other markets, to dispose of those commodities which they cannot use, nor to supply those wants which they cannot supply. Still less let it be proposed that our properties within our own territories shall be taxed or regulated by any power on earth but our own. The God who gave us life, gave us liberty at the same time: the hand of force may destroy, but cannot disjoin them. This, Sire, is our last, our determined resolution: and that you will be pleased to interpose with that efficacy which your earnest endeavors may insure to procure redress of these our great grievances, to quiet the minds of your subjects in British America against any apprehensions of future encroachment, to establish fraternal love and harmony through the whole empire, and that that may continue to the latest ages of time, is the fervent prayer of all British America.

1. Thomas Jefferson, “Draft of Instructions to the Virginia Delegates in the Continental Congress,” July 1774, in Julian P. Boyd, ed., *The Papers of Thomas Jefferson,* Vol. 1 (Princeton, NJ: Princeton University Press, 1950-1992), 121-23, 125-35.

Wednesday, March 6, 2013 – Essay #13 – A Summary View of the Rights of British America-Thomas Jefferson – Guest Essayist: Professor Joerg Knipprath, Professor of Law at Southwestern Law School

On July 4, 1776, the Continental Congress, after months of preparation and weeks of political wrangling, announced that it had adopted an independence declaration. That document was written by Thomas Jefferson and substantially revised ("mangled," according to Jefferson) by the Congress. Due to his other obligations, Jefferson had little time to spend on this task. Fortunately, he had composed his *Summary View of the Rights of British America* just two years earlier, from which he could draw much of the substance of the new document.

The *Summary View* resonates quite differently from the petitions, remonstrances, and declarations of a decade earlier. Gone are the beseeching tone and the professions of submission to royal and Parliamentary authority so common in earlier appeals for relief. Instead, one finds truculence "penned in the language of truth, and divested of those expressions of servility which would persuade his majesty that we are asking favors and not rights," barely softened by the stray modifier "humbly." Gone is James Otis's encomium to King George's good will, justice, and desire to achieve the people's welfare. Instead, one finds a stream, or indeed a river, of sarcasm, hectoring, and thinly-veiled threats. Gone, finally, is Otis's attempt at harmonizing the Parliament and its powers as the "supreme" legislature with the "inferior" or "subordinate" legislatures of the colonies. Instead, Jefferson sets forth the evolved American position that the only tolerable constitutional arrangement within an imperial system was one of local self-government uncontrolled by Parliament, lest "[o]ne free and independent legislature…takes upon itself to suspend the powers of another, free and independent as itself." American representation in Parliament would no longer suffice to allow that body to legislate for the colonies. A broader constitutional settlement was required to avert independence.

While the main object of derision and protest is the Parliament, the King does not, and cannot, escape blame. It was incumbent on the pro-independence forces to overcome the popular inertia in favor of existing political arrangements and the residual affection that broad swaths of the populace typically have towards their chief of state and that the colonists had toward George III. That required an incremental increase in the vitriol directed at the king, as each petition to redress grievances presented by the colonists suffered the fate of the previous ones "to none of which was ever even an answer condescended." The break with Great Britain was achieved only when the king himself, not just his ministers or the Parliament, could be indicted as a monstrous usurper in the Declaration of Independence.

Jefferson wrote in response to the Parliament's adoption of the Coercive (or Intolerable) Acts, a series of laws intended to demonstrate Parliamentary sovereignty. His recitation of the evils in the *Summary View* was in direct reference to the particular laws that composed the Coercive Acts. The Boston Port Act had closed the shipping in that town until the British East India Company was reimbursed for the tea dumped into the harbor by the Sons of Liberty in the "Boston Tea Party."

The Administration of Justice Act gave the royal governor jurisdiction to move trials of royal officials and soldiers to other colonies or to the British Isles if he believed that they could not get

a fair trial. Based on prior legislation, Jefferson interpreted this law also to provide for the trial of Americans away from their local communities, should the governor so order. Jefferson's objections against trying a defendant "stripped of his privilege of trial by peers, of his vicinage [locality], removed from the place where alone full evidence could be obtained, without money, without counsel, without friends, without exculpatory proof…tried before judges predetermined to condemn" are a preview of various protections later contained in the Bill of Rights' Sixth Amendment and in the general understanding of "due process" in the Fifth Amendment.

The Massachusetts Government Act took significant control from the colonial assembly and the town meetings and placed far more extensive political power over those assemblies in the hands of the royal governor. Jefferson decried those powers and the actions of the British government under them. Curiously, there is no direct criticism of the Quartering Act, which supposedly allowed the housing of troops in private homes during peacetime, a practice addressed later by the Third Amendment to the Constitution.

Perhaps needless to say, the exasperated British saw the matter quite differently. Prime Minister Lord North complained in a speech before Parliament, "The Americans have tarred and feathered your subjects, plundered your merchants, burnt your ships, denied all obedience to your laws and authority; yet so clement and so long forbearing has our conduct been that it is incumbent on us now to take a different course."

As suggested earlier, some of the concrete accusations against King George in the Declaration of Independence have their germ in the *Summary View*. "Single acts of tyranny may be ascribed to the accidental opinion of a day; but a series of oppressions…pursued unalterably thro' every change of ministers, too plainly prove[s] a deliberate, systematical plan of reducing us to slavery," becomes in the Declaration, "when a long Train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism."

Even a cursory review of the Declaration's bill of particulars against the king shows the direct connection to the *Summary View*. The first seven of the Declaration's accusations are wholly or significantly discussed in the earlier document. So are the tenth through the thirteenth, including most of the subsections of the last.

One section of the *Summary View* found its way into Jefferson's draft of the Declaration, but was deleted by the Continental Congress. Jefferson, as was his wont from personal conviction, sense of guilt, hypocrisy, or a combination of all of them, lamented the practice of slavery in the colonies. He sought to lay the blame for the continued importation of slaves and, indeed, the continued existence of the "peculiar institution" itself at the feet of the British and to make it seem that this was yet another oppression visited on the virtuous Americans. When he similarly inserted such an accusation in the Declaration, the Congress thought it a political distraction and omitted it.

One final, yet very important, portion of Jefferson's proposal was his discussion of the origins of property rights. The colonists talked much about the "ancient rights of Englishmen" supposedly assaulted by the British. That was a satisfying rhetorical device, but inevitably led to a discussion of what, precisely, it meant.

Due to reasons grounded in the legal and constitutional structure of Norman-English feudalism and the medieval scholastic view of rights defined by duties, it was discovered with some discomfort that the standard English conception of the origin of rights was in grants from the king. This fit the English theory of land tenures and the Americans' experience with their colonial charters. Even the various versions of Magna Charta were phrased in that language.

Jefferson sought to establish an "allodial" (owned free and without accompanying duties to a superior) basis of holding property in America, in contrast to the "feudal" British system. Aside from connecting Americans to the (idealized) freedom of the ancient Saxons, this distinction was a useful jurisprudential distinction. By positing that *rights* to property were not created by the Crown within a system of duty and obedience but were inherent in every free man (a natural and God-given right), it was easy to claim that other rights were similarly not merely the creation of an earthly ruler.

By tying the British system to "William the Norman," Jefferson also subtly tainted its legitimacy. William, after all, was seen by many at the time of the Norman Conquest as a foreign usurper to the throne who had taken it by force. The parallels were not coincidental. George III, though born in England, was descended from Hanoverian (German) princes, a point Jefferson raised indirectly. According to the Americans, the king was now trying to undo the existing constitutional arrangements, and to do so by force. Jefferson warned, "[B]ut let him remember that force cannot give right."

This distinction allowed Jefferson to challenge the very practical concern about perceived British policy to limit immigration and growth in America. It also provided a philosophic basis for sovereign self-government because Americans had formed—and had the right to form—their own communities without the need for and the restrictions of the royal charters. Ultimately, it led to the Declaration's assertion that Americans were not subjects of the Crown, but free men "endowed by their Creator with certain unalienable Rights."

An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

An Election Sermon by Gad Hitchcock (1718-1803)

1774

…In a mixed government, such as the British, public virtue and religion, in the several branches, though they may not be exactly of a mind in every measure, will be the security of order and tranquility—Corruption and venality, the certain source of confusion and misery to the state.

This form of government, in the opinion of subjects and strangers, is happily calculated for the preservation of the Rights and Liberties of mankind.—Much, however, depends on union; and the concern of every part to pursue the great ends of government….

In such a government, rulers have their distinct powers assigned them by the people, who are the only source of civil authority on earth, with the view of having them exercised for the public advantage; and in proportion as this worthy end of their investiture is kept in sight, and prosecuted, the bands of society are strengthened, and its interests promoted….

Rulers are under the most sacred ties to consult the good of society. 'Tis the only grand design of their appointment. For the promotion of this valuable end, they are ordained of God, and clothed with authority by men.

In a state of nature men are equal, exactly on a par in regard to authority: each one is a law to himself, having the law of God, the sole rule of conduct, written on his heart.

No individual has any authority, or right to attempt to exercise any, over the rest of the human species, however he may be supposed to surpass them in wisdom and sagacity. The idea of superior wisdom giving a right to rule, can answer the purpose of power but to one; for on this plan the Wisest of all is Lord of all. Mental endowments, though excellent qualifications for rule, when men have entered into combination and erected government, and previous to government, bring the possessors under moral obligation, by advice, persuasion and argument, to do good proportionate to the degrees of them; yet do not give any antecedent right to the exercise of authority. Civil authority is the production of combined society—not born with, but delegated to certain individuals for the advancement of the common benefit.

And as its origin is from the people, who have not only a right, but are bound in duty, for the preservation of the property and liberty of the whole society, to lodge it in such hands as they judge best qualified to answer its intention; so when it is misapplied to other purposes, and the public, as it always will, receives damage from the abuse, they have the same original right, grounded on the same fundamental reasons, and are equally bound in duty to resume it, and transfer it to others.—These are principles which will not be denied by any good and loyal subject of his present Majesty King George, either in Great-Britain or America—The royal right to the throne absolutely depends on the truth of them,—and the revolution, an event seasonable and happy both to the mother country and these colonies, evidently supports them, and is supported by them….

1. Gad Hitchcock, "An Election Sermon," 1774, in Charles S. Hyneman and Donald S. Lutz, eds., *American Political Writing during the Founding Era, 1760–1805,* Vol. 1 (Indianapolis, IN: Liberty Fund, 1983), 287-89. This material appears on the Online Library of Liberty [http://app.libraryofliberty.org] hosted by Liberty Fund, Inc.

Thursday, March 7, 2013 – Essay #14 – An Election Sermon – Gad Hitchcock – Guest Essayist: James D. Best, author of Tempest at Dawn, a novel about the 1787 Constitutional Convention, and Principled Action, Lessons from the Origins of the American Republic

John Adams wrote, "The Revolution was effected before the war commenced. The Revolution was in the minds and hearts of the people … This radical change in the principles, opinions, sentiments, and affections of the people, was the real American Revolution."

How did a revolution *commence* in the *minds and hearts* of Americans? It germinated in pulpits and taverns, and from pamphleteers and newspapers. By the time the Declaration of Independence was signed, there was a colonial consensus on a few key principles. Today, we call these the Founding Principles or First Principles.

These principles did not suddenly emerge in the American colonies. They had been incubating for a hundred years as the philosophical underpinnings for the Age of Enlightenment. Our Founders took the musings of the brightest thinkers of the Enlightenment and implemented them in the New World. Our founding was simultaneously an armed rebellion against tyranny and a revolution of ideas— ideas that changed the course of world history.

Prior to the Declaration, a consensus had to be developed within the colonies to seek independence; otherwise there would never have been enough volunteers to fight the powerful British Empire. The Hitchcock sermon was important because it presented First Principles in an Election Day Sermon, which by custom would be printed and distributed across the land. It was also remarkably brave. Some believe Hitchcock was the first to use the term "American cause." Probably not, but he was likely the first to publically use the phrase in front of a colonial military governor.

The sermon was highly controversial. First, Hitchcock's repeatedly denied the legitimacy of "Divine Right of Kings" in front of the King's emissary.

"civil authority is the production of combined society—not born with, but delegated to certain individuals for the advancement of the common benefit."

"No individual has any authority, or right to attempt to exercise any, over the rest of the human species, however he may be supposed to surpass them in wisdom and sagacity."

"rulers have their distinct powers assigned them by the people, who are the only source of civil authority on earth"

But if nobility has no natural right to rule, then who does? One of the First Principles is that every person is born equal and has an inalienable right to self-government.

"In a state of nature men are equal, exactly on a par in regard to authority"

The denial of "Divine Right" was heretical. Hitchcock's claim that people had a right and duty to change a despotic government was treasonous.

"And as its origin is from the people, who have not only a right, but are bound in duty, for the preservation of the property and liberty of the whole society, to lodge it in such hands as they judge best qualified to answer its intention; so when it is misapplied to other purposes, and the public, as it always will, receives damage from the abuse, they have the same original right, grounded on the same fundamental reasons, and are equally bound in duty to resume it, and transfer it to others."

Hitchcock went further, hinting that the colonies had received *damage from the abuse*.

"we need not pass the limits of our own nation for sad instances of this."

"Our contention is not about trifles, but about liberty and property and not ours only, but those of posterity"

And in this type of case, he claimed that rebellion was lawful.

"With respect therefore to rulers of evil dispositions, nothing is more necessary than that they should believe resistance, in some cases to be lawful."

Was Hitchcock a rogue pastor, more foolhardy than brave? He didn't believe so. He said he spoke "the united voice of America."

"If I am mistaken … all America is mistaken with me."

Gad Hitchcock presented this sermon two years before the Declaration of Independence. By his own admission, he was not presenting original ideas. As evidenced by the second paragraph of the Declaration, he was indeed speaking "the united voice of America."

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.–That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, –That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to 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. … But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

The scholars of the Enlightenment audaciously proposed that individuals, not kings, were *endowed by their Creator with certain unalienable rights*. This simple principle is the earth-shaking idea that guided the Founders' actions before, during, and after the Revolution.

James D. Best is the author of Tempest at Dawn, a novel about the 1787 Constitutional Convention, and Principled Action, Lessons from the Origins of the American Republic.

The Farmer Refuted by Alexander Hamilton (1755-1804)

February 23, 1775

I shall, for the present, pass over to that part of your pamphlet, in which you endeavor to establish the supremacy of the British Parliament over America. After a proper eclaircissement of this point, I shall draw such inferences, as will sap the foundation of every thing you have offered.

The first thing that presents itself is a wish, that "*I* had, explicitly, declared to the public my ideas of the *natural rights* of mankind. Man, in a state of nature (you say) may be considered, as perfectly free from all restraints of*law* and *government,* and, then, the weak must submit to the strong."

I shall, henceforth, begin to make some allowance for that enmity, you have discovered to the *natural rights* of mankind. For, though ignorance of them in this enlightened age cannot be admitted, as a sufficient excuse for you; yet, it ought, in some measure, to extenuate your guilt. If you will follow my advice, there still may be hopes of your reformation. Apply yourself, without delay, to the study of the law of nature. I would recommend to your perusal, Grotius, Puffendorf, Locke, Montesquieu, and Burlemaqui. I might mention other excellent writers on this subject; but if you attend, diligently, to these, you will not require any others.

There is so strong a similitude between your political principles and those maintained by Mr. Hobb[e]s, that, in judging from them, a person might very easily *mistake* you for a disciple of his. His opinion was, exactly, coincident with yours, relative to man in a state of nature. He held, as you do, that he was, then, perfectly free from all restraint of *law* and*government.* Moral obligation, according to him, is derived from the introduction of civil society; and there is no virtue, but what is purely artificial, the mere contrivance of politicians, for the maintenance of social intercourse. But the reason he run into this absurd and impious doctrine, was, that he disbelieved the existence of an intelligent superintending principle, who is the governor, and will be the final judge of the universe.

As you, sometimes, swear *by him that made you,* I conclude, your sentiment does not correspond with his, in that which is the basis of the doctrine, you both agree in; and this makes it impossible to imagine whence this congruity between you arises. To grant, that there is a supreme intelligence, who rules the world, and has established laws to regulate the actions of his creatures; and, still, to assert, that man, in a state of nature, may be considered as perfectly free from all restraints of *law* and*government,* appear to a common understanding, altogether irreconcileable.

Good and wise men, in all ages, have embraced a very dissimilar theory. They have supposed,

that the deity, from the relations, we stand in, to himself and to each other, has constituted an eternal and immutable law, which is, indispensibly, obligatory upon all mankind, prior to any human institution whatever.

This is what is called the law of nature, "which, being coeval with mankind, and dictated by God himself, is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, and at all times. No human laws are of any validity, if contrary to this; and such of them as are valid, derive all their authority, mediately, or immediately, from this original." Blackstone.

Upon this law, depend the natural rights of mankind, the supreme being gave existence to man, together with the means of preserving and beatifying that existence. He endowed him with rational faculties, by the help of which, to discern and pursue such things, as were consistent with his duty and interest, and invested him with an inviolable right to personal liberty, and personal safety.

Hence, in a state of nature, no man had any *moral* power to deprive another of his life, limbs, property or liberty; nor the least authority to command, or exact obedience from him; except that which arose from the ties of consanguinity.

Hence also, the origin of all civil government, justly established, must be a voluntary compact, between the ruler and the ruled; and must be liable to such limitations, as are necessary for the security of the *absolute rights* of the latter; for what original title can any man or set of men have, to govern others, except their own consent? To usurp dominion over a people, in their own despite, or to grasp at a more extensive power than they are willing to entrust, is to violate that law of nature, which gives every man a right to his personal liberty; and can, therefore, confer no obligation to obedience.

"The principal aim of society is to protect individuals, in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved, in peace, without that mutual assistance, and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws, is to maintain and regulate these *absolute rights* of individuals." Blackstone.

If we examine the pretensions of parliament, by this criterion, which is evidently, a good one, we shall, presently detect their injustice. First, they are subversive of our natural liberty, because an authority is assumed over us, which we by no means assent to. And secondly, they divest us of that moral security, for our lives and properties, which we are entitled to, and which it is the primary end of society to bestow. For such security can never exist, while we have no part in making the laws, that are to bind us; and while it may be the interest of our uncontrolled legislators to oppress us as much as possible.

To deny these principles will be not less absurd, than to deny the plainest axioms: I shall not, therefore, attempt any further illustration of them….

Thus Sir, I have taken a pretty general survey of the American Charters; and proved to the

satisfaction of every unbiased person, that they are entirely, discordant with that sovereignty of parliament, for which you are an advocate. The disingenuity of your extracts (to give it no harsher name) merits the severest censure; and will no doubt serve to discredit all your former, as well as future labors, in your favorite cause of despotism.

It is true, that New-York has no Charter. But, if it could support its claim to liberty in no other way, it might, with justice, plead the common principles of colonization: for, it would be unreasonable, to seclude one colony, from the enjoyment of the most important privileges of the rest. There is no need, however, of this plea: The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole *volume* of human nature, by the hand of the divinity itself; and can never be erased or obscured by mortal power.

The nations of Turkey, Russia, France, Spain, and all other despotic kingdoms, in the world, have an inherent right, when ever they please, to shake off the yoke of servitude, (though sanctified by the immemorial usage of their ancestors;) and to model their government, upon the principles of civil liberty….

Had the rest of America passively looked on, while a sister colony was subjugated, the same fate would gradually have overtaken all. The safety of the whole depends upon the mutual protection of every part. If the sword of oppression be permitted to lop off one limb without opposition, reiterated strokes will soon dismember the whole body. Hence it was the duty and interest of all the colonies to succour and support the one which was suffering. It is sometimes sagaciously urged, that we ought to commisserate the distresses of the people of Massachusetts; but not intermeddle in their affairs, so far, as perhaps to bring ourselves into like circumstances with them. This might be good reasoning, if our neutrality would not be more dangerous, than our participation: But I am unable to conceive how the colonies in general would have any security against oppression, if they were once to content themselves, with barely *pitying* each other, while parliament was prosecuting and enforcing its demands. Unless they continually protect and assist each other, they must all inevitably fall a prey to their enemies.

Extraordinary emergencies, require extraordinary expedients. The best mode of opposition was that in which there might be an union of councils. This was necessary to ascertain the boundaries of our rights; and to give weight and dignity to our measures, both in Britain and America. A Congress was accordingly proposed, and universally agreed to.

You, Sir, triumph in the supposed *illegality* of this body; but, granting your supposition were true, it would be a matter of no real importance. When the first principles of civil society are violated, and the rights of a whole people are invaded, the common forms of municipal law are not to be regarded. Men may then betake themselves to the law of nature; and, if they but conform their actions, to that standard, all cavils against them, betray either ignorance or dishonesty. There are some events in society, to which human laws cannot extend; but when applied to them lose all their force and efficacy. In short, when human laws contradict or discountenance the means, which are necessary to preserve the essential rights of any society, they defeat the proper end of all laws, and so become null and void….

1. Alexander Hamilton, "The Farmer Refuted," February 23, 1775, in Harold Coffin Syrett, ed., *The Papers of Alexander Hamilton, 1768–1778,* Vol. 1 (New York: Columbia University Press, 1961–1987), 86-89, 121-22, 135-36. Reproduced with permission of Columbia University Press in the format Textbook via Copyright Clearance Center.

Friday, March 8, 2013 – Essay #15 – The Farmer Refuted – Alexander Hamilton – Guest Essayist: Professor Joerg Knipprath, Professor of Law at Southwestern Law School

With the certitude of wisdom and the patronizing tone one might recall from one's own youth, the precocious young Alexander Hamilton offers to teach the Loyalist Samuel Seabury the true meaning of the rights of man. The pointed words used and Hamilton's sarcastic references to the "Farmer's" ignorance of the God-given nature of those rights are put in even greater relief when one is reminded that Seabury was one of a long line of bishops, rectors, and professors in the American Episcopal Church and extremely influential in the development of the American church's doctrine after the Revolution. "If you will follow my advice, there still may be hopes of your reformation," takes on more layers of meaning, when addressed to a Protestant clergyman. Since Seabury's authorship was not definitively established until a few years after publication, it is possible that Hamilton did not realize the identity of his antagonist, and his tone and substance are ironic coincidence, rather than intelligent design.

In any case, "Farmer" and "Sincere Friend" had exchanged earlier rhetorical volleys, and this "more comprehensive and impartial view" (as Hamilton styled it) appears to be the final one. There are two basic themes, the nature of rights and the people's right of revolution. There really is little original thought in the essay, although it shows Hamilton's education in both classic ideas and—for then—rather more contemporary interpretations. He even provides a "helpful" syllabus of writers on natural law (Burlamaqui, for example, was the progenitor of the "pursuit of happiness" as a natural right, a concept Jefferson wrote into the Declaration of Independence).

Hamilton rejects the Hobbesian view of the state of nature as a struggle for existence, where self-preservation is the first law of nature, and doing whatever it takes to preserve one's life is its first right. For Hobbes, law and morality were artifices created by secular government to impose order and to establish a peace that allowed humans to escape the state of nature's nihilism. There was no good law or bad, except as it secured that peace, or failed to do so. In like vein, vice and virtue were not inherently so and were not derived from an external source, God. They were mere utilitarian contrivances, based on fleeting collective opinion.

Enlightenment sensibility found a much more congenial version of the state of nature and the basis of government in Locke and the other writers Hamilton cites. Hamilton equates Seabury's position with Hobbes's. In another astounding accusation, he suggests that their fundamental error is grounded in an atheistic rejection of a belief in God. Hamilton's claim about the universal nature of human rights as coextensive with a God-created natural law order reflects a long intellectual heritage going back two millenia at least to the Stoics, if not to the Platonic reaction against pre-Socratic and Sophist skepticism whose views about law and morality were

similar to those expressed by Hobbes and, it must be mentioned, to those that dominate academic discourse today.

This "eternal and immutable law" is "obligatory upon all mankind" and pre-exists any human institution. It recognizes each person's absolute right to "life, limb, property, and liberty." No one has the right to exact obedience from another or to command him. In very libertarian reasoning, Hamilton claims that all government must be based on voluntary consent. To assume power over others, or to take more than has been given, violates that law of nature. This mode of argumentation was so common, and by its repetition became so ingrained in American thinking, that it appeared in different settings by various writers and orators unconnected to each other. The same reasoning eventually coalesces as the "self-evident truths" listed in the Declaration of Independence.

Hamilton's appeal to this universal law that, quoting Blackstone, is "binding over all the globe, in all countries, and at all times," eliminates the vexing task that American writers of a few years before had set themselves of trying to define exactly what were the "ancient rights of Englishmen" that they accused Parliament of violating. Hence, there is no need to refer to elements common in colonial charters or to other documents of the English constitution: "The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole *volume* of human nature, by the hand of the divinity itself."

Having established the universality and divine origin of the human right to liberty, Hamilton must still confront the ticklish proposition of disobedience. Only law that is based on consent of the governed, that is consistent with the essence of human nature and the purpose of political society, and that furthers the right to liberty can demand obedience. Those laws that fail this test are null and void. While it might be best to proceed through regular channels of government, "Extraordinary emergencies, require extraordinary expedients….When the first principles of civil society are violated, and the rights of a whole people are invaded, the common forms of municipal law are not to be regarded."

This endorsement of the establishment of the "revolutionary" First Continental Congress recognizes a right to disobedience when the fundamental purpose of political society is threatened by those who claim the governing authority. It embodies a forthright acceptance of a right of revolution, though its precise contours still remain unclear, hidden in the smoke of fiery rhetoric and bald assertions. It is also an appeal to utility, with the means determined by the need. "Necessity makes its own law," it has often been held. Hamilton later would use similar reasoning, along with the ultimate legitimization by popular consent, to urge the Second Continental Congress to abrogate the Articles of Confederation, to justify his report at the Annapolis Convention calling for a convention of states to alter the Articles, and, finally, (along with Madison) to reply to the critics of the Philadelphia Convention who, as Seabury did here, challenged the authority of that body to act contrary to the structure of the existing constitutional order.

Today, government at all levels intrudes into our lives in matters great and mundane, from attempting to restrict through vexatious gun ownership regulations our fundamental right to self-

defense or through burdensome labor, environmental, and other regulatory laws our freedom to use our property for productive purposes, to paternalistic prohibitions on certain sized soft drinks and requirements for health insurance. Moreover, government does so primarily through hordes of unelected bureaucrats whose discretion is guided only through the most general of legislative boundaries and the occasional court decision that is then promptly ignored. In addition, there is a tax system that removes increasing numbers of people from having "skin in the game," but that also taxes those who remain in the system at a level that would have been astounding in the past. Finally, many are increasingly accustomed to dependency on government assistance or sinecure, the very antithesis of a free and self-reliant people.

The great challenge for us, then, is to confront whether the current system is consistent with the vision of the Americans of the Revolutionary War era, and whether the scope and substance of the torrent of laws and regulations can be reconciled with the first principles on which government is based. Still more daunting is the question of what might be done to correct the course if it turns out, as many fear, that the current system is—to be very generous—as oppressive and alien to our traditions and liberty as King George and Parliament were to Hamilton and his contemporaries. Are the Declaration's "self-evident truths" still such?

An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

Common Sense by Thomas Paine (1737-1809)

January 10, 1776

On the Origin and Design of Government in General, With Concise Remarks on the English Constitution

Some writers have so confounded society with government, as to leave little or no distinction between them; whereas they are not only different, but have different origins. Society is produced by our wants and government by our wickedness; the former promotes our happiness*positively* by uniting our affections, the latter *negatively* by restraining our vices. The one encourages intercourse, the other creates distinctions. The first is a patron, the last a punisher.

Society in every state is a blessing, but government, even in its best state, is but a necessary evil; in its worst state an intolerable one: for when we suffer, or are exposed to the same miseries *by a government,* which we might expect in a country *without government,* our calamity is heightened by reflecting that we furnish the means by which we suffer. Government, like dress, is the badge of lost innocence; the palaces of kings are built upon the ruins of the bowers of paradise. For

were the impulses of conscience clear, uniform and irresistibly obeyed, man would need no other law-giver; but that not being the case, he finds it necessary to surrender up a part of his property to furnish means for the protection of the rest; and this he is induced to do by the same prudence which in every other case advises him, out of two evils to choose the least. Wherefore, security being the true design and end of government, it unanswerably follows that whatever form thereof appears most likely to ensure it to us, with the least expense and greatest benefit, is preferable to all others.

In order to gain a clear and just idea of the design and end of government, let us suppose a small number of persons settled in some sequestered part of the earth, unconnected with the rest; they will then represent the first peopling of any country, or of the world. In this state of natural liberty, society will be their first thought. A thousand motives will excite them thereto; the strength of one man is so unequal to his wants, and his mind so unfitted for perpetual solitude, that he is soon obliged to seek assistance and relief of another, who in his turn requires the same. Four or five united would be able to raise a tolerable dwelling in the midst of a wilderness, but one man might labor out the common period of life without accomplishing any thing; when he had felled his timber he could not remove it, nor erect it after it was removed; hunger in the mean time would urge him to quit his work, and every different want would call him a different way. Disease, nay even misfortune, would be death; for though neither might be mortal, yet either would disable him from living, and reduce him to a state in which he might rather be said to perish than to die.

Thus necessity, like a gravitating power, would soon form our newly arrived emigrants into society, the reciprocal blessings of which would supercede, and render the obligations of law and government unnecessary while they remained perfectly just to each other; but as nothing but Heaven is impregnable to vice, it will unavoidably happen that in proportion as they surmount the first difficulties of emigration, which bound them together in a common cause, they will begin to relax in their duty and attachment to each other; and this remissness will point out the necessity of establishing some form of government to supply the defect of moral virtue.

Some convenient tree will afford them a State House, under the branches of which the whole colony may assemble to deliberate on public matters. It is more than probable that their first laws will have the title only of regulations and be enforced by no other penalty than public disesteem. In this first parliament every man by natural right will have a seat.

But as the colony increases, the public concerns will increase likewise, and the distance at which the members may be separated, will render it too inconvenient for all of them to meet on every occasion as at first, when their number was small, their habitations near, and the public concerns few and trifling. This will point out the convenience of their consenting to leave the legislative part to be managed by a select number chosen from the whole body, who are supposed to have the same concerns at stake which those have who appointed them, and who will act in the same manner as the whole body would act were they present. If the colony continue increasing, it will become necessary to augment the number of representatives, and that the interest of every part of the colony may be attended to, it will be found best to divide the whole into convenient parts, each part sending its proper number: and that the *elected* might never form to themselves an interest separate from the *electors,* prudence will point out the propriety of having elections

often: because as the *elected* might by that means return and mix again with the general body of the *electors* in a few months, their fidelity to the public will be secured by the prudent reflection of not making a rod for themselves. And as this frequent interchange will establish a common interest with every part of the community, they will mutually and naturally support each other, and on this, (not on the unmeaning name of king,) depends the *strength of government, and the happiness of the governed.*

Here then is the origin and rise of government; namely, a mode rendered necessary by the inability of moral virtue to govern the world; here too is the design and end of government, viz. freedom and security. And however our eyes may be dazzled with show, or our ears deceived by sound; however prejudice may warp our wills, or interest darken our understanding, the simple voice of nature and reason will say, 'tis right.

I draw my idea of the form of government from a principle in nature which no art can overturn, viz. that the more simple any thing is, the less liable it is to be disordered; and the easier repaired when disordered; and with this maxim in view I offer a few remarks on the so much boasted Constitution of England. That it was noble for the dark and slavish times in which it was erected, is granted. When the world was overrun with tyranny the least remove therefrom was a glorious rescue. But that it is imperfect, subject to convulsions, and incapable of producing what it seems to promise, is easily demonstrated.

Absolute governments, (though the disgrace of human nature) have this advantage with them, they are simple; if the people suffer, they know the head from which their suffering springs; know likewise the remedy; and are not bewildered by a variety of causes and cures. But the Constitution of England is so exceedingly complex, that the nation may suffer for years together without being able to discover in which part the fault lies; some will say in one and some in another, and every political physician will advise a different medicine.

I know it is difficult to get over local or long standing prejudices, yet if we will suffer ourselves to examine the component parts of the English Constitution, we shall find them to be the base remains of two ancient tyrannies, compounded with some new Republican materials.

First.—The remains of monarchical tyranny in the person of the king.

Secondly.—The remains of aristocratical tyranny in the persons of the peers.

Thirdly.—The new Republican materials, in the persons of the Commons, on whose virtue depends the freedom of England.
The two first, by being hereditary, are independent of the people; wherefore in a *constitutional sense* they contribute nothing towards the freedom of the State.

To say that the Constitution of England is an *union* of three powers, reciprocally *checking* each other, is farcical; either the words have no meaning, or they are flat contradictions.

To say that the Commons is a check upon the king, presupposes two things.

First.—That the king is not to be trusted without being looked after; or in other words, that a thirst for absolute power is the natural disease of monarchy.

Secondly.—That the Commons, by being appointed for that purpose, are either wiser or more worthy of confidence than the crown.

But as the same constitution which gives the Commons a power to check the king by withholding the supplies, gives afterwards the king a power to check the Commons, by empowering him to reject their other bills; it again supposes that the king is wiser than those whom it has already supposed to be wiser than him. A mere absurdity!

There is something exceedingly ridiculous in the composition of monarchy; it first excludes a man from the means of information, yet empowers him to act in cases where the highest judgment is required. The state of a king shuts him from the world, yet the business of a king requires him to know it thoroughly; wherefore the different parts, by unnaturally opposing and destroying each other, prove the whole character to be absurd and useless.

Some writers have explained the English Constitution thus: the king, say they, is one, the people another; the peers are a house in behalf of the king, the Commons in behalf of the people; but this hath all the distinctions of a house divided against itself; and though the expressions be pleasantly arranged, yet when examined they appear idle and ambiguous; and it will always happen, that the nicest construction that words are capable of, when applied to the description of something which either cannot exist, or is too incomprehensible to be within the compass of description, will be words of sound only, and though they may amuse the ear, they cannot inform the mind: for this explanation includes a previous question, viz. *how came the king by a power which the people are afraid to trust, and always obliged to check?* Such a power could not be the gift of a wise people, neither can any power, *which needs checking,* be from God; yet the provision which the Constitution makes supposes such a power to exist.

But the provision is unequal to the task; the means either cannot or will not accomplish the end, and the whole affair is a *Felo de se;* for, as the greater weight will always carry up the less, and as all the wheels of a machine are put in motion by one, it only remains to know which power in the constitution has the most weight, for that will govern: and though the others, or a part of them, may clog, or, as the phrase is, check the rapidity of its motion, yet so long as they cannot stop it, their endeavors will be ineffectual: the first moving power will at last have its way, and what it wants in speed is supplied by time.

That the crown is this overbearing part in the English Constitution needs not be mentioned, and that it derives its whole consequence merely from being the giver of places and pensions is self-evident; wherefore, though we have been wise enough to shut and lock a door against absolute Monarchy, we at the same time have been foolish enough to put the crown in possession of the key.

The prejudice of Englishmen, in favor of their own government, by king, lords and Commons, arises as much or more from national pride than reason. Individuals are undoubtedly safer in England than in some other countries: but the will of the king is as much the law of the land in

Britain as in France, with this difference, that instead of proceeding directly from his mouth, it is handed to the people under the formidable shape of an act of Parliament. For the fate of Charles the First hath only made kings more subtle—not more just.

Wherefore, laying aside all national pride and prejudice in favor of modes and forms, the plain truth is that *it is wholly owing to the constitution of the people, and not to the constitution of the government* that the crown is not as oppressive in England as in Turkey.

An inquiry into the *constitutional errors* in the English form of government, is at this time highly necessary; for as we are never in a proper condition of doing justice to others, while we continue under the influence of some leading partiality, so neither are we capable of doing it to ourselves while we remain fettered by any obstinate prejudice. And as a man who is attached to a prostitute is unfitted to choose or judge of a wife, so any prepossession in favor of a rotten constitution of government will disable us from discerning a good one.

Of Monarchy and Hereditary Succession

Mankind being originally equals in the order of creation, the equality could only be destroyed by some subsequent circumstance: the distinctions of rich and poor may in a great measure be accounted for, and that without having recourse to the harsh ill-sounding names of oppression and avarice. Oppression is often the *consequence,* but seldom or never the *means* of riches; and though avarice will preserve a man from being necessitously poor, it generally makes him too timorous to be wealthy.

But there is another and greater distinction for which no truly natural or religious reason can be assigned, and that is the distinction of men into kings and subjects. Male and female are the distinctions of nature, good and bad the distinctions of heaven; but how a race of men came into the world so exalted above the rest, and distinguished like some new species, is worth inquiring into, and whether they are the means of happiness or of misery to mankind.

In the early ages of the world, according to the scripture chronology there were no kings; the consequence of which was, there were no wars; it is the pride of kings which throws mankind into confusion. Holland, without a king hath enjoyed more peace for this last century than any of the monarchical governments in Europe. Antiquity favors the same remark; for the quiet and rural lives of the first Patriarchs have a happy something in them, which vanishes when we come to the history of Jewish royalty.

Government by kings was first introduced into the world by the heathens, from whom the children of Israel copied the custom. It was the most prosperous invention the devil ever set on foot for the promotion of idolatry. The heathens paid divine honors to their deceased kings, and the Christian world has improved on the plan by doing the same to their living ones. How impious is the title of sacred majesty applied to a worm, who in the midst of his splendor is crumbling into dust!

As the exalting one man so greatly above the rest cannot be justified on the equal rights of nature, so neither can it be defended on the authority of scripture; for the will of the Almighty as

declared by Gideon, and the prophet Samuel, expressly disapproves of government by kings. All anti-monarchical parts of scripture, have been very smoothly glossed over in monarchical governments, but they undoubtedly merit the attention of countries which have their governments yet to form. *Render unto Caesar the things which are Caesar's,* is the scripture doctrine of courts, yet it is no support of monarchical government, for the Jews at that time were without a king, and in a state of vassalage to the Romans.

Near three thousand years passed away, from the Mosaic account of the creation, till the Jews under a national delusion requested a king. Till then their form of government (except in extraordinary cases where the Almighty interposed) was a kind of Republic, administered by a judge and the elders of the tribes. Kings they had none, and it was held sinful to acknowledge any being under that title but the Lord of Hosts. And when a man seriously reflects on the idolatrous homage which is paid to the persons of kings, he need not wonder that the Almighty, ever jealous of his honor, should disapprove a form of government which so impiously invades the prerogative of heaven….

These portions of scripture are direct and positive. They admit of no equivocal construction. That the Almighty hath here entered his protest against monarchical government is true, or the scripture is false. And a man hath good reason to believe that there is as much of kingcraft as priestcraft in withholding the scripture from the public in popish countries. For monarchy in every instance, is the popery of government.

To the evil of monarchy we have added that of hereditary succession; and as the first is a degradation and lessening of ourselves, so the second, claimed as a matter of right, is an insult and imposition on posterity. For all men being originally equals, no one by birth could have a right to set up his own family in perpetual preference to all others for ever, and though himself might deserve some decent degree of honors of his cotemporaries, yet his descendants might be far too unworthy to inherit them. One of the strongest natural proofs of the folly of hereditary right in kings, is that nature disapproves it, otherwise she would not so frequently turn it into ridicule, by giving mankind an *ass for a lion.*

Secondly, as no man at first could possess any other public honors than were bestowed upon him, so the givers of those honors could have no power to give away the right of posterity, and though they might say, "We choose you for our head," they could not without manifest injustice to their children say "that your children and your children's children shall reign over ours forever." Because such an unwise, unjust, unnatural compact might (perhaps) in the next succession put them under the government of a rogue or a fool. Most wise men in their private sentiments have ever treated hereditary right with contempt; yet it is one of those evils which when once established is not easily removed: many submit from fear, others from superstition, and the more powerful part shares with the king the plunder of the rest.

This is supposing the present race of kings in the world to have had an honorable origin: whereas it is more than probable, that, could we take off the dark covering of antiquity and trace them to their first rise, we should find the first of them nothing better than the principal ruffian of some restless gang; whose savage manners or pre-eminence in subtlety obtained him the title of chief among plunderers: and who by increasing in power and extending his depredations, overawed

the quiet and defenseless to purchase their safety by frequent contributions. Yet his electors could have no idea of giving hereditary right to his descendants, because such a perpetual exclusion of themselves was incompatible with the free and unrestrained principles they professed to live by. Wherefore, hereditary succession in the early ages of monarchy could not take place as a matter of

claim, but as something casual or complemental; but as few or no records were extant in those days, and traditionary history stuff'd with fables, it was very easy, after the lapse of a few generations, to trump up some superstitious tale conveniently timed…to cram hereditary right down the throats of the vulgar. Perhaps the disorders which threatened, or seemed to threaten, on the decease of a leader and the choice of a new one (for elections among ruffians could not be very orderly) induced many at first to favor hereditary pretensions; by which means it happened, as it hath happened since, that what at first was submitted to as a convenience was afterwards claimed as a right.

England since the conquest hath known some few good monarchs, but groaned beneath a much larger number of bad ones; yet no man in his senses can say that their claim under William the Conqueror is a very honorable one. A French bastard landing with an armed banditti and establishing himself king of England against the consent of the natives, is in plain terms a very paltry rascally original. It certainly hath no divinity in it. However it is needless to spend much time in exposing the folly of hereditary right; if there are any so weak as to believe it, let them promiscuously worship the ass and the lion, and welcome. I shall neither copy their humility, nor disturb their devotion.

Yet I should be glad to ask how they suppose kings came at first? The question admits but of three answers, viz. either by lot, by election, or by usurpation. If the first king was taken by lot, it establishes a precedent for the next, which excludes hereditary succession. Saul was by lot, yet the succession was not hereditary, neither does it appear from that transaction that there was any intention it ever should. If the first king of any country

was by election, that likewise establishes a precedent for the next; for to say, that the right of all future generations is taken away, by the act of the first electors, in their choice not only of a king but of a family of kings for ever, hath no parallel in or out of scripture but the doctrine of original sin, which supposes the free will of all men lost in Adam; and from such comparison, and it will admit of no other, hereditary succession can derive no glory. For as in Adam all sinned, and as in the first electors all men obeyed; as in the one all mankind were subjected to Satan, and in the otherto sovereignty; as our innocence was lost in the first, and our authority in the last; and as both disable us from reassuming some former state and privilege, it unanswerably follows that original sin and hereditary succession are parallels. Dishonorable rank! Inglorious connection! Yet the most subtle sophist cannot produce a juster simile.

As to usurpation, no man will be so hardy as to defend it; and that William the Conqueror was an usurper is a fact not to be contradicted. The plain truth is, that the antiquity of English monarchy will not bear looking into.

But it is not so much the absurdity as the evil of hereditary succession which concerns mankind.

Did it insure a race of good and wise men it would have the seal of divine authority, but as it opens a door to the *foolish,*the *wicked,* and the *improper,* it has in it the nature of oppression. Men who look upon themselves born to reign, and others to obey, soon grow insolent. Selected from the rest of mankind, their minds are early poisoned by importance; and the world they act in differs so materially from the world at large, that they have but little opportunity of knowing its true interests, and when they succeed to the government are frequently the most ignorant and unfit of any throughout the dominions.

Another evil which attends hereditary succession is, that the throne is subject to be possessed by a minor at any age; all which time the regency acting under the cover of a king have every opportunity and inducement to betray their trust. The same national misfortune happens when a king worn out with age and infirmity enters the last stage of human weakness. In both these cases the public becomes a prey to every miscreant who can tamper successfully with the follies either of age or infancy.

The most plausible plea which hath ever been offered in favor of hereditary succession is, that it preserves a nation from civil wars; and were this true, it would be weighty; whereas it is the most barefaced falsity ever imposed upon mankind. The whole history of England disowns the fact. Thirty kings and two minors have reigned in that distracted kingdom since the conquest, in which time there has been (including the revolution) no less than eight civil wars and nineteen rebellions. Wherefore instead of making for peace, it makes against it, and destroys the very foundation it seems to stand upon….

In short, monarchy and succession have laid (not this or that kingdom only) but the world in blood and ashes. 'Tis a form of government which the word of God bears testimony against, and blood will attend it.

If we inquire into the business of a king, we shall find that in some countries they may have none; and after sauntering away their lives without pleasure to themselves or advantage to the nation, withdraw from the scene, and leave their successors to tread the same idle round. In absolute monarchies, the whole weight of business civil and military lies on the king; the children of Israel in their request for a king urged this plea, "that he may judge us, and go out before us and fight our battles." But in countries where he is neither a judge nor a general, as in England, a man would be puzzled to know what *is* his business.

The nearer any government approaches to a Republic, the less business there is for a king. It is somewhat difficult to find a proper name for the government of England. Sir William Meredith calls it a Republic; but in its present state it is unworthy of the name, because the corrupt influence of the crown, by having all the places in its disposal, hath so effectually swallowed up the power, and eaten out the virtue of the House of Commons (the republican part in the Constitution) that the government of England is nearly as monarchical as that of France or Spain. Men fall out with names without understanding them. For 'tis the republican and not the monarchical part of the Constitution of England which Englishmen glory in, viz. the liberty of choosing an House of Commons from out of their own body—and it is easy to see that when republican virtues fail, slavery ensues. Why is the Constitution of England sickly, but because monarchy hath poisoned the Republic; the crown has engrossed the Commons.

In England a king hath little more to do than to make war and give away places; which, in plain terms, is to impoverish the nation and set it together by the ears. A pretty business indeed for a man to be allowed eight hundred thousand sterling a year for, and worshipped into the bargain! Of more

worth is one honest man to society, and in the sight of God, than all the crowned ruffians that ever lived….

1. Thomas Paine, "Common Sense," in William M. Van der Weyde, ed.,*The Life and Works of Thomas Paine,* "Patriot's Edition," Vol. 2 (New Rochelle, NY: Thomas Paine National Historical Association, 1925), 97-110, 114-22. Thomas Paine National Historical Association, New Rochelle, NY. www.thomaspaine.org.

Monday, March 11, 2013 – Essay #16 – Common Sense by Thomas Paine – Guest Essayist: Scot Faulkner, Co-Founder, George Washington Institute of Living Ethics, Shepherd University

As 1776 began, America's rebellion against British colonial rule was not yet a revolution. Less than half the projected number of volunteers had enlisted in the Continental army with desertions mounting. George Washington was entrenched, but stalemated in Cambridge outside of Boston. The British Commander, General John Burgoyne, mocked the situation by writing and producing the satirical play, "The Blockade", which portrayed Washington as an incompetent flailing a rusty sword. Then something amazing happened.

"Common Sense" was published on January 9, 1776. It remains one of the most indispensable documents of America's founding. In forty-eight pages, Thomas Paine accomplished three things fundamental to America. He is the first to publically assert the only possible outcome of the rebellion is independence from Great Britain. He makes the case for American independence understandable and accessible to everyone. He lays the ground work for the Declaration of Independence and the U.S. Constitution.

Paine is both the most unlikely and likely person to accomplish this pivotal Trifecta. He was born in rural England on January 29, 1737, the son of a Quaker father and an Anglican mother. This religious diversity formed a key part of his early writings on religious freedom. His career was a mixture of failed business ventures, failed marriages, and minor positions in British Excise (tax) offices. This mix of mundane activities masked the brilliant mind of an outstanding observer, thinker, and communicator.

In the summer of 1772, Paine wrote his first political article, *The Case of the Officers of Excise*, a twenty-one page brief for better pay and working conditions among Excise Officers. The work had little impact on Parliament, but did bring him to the attention of political thinkers in London, and ultimately to being introduced to Benjamin Franklin in September 1774. Franklin

recommended that Paine immigrate to Pennsylvania and commence a publishing career. Thomas Paine arrived in Philadelphia on November 30, 1774 and became editor of the *Pennsylvania Magazine* in January 1775.

Editing the magazine gave Paine two major opportunities. He honed his writing skills for appealing to a mass audience and he befriended those opposing British colonial rule, including Benjamin Rush, an active member of the Sons of Liberty. After open rebellion erupted in April 1775, Rush was concerned that, "When the subject of American independence began to be agitated in conversation, I observed the public mind to be loaded with an immense mass of prejudice and error relative to it". He urged Paine to make the case for American independence understandable to common people.

Common Sense was just that. Paine laid out methodical and easily understood reasons for American independence in plain terms. Up until *Common Sense* those opposed to British rule did so only in lengthy philosophical letters circulated among intellectual elites.

Common Sense ushered in a new style of political writing, devoid of Latin phrases and complex concepts. Historian Scott Liell asserts in *Thomas Paine, Common Sense, and the Turning Point to Independence*: "[B]y including all of the colonists in the discussion that would determine their future, *Common Sense* became not just a critical step in the journey toward American independence but also an important artifact in the foundation of American democracy."

Paine's simple prose promoted the premise that the rebellion was not about subjects wronged by their monarch, but a separate and independent people being oppressed by a foreign power:

"Europe, and not England, is the parent country of America. This new world hath been the asylum for the persecuted lovers of civil and religious liberty from *every part* of Europe. Hither they have fled, not from the tender embraces of the mother, but from the cruelty of the monster; and it is so far true of England, that the same tyranny which drove the first emigrants from home, pursues their descendants still." *Common Sense* was an instant bestseller. It sold as many as 120,000 copies in the first three months, 500,000 in twelve months, going through twenty-five editions in the first year alone. This amazingly wide distribution was among a free population of only 2 million Americans.

Originally published anonymously as "Written by an Englishman", word soon spread that Paine was the author. His authorship known, Paine publically declared that all proceeds would go to the purchase of woolen mittens for Continental soldiers. General Washington ordered Paine's pamphlet distributed among all his troops. Within the year, Paine became an aide-de-camp to Nathanael Greene, one of Washington's top field commanders.

Common Sense was not only read by the masses, it was read to them. In countless taverns and local gatherings Paine's case for American independence and for a unique American form of government was heard even by common folk who had never learned to read.

The masses heard and embraced the concept that, "A government of our own is our natural right". They also heard and understood the foundations of America: Government as a "necessary

evil" formed and maintained by the will of the governed – "in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King"; and the need for an engaged electorate, "this frequent interchange will establish a common interest with every part of the community, they will mutually and naturally support each other, and on this, (not on the unmeaning name of king,) depends the *strength of government, and the happiness of the governed."*

While the Declaration of Independence became the philosophical core of our Revolution, *Common Sense* initiated and broadened the public debate about independence, building the public commitment necessary to make our Revolution possible.

Scot Faulkner is Co-Founder of the George Washington Institute of Living Ethics, Shepherd University. Follow him on Twitter @ScotFaulkner53

Letter to Roger Weightman by Thomas Jefferson

June 24, 1826

Respected Sir:

The kind invitation I receive from you, on the part of the citizens of the city of Washington, to be present with them at their celebration on the fiftieth anniversary of American Independence, as one of the surviving signers of an instrument pregnant with our own, and the fate of the world, is most flattering to myself, and heightened by the honorable accompaniment proposed for the comfort of such a journey. It adds sensibly to the sufferings of sickness, to be deprived by it of a personal participation in the rejoicings of that day. But acquiescence is a duty, under circumstances not placed among those we are permitted to control. I should, indeed, with peculiar delight, have met and exchanged there congratulations personally with the small band, the remnant of that host of worthies, who joined with us on that day, in the bold and doubtful election we were to make for our country, between submission or the sword; and to have enjoyed with them the consolatory fact, that our fellow citizens, after half a century of experience and prosperity, continue to approve the choice we made. May it be to the world, what I believe it will be, (to some parts sooner, to others later, but finally to all,) the signal of arousing men to burst the chains under which monkish ignorance and superstition had persuaded them to bind themselves, and to assume the blessings and security of self-government.That form which we have substituted, restores the free right to the unbounded exercise of reason and freedom of opinion. All eyes are opened, or opening, to the rights of man. The general spread of the light of science has already laid open to every view the palpable truth, that 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. These are grounds of hope for others. For ourselves, let the annual return of this day forever refresh our recollections of these rights, and an undiminished devotion to them.

I will ask permission here to express the pleasure with which I should have met my ancient neighbors of the city of Washington and of its vicinities, with whom I passed so many years of a

pleasing social intercourse; an intercourse which so much relieved the anxieties of the public cares, and left impressions so deeply engraved in my affections, as never to be forgotten. With my regret that ill health forbids me the gratification of an acceptance, be pleased to receive for yourself, and those for whom you write, the assurance of my highest respect and friendly attachments.

1. Thomas Jefferson, "To Roger C. Weightman," June 24, 1826, in Paul Leicester Ford, ed., *The Works of Thomas Jefferson,* "Federal Edition," Vol. 10 (New York: G.P. Putnam's Sons, 1904-5), 390-92.

Tuesday, March 12, 2013 – Essay #17 – Letter to Roger Weightman – Thomas Jefferson – Guest Essayist: Scot Faulkner, Co-Founder, George Washington Institute of Living Ethics, Shepherd University

In the last public communication of his life, Thomas Jefferson made it crystal clear why documents and actions have lasting consequences. In his letter to Washington, DC Mayor, Roger C. Weightman, Jefferson eloquently asserts the legacy of the Declaration of Independence by declaring it: "the signal of arousing men to burst the chains under which monkish ignorance and superstition had persuaded them to bind themselves, and to assume the blessings and security of self-government."

Jefferson was a student of history. He understood its central role in our present and future. Earlier he wrote: "History, by apprising them of the past will enable them to judge of the future; it will avail them of the experience of other times and other nations; it will qualify them as judges of the actions and designs of men; it will enable them to know ambition under every disguise it may assume; and knowing it, to defeat its views."[1]

On June 24, 1826, Jefferson knew he was dying. His ailments had been slowing him down since the beginning of the year. He hoped to communicate a timeless legacy of liberty to others. He also hoped to survive until July 4, the fiftieth anniversary of the Declaration of Independence. On that June morning he had summoned Dr. Robley Dunglison to help him live just a few more days and then to ease his journey to, "the shore which crowns all my hopes or which buries my cares." [2] He then completed his letter to Weightman.

Mayor Weightman had invited all surviving signers of the Declaration of Independence to a major celebration in Washington, DC. Jefferson knew his infirmities would prevent his attending, but he viewed responding to Weightman's invitation as a valedictory – a final farewell to inspire people to seek freedom for ages to come.

Jefferson opens by making his apology for not being able to attend. He then frames the fiftieth commemoration of the Declaration of Independence as vindicating the actions of the signers in 1776: "the remnant of that host of worthies, who joined with us, on that day, in the bold and

doubtful election we were to make for our country, between submission or the sword; and to have enjoyed with them the consolatory fact, that our fellow citizens, after half a century of experience and prosperity, continue to approve the choice we made."

He shifts his focus to the broader themes of July 4th. He affirms the eternal value and inspirational message of the Declaration of Independence as, "the signal of arousing men to burst the chains." Jefferson then writes about the how the Declaration not only launched the first successful revolution based solely on freedom, but also established timeless values for creating a noble new civic culture, "That form which we have substituted, restores the free right to the unbounded exercise of reason and freedom of opinion."

He goes on to describe the universal impact of the Declaration, "All eyes are opened, or opening, to the rights of man." Jefferson deeply desired that an expanding universe of freedom and knowledge would lift everyone on earth out of tyranny, "The general spread of the light of science has already laid open to every view the palpable truth, that 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. These are grounds of hope for others."

Jefferson closes with a recommendation for the ages, "For ourselves, let the annual return of this day forever refresh our recollections of these rights, and an undiminished devotion to them."

As Jefferson envisioned, July 4 should always be about more than parades, fireworks, and barbeques. It is about refreshing our recollections of our freedom being "self evident" and our "unalienable Rights" arising from our "Creator" never to be abridged by any earthly power. The sole role of government is to "secure these rights," deriving its just power, "from the consent of the governed".

Jefferson lived to see the sunrise on America's fiftieth birthday, passing just before one o'clock in the afternoon on Tuesday, July 4, 1826. Later that day, Jefferson's colleague and co-author of the Declaration of Independence, John Adams, also passed. Adams' last words were, "Thomas Jefferson lives". And so he does.

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[1] Meacham, Jon *Thomas Jefferson; The Art of Power*. New York, NY Random House 2012. Page 537.

[2] Ibid. p. 492.

Virginia Declaration of Rights by George Mason (1725-1792)

June 12, 1776

A declaration of rights made by the Representatives of the good people of Virginia,

assembled in full and free Convention; which rights do pertain to them and their posterity, as the basis and foundation of Government.

Section 1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Section 2. That all power is vested in, and consequently derived from, the People; that magistrates are their trustees and servants, and at all times amenable to them.

Section 3. That Government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community;—of all the various modes and forms of Government that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of mal-administration;—and that, whenever any Government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

Section 4. That no man, or set of men, are entitled to exclusive or separate emoluments and privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of Magistrate, Legislator, or Judge, to be hereditary.

Section 5. That the Legislative and Executive powers of the State should be separate and distinct from the Judicative; and, that the members of the two first may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the law shall direct.

Section 6. That elections of members to serve as Representatives of the people, in Assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses without their own consent or that of their Representative so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.

Section 7. That all power of suspending laws, or the execution of laws, by any authority, without consent of the Representatives of the people, is injurious to their rights, and ought not to be exercised.

Section 8. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

Section 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 10. That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

Section 11. That in controversies respecting property, and in suits between man and man, the ancient trial by Jury is preferable to any other, and ought to be held sacred.

Section 12. That the freedom of the Press is one of the greatest bulwarks of liberty, and can never be restrained but by despotic Governments.

Section 13. That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free State; that Standing Armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.

Section 14. That the people have a right to uniform Government; and, therefore, that no Government separate from, or independent of, the Government of *Virginia,* ought to be erected or established within the limits thereof.

Section 15. That no free Government, or the blessing 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.

Section 16. That 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 equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other.

1. George Mason, "Final Draft of the Virginia Declaration of Rights," from *The Papers of George Mason, 1727-1792,* edited by Robert A. Rutland and published in three volumes for the Omohundro Institute of Early American History and Culture.

Wednesday, March 13, 2013 – Essay #18 – Virginia Declaration of Rights by George Mason – Guest Essayist: Kevin R. C. Gutzman, J.D., Ph.D. Professor and Director of Graduate Studies Department of History Western Connecticut State University And Author, James Madison and the Making of America

The Virginia Declaration of Rights is one of the key source documents of the U.S. Constitution. This first American declaration of rights includes multiple provisions later echoed, and even copied, by the authors of the U.S. Constitution. The Declaration's chief author, George Mason, and one of the two other main contributors, James Madison, played extremely prominent roles in both the writing and ratification of the Constitution and the movement culminating in the Bill of Rights, so the resemblance is no surprise.

Virginia's last colonial governor, Lord Dunmore, fled the colony in early 1776, the Council and House of Burgesses resolved themselves into the Convention and ruled in his absence. On May 15, 1776, it took an epochal step, adopting three resolutions: one calling for a declaration of rights, a second calling for a republican constitution, and a third calling for federal relations with other colonies and treaty relations with other countries.

Self-consciously following the example of Britain's Glorious Revolution, in which the Declaration of Right had been the condition of William and Mary's joint assumption of the English monarchy, the Virginians put their fundamental statement of political principles first, and then adopted the constitution that would implement it. Virginians thought of their colony as independent from that point.

The Convention appointed a committee chaired by George Mason to draft the declaration and constitution. The draft declaration it reported back to the Convention stated the philosophical basis of their new government in several articles, and then it laid out some of the chief individual rights on which Virginians could continue to rely.

So, for example, Mason's draft of Section I said, "That all men are by nature equally free and independent, and have certain inherent rights, of which they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

This seemingly unexceptionable statement of Whig political philosophy drew powerful objection from Robert Carter Nicholas, Virginia's last colonial treasurer and the highest-ranking royal official to support the Revolution in Virginia. If we go on record to this effect, Nicholas thundered, we will instantly face a choice between ignoring our stated principles and social convulsion. After all, Virginia is full of slaves, who become more numerous all the time, and they certainly are not free

In response, the Convention amended Section 1 to say, "That all men are by nature equally free and independent, and have certain inherent rights, of which, *when they enter into a state of society*, they cannot, by any compact, deprive or divest their posterity…." [emphasis added] In other words, slaves were not parties to the social compact, and so government would have no

responsibility to protect their natural rights. At the very beginning, Virginia was casting its lot as a slave state.

The declaration's other notable statements of general political principle included Section 3's claim that a majority has a right to replace government with which it is discontented, Section 4's statement that offices should not be hereditary, Section 5's statement in favor of term limits for all government officials, and Section 6's statements that holders of sufficient property should be allowed to vote and that only elected officials should have power to tax.

The declaration next turns to what we take to be individual rights. Section 8 enumerates several important rights of criminal defendants, including the right against self-incrimination, the right to confront one's accusers and other witnesses, the right to a speedy trial, and the right of trial by jury. Section 9 echoes the English Bill of Rights in banning excessive bail and cruel and unusual punishments—language that would become the Eighth Amendment to the U.S. Constitution in 1791. Section 12 holds up freedom of the press as "one of the greatest bulwarks of liberty."

After Section 13's pronouncement in favor of militias instead of professional armies, the declaration finally turns to the question of religious freedom in its sixteenth and last section. Mason's draft of Section 16 said that Virginians were entitled to the "fullest toleration" in matters of religion. Madison objected.

Aged 25 and sitting in his first parliamentary body, James Madison was the youngest member of the Virginia Convention. He here made the most important contribution of all his fabled contributions to the American constitutional tradition. Toleration, with its implication that government knew better, did not suit him. Rather, he insisted that Virginians were entitled to the "free exercise" of religion. Mason supported this formulation as far superior to his own, and the Convention adopted it unanimously. In time, Madison would make this phrase part of federal law too, when he helped to draft the First Amendment.

The influence of the Virginia Declaration of Rights would be hard to exaggerate. Many of its provisions were used in other states. Thomas Jefferson, helping Frenchmen draft their Revolution's Declaration of the Rights of Man and Citizen, saw to it that some of the Virginia provisions were essentially translated into that document. From France, their language made its way into the charters of several francophone countries, and eventually into the United Nations' version. From there, it would be transplanted into yet more countries'.

George Mason, and to a much lesser extent James Madison, had a powerful effect on legal charters all over the world. No wonder Thomas Jefferson begged to be relieved of his congressional duties so that he could go home to Virginia and join in writing his state's Declaration of Rights and Constitution. He said that this was the ground of the entire struggle with the British. Dejectedly, he had to settle for writing the Declaration of American Independence instead.

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Fast Day Proclamation of the Continental Congress

December 11, 1776

Whereas, the war in which the United States are engaged with Great Britain, has not only been prolonged, but is likely to be carried to the greatest extremity; and whereas, it becomes all public bodies, as well as private persons, to reverence the Providence of God, and look up to him as the supreme disposer of all events, and the arbiter of the fate of nations; therefore,

Resolved, That it be recommended to all the United States, as soon as possible, to appoint a day of solemn fasting and humiliation; to implore of Almighty God the forgiveness of the many sins prevailing among all ranks, and to beg the countenance and assistance of his Providence in the prosecution of the present just and necessary war.

The Congress do also, in the most earnest manner, recommend to all the members of the United States, and particularly the officers civil and military under them, the exercise of repentance and reformation; and further, require of them the strict observation of the articles of war, and particularly, that part of the said articles, which forbids profane swearing, and all immorality, of which all such officers are desired to take notice.

It is left to each state to issue out proclamations fixing the days that appear most proper within their several bounds….

1. "Fast Day Proclamation of the Continental Congress," December 11, 1776, in Worthington C. Ford, Gaillard Hunt et al., eds., *The Journals of the Continental Congress, 1774–1789,* Vol. 6 (Washington, D.C.: Government Printing Office, 1904-37), 1022.

Thursday, March 14, 2013 – Essay #19 – Fast Day Proclamation of the Continental Congress – Guest Essayist: George Landrith, President, Frontiers of Freedom

The Founders' proclamations on fasting and prayer are relevant today

by George Landrith

Today, many Americans think that government and even public life must be strictly separated from religious life and faith. Few know what the Constitution actually says about religious freedom or what the Founders believed about the concepts of liberty, God, and religion. But our history paints a very clear picture.

On March 16, 1776, the Continental Congress meeting in Philadelphia issued a proclamation calling for a day of fasting and prayer. This proclamation called on Americans to "with united

hearts, confess … our manifold sins and … by a sincere repentance … appease his righteous displeasure, and, through the merits and mediation of Jesus Christ, obtain his pardon and forgiveness."

It also encouraged Americans to "humbly implor[e] his assistance to frustrate the cruel purposes of our unnatural enemies; and by inclining their hearts to justice and benevolence…." The proclamation was overtly religious and overtly Christian and it had the strong support of the Founders and the public.

This proclamation did not violate anyone's religious freedom because it didn't require anyone to believe or do anything. It didn't give or withhold any government benefit and it didn't punish anyone who ignored it. So despite its religious content, it wasn't a violation of anyone's religious freedom.

This proclamation was not an unusual for the Founders. In fact, it was a regular occurrence. The Continental Congress passed numerous proclamations calling for the American people fast and pray and to "express the grateful feelings of their hearts and consecrate themselves to the service of their divine benefactor." The first President of the United States, George Washington, issued such proclamations as well. So did Abraham Lincoln and many others.

The Library of Congress refers to a 1779 proclamation as "the most eloquent of the Fast and Thanksgiving Day Proclamations." This proclamation also recommended a day of fasting and "prayer to Almighty God" requesting his blessings:

"That he will grant the Blessings of Peace to all contending Nations, Freedom to those who are in Bondage, and Comfort to the Afflicted: That he will diffuse Useful Knowledge, extend the Influence of True Religion, and give us that Peace of Mind which the World cannot give: That he will be our Shield in the Day of Battle, our Comforter in the Hour of Death, and our kind Parent and merciful Judge through Time and through Eternity."

This could have been part of a Sunday morning sermon, but it wasn't. It was the Founders speaking in a proclamation of the Continental Congress. And despite its religious message, it did not violate anyone's religious freedom.

Some disagree with me and say, "that obviously violates the separation of church and state!" But the phrase "separation of church and state" or anything close to it, never appears in the Constitution or the Declaration of Independence.

The phrase "separation of church and state" is merely a loose and sloppy phrase used in a personal letter by one of the Founders. It was not an attempt to give serious legal or scholarly thought to the provisions of the Constitution. It was just a shorthand phrase in a letter to a friend.

Yet, those with a political agenda — of forcibly purging faith from public life — have seized upon this phrase as if it were a carefully crafted constitutional doctrine — even to the point of turning the First Amendment on its head and effectively requiring the government to purge any

mention of faith in public. This is not something that the Founders or the Constitution ever contemplated.

The Constitution has three primary provisions dealing with religion. One prohibits religious tests "as a qualification to any office or public trust under the United States." While the Founders were overwhelmingly Christians, they wanted a free society for all — not just those who shared their religious beliefs. The First Amendment contains the other two religious clauses — the Free Exercise Clause and the No Establishment Clause. Both are encapsulated in one sentence, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Simply stated, Congress may not establish a state religion, nor may it prohibit the free exercise of religion.

There is no requirement that government actively separate or segregate religious life from secular life. In fact, if government segregates religion from the public forum, it would be violating the constitutional requirement that government not prohibit the free exercise of religion.

Often those antagonistic towards religion argue that freedom *of* religion means freedom *from* religion. Certainly, those who do not want to practice religion have every right not to. But the First Amendment does not give those who dislike religion a constitutional right to live in a society free of religious people, free of religious beliefs, or free of religious expressions or practices. That would infringe on the free exercise rights and the free speech rights of everyone else.

Every day, people around us express their political, cultural and religious views. We have no right to demand that we hear only those opinions with which we agree. We have no right to silence others, claiming that our freedom of speech or our freedom of religion trumps their freedoms. That would be sheer lunacy. Yet, it is often the argument of the extreme Left.

As the proclamations calling for fasting and prayer and thanksgiving clearly show, our Founders were deeply religious. Their Christian faith led them to strive and sacrifice for a nation based on the notion "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

The Founders believed that God was interested in the liberty and freedom of his children. The cause of liberty was not *theirs* alone — it was God's also. To them, government was designed to protect and insure the God-given liberties of the people. With that understanding, it would have made no sense for them to create a government that harbored hostility towards religion or viewed faith as dangerous or something that should be limited or segregated in mainstream society.

Yet, today, many on the extreme Left, see religion as something to be driven from public life and from the public square. Even the courts have periodically fallen prey to this anti-constitutional and anti-historical view. They seem to believe that people can practice their religion only in the privacy of their home with the blinds drawn. However sincere as these anti-faith folks may be, they are clearly and obviously wrong about the Constitution. Wrong about history. And wrong about what it means to be a free people.

The French historian, Francois Pierre Guillamume Guizot, asked James Russell Lowell, a famous American writer and abolitionist, "How long will the American Republic endure? Lowell's response was, "As long as the ideas of the men who founded it continue to dominate." For this reason, we cannot allow ourselves to forget that the Founders did not believe faith was in conflict with liberty. They saw faith as foundational to freedom. And while they were strong advocates of religious liberty, they did not believe it wise or useful for government to actively separate faith from public life.

George Landrith is the President of Frontiers of Freedom.

The Northwest Ordinance

July 13, 1787

An Ordinance for the government of the territory of the United States northwest of the river Ohio

Section 1. *Be it ordained by the United States in Congress assembled,* That the said territory, for the purpose of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

Section 2. *Be it ordained by the authority aforesaid,* That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among, their children and the descendants of a deceased child in equal parts, the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one-third part of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be, (being of full age,) and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers, shall be appointed for that purpose; and personal property may be transferred by delivery, saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskies, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

Section 3. *Be it ordained by the authority aforesaid,* That there shall be appointed, from time to time, by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district, and have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.

Section 4. There shall be appointed from time to time, by Congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department, and transmit authentic copies of such acts and proceedings every six months to the Secretary of Congress. There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdiction and reside in the district, and have each therein a freehold estate, in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.

Section 5. The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

Section 6. The governor, for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

Section 7. Previous to the organization of the general assembly the governor shall appoint such magistrates, and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized the powers and duties of magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

Section 8. For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed, from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

Section 9. So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly: *Provided,* That for every five hundred free male inhabitants there shall be one

representative, and so on, progressively, with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five; after which the number and proportion of representatives shall be regulate by the legislature: *Provided,* That no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee-simple, two hundred acres of land within the same: *Provided also,* That a freehold in fifty acres of land in the district, having been a citizen of one of the States, and being resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative.

Section 10. The representatives thus elected shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township, for which he was a member, to elect another in his stead, to serve for the residue of the term.

Section 11. The general assembly or legislature shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum; and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected the governor shall appoint a time and place for them to meet together, and when met they shall nominate ten persons, resident in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress, five of whom Congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress, one of whom Congress shall appoint and commission for the residue of the term; and every five years, four months at least before the expiration of the time of service of the members of the council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress, five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives shall have authority to make laws in all cases for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient.

Section 12. The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity, and of office; the governor before the President of Congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to Congress, who shall have a seat in Congress with a right of debating, but not of voting, during this temporary government.

Section 13. And for extending the fundamental principles of civil and religious liberty, which

form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

Section 14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:

Article I

No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territories.

Article II

The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus,* and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishment shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be paid for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide,* and without fraud previously formed.

Article III

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

Article IV

The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the

United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the Federal debts, contracted, or to be contracted, and a proportional part of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district, or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefore.

Article V

There shall be formed in the said territory, not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to wit: The western State, in the said territory, shall be bounded by the Mississippi, the Ohio, and the Wabash Rivers; a direct line drawn from the Wabash and Post Vincents, due north, to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle State shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the said territorial line, and by the said territorial line. The eastern State shall be bounded by the last-mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: *Provided, however,* And it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government: *Provided,* The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles, and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.

Article VI

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: *Provided always,* That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person

claiming his or her labor or service as aforesaid.

Be it ordained by the authority aforesaid, That the resolutions of the twenty-third of April, 1784, relative to the subject of this ordinance, be, and the same are hereby, repealed, and declared null and void.

Done by the United States, in Congress assembled, the thirteenth day of July, in the year of our Lord 1787, and of their sovereignty and independence the twelfth.

Friday, March 15, 2013 – Essay #20 – The Northwest Ordinance – Guest Essayist: Allison R. Hayward, political and ethics attorney

Enacted on July 13, 1787, the Northwest Ordinance was a great achievement, and a document Americans should be proud to own. Yet it emerged from a Congress that, under the Articles of Confederation, had not been able to achieve very much. Circumstances in the territories, moreover, were very difficult, and the motives for passing the ordinance among many Members were less than honorable. That shouldn't change our positive view of the Ordinance, but might instead lead us to think about how petty motives can nonetheless, sometimes, lead to great things.

The greatness of the Ordinance is evident in its text. It provided a free and republican foundation for the governance of the "Northwest" – the territory we now refer to as the "Midwest" and that became the states of Ohio (admitted 1803), Indiana (1816) Illinois (1818), Michigan (1837), Wisconsin (1848), and the eastern part of Minnesota (1858). The Ordinance guaranteed the right to habeas corpus, freedom of religion, trial by jury, equal apportionment in representation, compensation for taking of property for public use, and protections for the rights of Indians. It prohibited slavery or involuntary servitude. It also provided that states admitted from the territory would enjoy equal footing in national government with all other states.

It also reserved some power in Congress over the territory, since Congress appointed the government of the territory, including a Governor, Secretary, and judges. Furthermore, Congress could reject laws enacted by the territorial government. Recall that under the Articles of Confederation, Congress has been powerless to bring intransigent state governments into line. Congress lacked the power to regulate commerce, so states raised tariffs and duties against one another's goods. Congress lacked the power to impose taxes, and thus could not pay national debts from the Revolutionary War. Without the power to impose a common national currency, fiscal policy was left to localities, many who favored debtors and thus inflationary policies. None of these helped national economic recovery from the brutal losses sustained in the fight for independence.

But congressional control had other consequences. It allowed Congress to deal with land speculators, who has in the preceding years had recruited investors for development of western lands. Members with such economic power (then as now) are susceptible to self-dealing. As

historian Walter McDougall observes, "it was an easy matter for Cutler [a principal in a land company] to bribe key congressmen by making them partners… [a]ll he needed to do to claim his wooded empire was arrange for … territories subject to appointed governors."

In the Ordinance, Congress also retained the power to "the primary disposal of the soil" to bona fide purchasers. That is, land companies paid the national government– not the territory – for grants of land. So Cutler, the land speculator named above, contracted with Congress for about 1.5 million acres of Ohio Country, at a price of $1 million, half due immediately and half due at the completion of a survey of the land. The company never raised the promised funds, incurred extra expenses defending against Indians, and when key principals in the deal went bankrupt, the company failed to meet its end of the contract. Nevertheless, Congress patented (that is, deeded ownership) for much of the land under the agreement, which ultimately became owned by individuals.

The Northwest Ordinance, on the one hand, could be viewed as merely a tool for failed real estate speculation. On the other hand we remember it an important vehicle for expressing and preserving key liberties. That may be because the same week the Ordinance was enacted, another meeting of delegates, in Philadelphia, was debating a replacement to the failed Articles of Confederation in a Constitutional Convention. That Convention grappled with the same questions, and imperfect motives, that faced the drafters of the Northwest Ordinance. With the Ordinance as prologue (and a cautionary tale) it's therefore no coincidence that our Constitution emerged with a strong yet divided national government better able to protect national interests while preserving individual liberty.

Allison R. Hayward is a political and ethics attorney in California

Memorial and Remonstrance against Religious Assessments – James Madison (1751-1836)

June 20, 1785

To the Honorable the General Assembly of the Commonwealth of Virginia: A Memorial and Remonstrance

We the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last Session of General Assembly, entitled "A Bill establishing a provision for Teachers of the Christian Religion," and conceiving that the same if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State to remonstrate against it, and to declare the reasons by which we are determined. We remonstrate against the said Bill,

1. Because we hold it for a fundamental and undeniable truth, "that 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." The Religion then of every man must be left to the

conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority.

2. Because if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the coordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free Government requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves nor by an authority derived from them, and are slaves.

3. Because it is proper to take alarm at the first experiment on our liberties.We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

4. Because the Bill violates that equality which ought to be the basis of every law, and which is more indispensible, in proportion as the validity or expediency of any law is more liable to be impeached. If “all men are by nature equally free and independent,” all men are to be considered as

entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining

an *"equal* title to the free exercise of Religion according to the dictates of Conscience." Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offense against God, not against man: To God, therefore, not to man, must an account of it be rendered. As the Bill violates equality by subjecting some to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their Religions unnecessary and unwarrantable? Can their piety alone be entrusted with the care of public worship? Ought their Religions to be endowed above all others with extraordinary privileges by which proselytes may be enticed from all others? We think too favorably of the justice and good sense of these denominations to believe that they either covet pre-eminences over their fellow citizens or that they will be seduced by them from the common opposition to the measure.

5. Because the Bill implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.

6. Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself, for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them, and not only during the period of miraculous aid, but long after it had been left to its own evidence and the ordinary care of Providence. Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have pre-existed and been supported, before it was established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust it to its own merits.

7. Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution. Inquire of the Teachers of Christianity for the ages in which it appeared in its greatest luster; those of every sect, point to the ages prior to its incorporation with Civil policy. Propose a restoration of this primitive State in which its Teachers depended

on the voluntary rewards of their flocks, many of them predict its downfall. On which Side ought their testimony to have greatest weight, when for or when against their interest?

8. Because the establishment in question is not necessary for the support of Civil Government. If it be urged as necessary for the support of Civil Government only as it is a means of supporting Religion, and it be not necessary for the latter purpose, it cannot be necessary for the former. If

Religion be not within the cognizance of Civil Government how can its legal establishment be necessary to Civil Government? What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny: in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established Clergy convenient auxiliaries. A just Government instituted to secure and perpetuate it needs them not. Such a Government will be best supported by protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.

9. Because the proposed establishment is a departure from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a luster to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an Asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthrophy in their due extent, may offer a more certain repose from his Troubles.

10. Because it will have a like tendency to banish our Citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration by revoking the liberty which they now enjoy, would be the same species of folly which has dishonored and depopulated flourishing kingdoms.

11. Because it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theater has exhibited proofs that equal and complete liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State. If with the salutary effects of this system under our own eyes, we begin to contract the bounds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruits of the threatened innovation. The very appearance of the Bill has transformed “that Christian forbearance, love and charity,” which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded, should this enemy to the public quiet be armed with the force of a law?

12. Because the policy of the Bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it with the number still remaining under the dominion of false Religions; and how small is the former! Does the policy

of the Bill tend to lessen the disproportion? No; it at once discourages those who are strangers to the light of revelation from coming into the Region of it; and countenances by example the nations who continue in darkness, in shutting out those who might convey it to them. Instead of Levelling as far as possible, every obstacle to the victorious progress of Truth, the Bill with an ignoble and unchristian timidity would circumscribe it with a wall of defense against the encroachments of error.

13. Because attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society. If it be difficult to execute any law which is not generally deemed necessary or salutary, what must be the case, where it is deemed invalid and dangerous? And what may be the effect of so striking an example of impotency in the Government, on its general authority?

14. Because a measure of such singular magnitude and delicacy ought not to be imposed, without the clearest evidence that it is called for by a majority of citizens, and no satisfactory method is yet proposed by which the voice of the majority in this case may be determined, or its influence secured. "The people of the respective counties are indeed requested to signify their opinion respecting the adoption of the Bill to the next Session of Assembly." But the representation must be made equal, before the voice either of the Representatives or of the Counties will be that of the people. Our hope is that neither of the former will, after due consideration, espouse the dangerous principle of the Bill. Should the event disappoint us, it will still leave us in full confidence, that a fair appeal to the latter will reverse the sentence against our liberties.

15. Because finally, "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience" is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the "Declaration of those rights which pertain to the good people of Virginia, as the basis and foundation of Government," it is enumerated with equal solemnity, or rather studied emphasis. Either then, we must say, that the Will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred: Either we must say, that they may control the freedom of the press, may abolish the Trial by Jury, may swallow up the Executive and Judiciary Powers of the State; nay that they may despoil us of our very right of suffrage, and erect themselves into an independent and hereditary Assembly or, we must say, that they have no authority to enact into law the Bill under consideration. We the Subscribers say, that the General Assembly of this Commonwealth have no such authority: And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; earnestly praying, as we are in duty bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their Councils from every act which would affront his holy prerogative, or violate the trust committed to them: and on the other, guide them into every measure which may be worthy of his blessing, may redound to their own praise, and may establish more firmly the liberties, the prosperity and the happiness of the Commonwealth.

1. James Madison, "To the Honorable the General Assembly of the Commonwealth of Virginia

A Memorial and Remonstrance," June 20, 1785, in William T. Hutchinson et al., eds., *The Papers of James Madison,* Vol. 8 (Chicago: University of Chicago Press, 1962-present), 298-304. Reproduced with permission of University of Chicago Press—Books in the format Textbook via Copyright Clearance Center.

Monday, March 18, 2013 – Essay #21 – Memorial and Remonstrance against Religious Assessments – James Madison – Guest Essayist: Justin Butterfield, Religious Liberty Attorney at the Liberty Institute

James Madison's "Memorial and Remonstrance against Religious Assessments" is an important document in establishing the necessity of religious liberty in America.

Madison grew up in a Virginia in which the Church of England was the established church. Not only were Virginia's citizens taxed to support the Church of England, but ministers of other denominations were frequently jailed for preaching what they believed. In January of 1774, Madison wrote to his friend, William Bradford, regarding "[t]hat diabolical … principle of persecution.[1]" As Madison described the situation,

There are at this time in the adjacent County not less than 5 or 6 well meaning men in close Gaol for publishing their religious Sentiments which in the main are very orthodox. I have neither patience to hear talk or think of any thing relative to this matter, for I have squabbled and scolded abused and ridiculed so long about it, to so little purpose that I am without common patience. So I leave you to pity me and pray for Liberty of Conscience to revive among us.[2]

As one of Madison's biographers put it, these jailed preachers—all Baptists—had done nothing more than "bring vital religion to the unchurched or to indifferent Anglicans.[3]"

During the War for Independence, much of the religious persecution in the colonies subsided as members of different denominations united in a common cause. Following the end of the war, however, the debate about religious freedom resumed. In 1777, Thomas Jefferson drafted a "Bill for Establishing Religious Freedom in Virginia." While the Virginia General Assembly was considering Jefferson's bill, Patrick Henry introduced a bill in 1784 that would implement a statewide tax to fund preachers.

In 1785, James Madison anonymously published his "Memorial and Remonstrance against Religious Assessments" to oppose the tax to fund preachers and to support Jefferson's "Bill for Establishing Religious Freedom in Virginia." Madison's "Memorial and Remonstrance," as it is often called, makes fifteen arguments for why religious liberty is a necessary and fundamental right.

Madison begins by noting that man is subject to God first and is only secondly a member of "Civil Society." Therefore, every man must be free to serve God according his own conscience and conviction without interference from the civil society. Since legislative bodies, such as the Virginia General Assembly, derive their power from the civil society, and since civil society

cannot regulate a person's religious beliefs, then any legislators that attempt to do so have exceeded their authority and are "tyrants." Madison goes so far as to say that people who submit to laws regulating religion are slaves because they are being governed by rules that have no legitimacy.

Among Madison's fifteen arguments, Madison also pointed out that if the government has the power to establish Christianity as the state religion, then it also has the power to establish sects or other religions as the state religion. Even if the government is not establishing some other religion right now, Madison said that it is the duty of citizens to jealously guard their freedoms from being wrongfully taken by the government. As Madison noted, usurped power can strengthen itself by exercise and "entangle the question in precedents." That is, it is easier to stop the government from taking a power that the government should not possess when the government first tries to take the power instead of later, when the government's possession of the power is established and the government first abuses its power.

Madison also argued that, historically, establishment of state churches has harmed the established church instead of helped it. Madison asserts that established churches have arrogant and indolent clergy, an ignorant laity, superstition, bigotry, and persecution. Madison develops this further to note that, if government is helped by religion, then since maintaining an established church hurts religion, it cannot be good for government either.

Madison also argued in the "Memorial and Remonstrance" that the inequality resulting from an established church is a "signal of persecution." No longer would America be a beacon of freedom "to the persecuted and oppressed of every Nation and Religion," but rather a warning "to seek some other haven." Madison went so far as to state that establishing a church differs from the Inquisition "only in degree."

Finally, Madison noted that the freedom of religion is as important as all other freedoms, and if the government can trample the freedom of religion, then there is nothing to protect the freedom of speech, or the right to trial by jury, or the right to vote for our representatives.

Madison was ultimately successful with his arguments. The year after Madison's "Memorial and Remonstrance" was published, the Virginia General Assembly rejected the establishment of a state church and instead adopted Jefferson's "Bill for Establishing Religious Freedom in Virginia."

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In addition to his practice in the area of religious liberty, Mr. Butterfield co-authored two scholarly articles: "The Light of Accountability: Why Partisan Elections Are the Best Method of

Judicial Selection," published in The Advocate, and "The Parsonage Exemption Deserves Broad Protection," published in the Texas Review of Law & Politics. Mr. Butterfield has also co-written articles for the Washington Times and the Billy Graham Evangelistic Association's Decision Magazine.

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[1] Letter from James Madison to William Bradford. January 1774.

[2] *Id.*

[3] Ketcham, Ralph Louis. *James Madison: A Biography.* 1st ed. University of Virginia Press, 1990. 58.

Virginia Statute for Religious Freedom By Thomas Jefferson

January 16, 1786

I. *Well aware that the opinions and belief of men depend not on their own will but follow involuntarily the evidence proposed to their minds; that* Almighty God hath created the mind free; *and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint;* that all attempts to influence it by temporal punishments, or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do *but to extend it by its influence on reason alone;*that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time: That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves *and abhors,* is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness and is withdrawing from the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labors for the instruction of mankind; that our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right; that it tends also to corrupt the principles of that religion it is meant to encourage, by bribing, with a monopoly of worldly honors and emoluments, those who will externally profess and conform to

it; that though indeed these are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way *that the opinions of men are not the object of civil government, nor under its jurisdiction;* that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgement, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.

II. *We the General Assembly of Virginia do enact,* that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

And though we well know that this Assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding Assemblies, constituted with powers equal to our own, and that therefore to declare this act to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right.

1. Thomas Jefferson, "A Bill for Establishing Religious Freedom," in Julian P. Boyd, ed., *The Papers of Thomas Jefferson,* Vol. 2 (Princeton, NJ: Princeton University Press, 1950-1992), 545-47.

Tuesday, March 19, 2013 – Essay #22 – Virginia Statute for Religious Freedom By Thomas Jefferson – Guest Essayist: Gennie Westbrook, Director of Curriculum and Professional Development, The Bill of Rights Institute

America's Founding generation well understood the principle that, in order to maintain individual liberty and freedom of conscience, civil government must be limited in its purpose and its power. They also knew the history of widespread and bloody religious conflict behind that principle. At the same time, many Americans believed that government should support religion because religion promoted virtuous lives and nurtured the social order needed for self-government. Balancing these concerns was a matter of great significance.

In his 1689 Letter Concerning Toleration, John Locke had written that it is important to "Distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other." Locke explained that it was completely unjust for civil government to interfere with peaceful religious activity: "The commonwealth seems to me to be a society of men constituted only for the procuring, preserving, and advancing their own civil interests. Civil interests I call life, liberty, health, and indolency [absence of pain] of body, and the possession of outward things, such as money, lands, houses, furniture, and the like. …[T]he whole jurisdiction of the magistrate reaches only to these civil concernments, and that all civil power, right and dominion, is bounded and confined to the only care of promoting these things; and that it neither can nor ought in any manner to be extended to the salvation of souls."

Nearly a century later, George Mason and James Madison continued the theme as they collaborated on the final wording of Article XVI of the Virginia Declaration of Rights, 1776. "That 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 equally entitled to the free exercise of religion, according to the dictates of conscience, and that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other." Like Mason and Madison, Thomas Jefferson was committed to freedom of conscience, and in 1777 he drafted the Virginia Statute for Religious Freedom, which he introduced in the Virginia legislature in 1779. The bill was intended to disestablish the Anglican Church, but the fiery orator, Patrick Henry, believed that religion was essential in civil society, and he opposed Jefferson's bill.

In 1784, Patrick Henry proposed a general tax called the Bill Establishing a Provision for Teachers [Ministers] of the Christian Religion. As required in some New England state laws, citizens would choose which Christian church received their support, or the money could go to a general fund to be distributed by the state legislature. George Washington supported Henry's bill, arguing that there was nothing wrong with requiring people to pay toward that which they said they supported. Jefferson and Madison, however, opposed Henry's bill. In 1785, Madison explained in his Memorial and Remonstrance opposing the proposed tax, that religion could not be forced on people, and that state support actually corrupted religion. Henry's bill requiring tax support for churches was defeated in the subsequent vote by the Virginia legislature.

In 1786, Madison reintroduced the Virginia Act for Establishing Religious Freedom, and this time the Act was approved by the legislature. Jefferson was serving as the United States Ambassador to France at the time. Madison wrote to Jefferson, "I flatter myself [that the act has] in this country extinguished forever the ambitious hope of making laws for the human mind."

The first, and longest, section of the Statute builds a case for prohibiting establishment of religion.

1. God created the mind free, and no one has legitimate authority to coerce the faith of others. Genuine faith is a matter of individual conscience.

2. It is "sinful and tyrannical" to compel a man to support opinions with which he disagrees.

3. “Our civil rights have no dependence on our religious opinions…”

4. It is unjust and a violation of natural rights to require a man to profess belief in any religious position as a condition of his election to public office.

5. State support “tends to corrupt the principles of that religion it is meant to encourage…”

6. “Truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.”

The second section is the enactment itself, which prohibits any law requiring people to attend or pay taxes in support of any church, and guarantees freedom of worship, as well as freedom to express religious opinions.

The third section states that future legislators, as they represent the people themselves, might repeal this law. However, if they do so, they will be in violation of the natural rights of mankind.

In his December 16, 1786 letter to James Madison, Jefferson wrote that many European citizens approved of the Virginia act for religious freedom. “In fact, it is comfortable to see the standard of reason at length erected, after so many ages, during which the human mind has been held in vassalage by kings, priests, and nobles; and it is honorable for us, to have produced the first legislature who had the courage to declare, that the reason of man may be trusted with the formation of his own opinions.”

The Virginia Statute laid groundwork not only for disestablishment in Virginia, but also for the establishment and free exercise clauses of the First Amendment to the United States Constitution.

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George Washington’s Letter to the Hebrew Congregation

August 18, 1790

Gentlemen:

While I receive, with much satisfaction, your Address replete with expressions of esteem; I rejoice in the opportunity of assuring you, that I shall always retain grateful remembrance of the cordial welcome I experienced in my visit to Newport, from all classes of Citizens.

The reflection on the days of difficulty and danger which are past is rendered the more sweet,

from a consciousness that they are succeeded by days of uncommon prosperity and security. If we have wisdom to make the best use of the advantages with which we are now favored, we cannot fail, under the just administration of a good Government, to become a great and happy people.

The Citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy: a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.

It would be inconsistent with the frankness of my character not to avow that I am pleased with your favorable opinion of my Administration and fervent wishes for my felicity. May the Children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other Inhabitants; while every one shall sit in safety under his own vine and figtree, and there shall be none to make him afraid. May the father of all mercies scatter light and not darkness in our paths, and make us all in our several vocations useful here, and in his own due time and way everlastingly happy.

1. George Washington, "To the Hebrew Congregation in Newport, Rhode Island," August 18, 1790, in W. W. Abbot et al., eds., *The Papers of George Washington, 1748-1799,* "Presidential Series," Vol. 6 (Charlottesville, VA: University of Virginia Press, 1976-present), 284-85

Wednesday, March 20, 2013 – Essay #23 – George Washington's Letter to the Hebrew Congregation – Essayist: Robert Lowry Clinton, Professor and Chair Emeritus, Department of Political Science, Southern Illinois University Carbondale

President George Washington's famous letter "To the Hebrew Congregation in Newport, Rhode Island" of August 18, 1790, is a response to a letter of the previous day penned by Moses Seixas on behalf of Congregation Yeshuat Israel. Seixas's letter gives thanks to God for the religious liberty afforded at last by a government "erected by the Majesty of the People" and an "equal and benign administration." This, after centuries of persecution and oppression of the descendants of Abraham by governments worldwide.

In his reply, Washington assures the Congregation that its' newly-found religious freedom is neither the result of mere tolerance nor of governmental benignity. Rather, it is the result of a growing recognition that freedom of conscience is an "inherent," inalienable natural right

granted by the Author of Nature, the "father of all mercies" who alone possesses the power to enlighten and lead us to everlasting happiness. Here Washington not only makes it plain that religious liberty cannot be an advantage conferred by government, but it cannot be conferred by the Constitution either, for the Bill of Rights was not yet adopted, though it had been proposed.

After Washington's letter, the Bill of Rights was ratified and the First Amendment has since protected religious liberty, though in many ways that undoubtedly would have been surprising to Washington himself. On the other hand, the natural law/natural rights tradition that Washington insisted is the real foundation of religious (and other) liberties has been severely undermined by such modern developments as the rise of secularism, progressivism, and legal positivism. These ideological developments call into question once again the fundamental issue raised by Washington's Letter to the Hebrew Congregation: Can religious liberty (not mere tolerance) and other key constitutional principles flourish, in the long run, absent their natural law/natural rights foundation?

Ever the cautious politician, Washington suggests in his letter that the "advantages with which we are now favored" can yet be lost without the "just administration of a good Government." Without the "wisdom to make the best use of the advantages with which we are now favored," we may fail to become "a great and happy people." What will be required for this greatness and happiness is "the just administration of a good Government."

Elsewhere (see especially Washington's "Farewell Address"), Washington will elaborate the requirements of the good government he has in mind. Among these requirements will be found that faction, public debt, and excessive consolidation of power must be avoided. He will also warn that the Constitution may be altered only by an explicit act of the whole people (not by usurpation by courts or other agencies of government), that the dependence of morality upon religion must be acknowledged and nurtured (thus acknowledging the central role of religion in public discourse), and that the "spirit of innovation" upon the fundamental principles of the Constitution must be resisted. It is reasonable to assume that the presupposition of natural rights announced in Washington's Letter to the Hebrew Congregation is among those fundamental principles.

Our Constitution is much to be celebrated, as is the governing system that it set in motion. Nonetheless, Washington's Letter to the Hebrew Congregation serves as a powerful reminder that there are principles and powers even deeper that those that any written instrument can express, principles and powers that are at the root of all good constitutions, and which must therefore be acknowledged if the full force of the Founders' achievement is to be realized.

All that said, I shall rest content, for the time being, to leave for others the decision of whether and to what extent our nation has measured up to George Washington's call for the "just administration of a good Government," to his warning against the "spirit of innovation" upon the principles of the Constitution, and especially, to his insistence that we persevere in the determination to regard our most fundamental rights and liberties not as grants of governments, constitutions, or bills of rights, but as gifts of God.

Robert Lowry Clinton holds B.A. and M.A. degrees from Texas Tech University and a Ph.D. in Government from the University of Texas at Austin. He is the author of Marbury v. Madison and Judicial Review and God and Man in the Law: The Foundations of Anglo-American Constitutionalism (both published by the University Press of Kansas), as well as numerous journal articles and book chapters. He is a Fellow of the Center of Science and Culture at the Discovery Institute in Seattle, Washington, and was a Fellow of the James Madison Program in American Ideals and Institutions at Princeton University in 2007-08. Dr. Clinton's main fields of study are in Supreme Court history, constitutional jurisprudence, social and political philosophy, and political theology.

George Washington's Farewell Address

September 19, 1796

Friends, and Fellow Citizens:

The period for a new election of a Citizen, to Administer the Executive government of the United States, being not far distant, and the time actually arrived, when your thoughts must be employed in designating the person, who is to be clothed with that important trust, it appears to me proper, especially as it may conduce to a more distinct expression of the public voice, that I should now apprise you of the resolution I have formed, to decline being considered among the number of those, out of whom a choice is to be made.

I beg you, at the same time, to do me the justice to be assured, that this resolution has not been taken, without a strict regard to all the considerations appertaining to the relation, which binds a dutiful citizen to his country, and that, in withdrawing the tender of service which silence in my situation might imply, I am influenced by no diminution of zeal for your future interest, no deficiency of grateful respect for your past kindness; but am supported by a full conviction that the step is compatible with both.

The acceptance of, and continuance hitherto in, the office to which your Suffrages have twice called me, have been a uniform sacrifice of inclination to the opinion of duty, and to a deference for what appeared to be your desire. I constantly hoped, that it would have been much earlier in my power, consistently with motives, which I was not at liberty to disregard, to return to that retirement, from which I had been reluctantly drawn. The strength of my inclination to do this, previous to the last Election, had even led to the preparation of an address to declare it to you; but mature reflection on the then perplexed and critical posture of our Affairs with foreign Nations, and the unanimous advice of persons entitled to my confidence, impelled me to abandon the idea.

I rejoice, that the state of your concerns, external as well as internal, no longer renders the pursuit of inclination incompatible with the sentiment of duty, or propriety; and am persuaded whatever partiality may be retained for my services, that in the present circumstances of our country, you will not disapprove my determination to retire.

The impressions, with which I first undertook the arduous trust, were explained on the proper occasion. In the discharge of this trust, I will only say, that I have, with good intentions, contributed towards the Organization and Administration of the government, the best exertions of which a very fallible judgment was capable. Not unconscious, in the outset, of the inferiority of my qualifications, experience in my own eyes, perhaps still more in the eyes of others, has strengthened the motives to diffidence of myself; and every day the increasing weight of years admonishes me more and more, that the shade of retirement is as necessary to me as it will be welcome. Satisfied that if any circumstances have given peculiar value to my services, they were temporary, I have the consolation to believe, that while choice and prudence invite me to quit the political scene, patriotism does not forbid it.

In looking forward to the moment, which is intended to terminate the career of my public life, my feelings do not permit me to suspend the deep acknowledgment of that debt of gratitude which I owe to my beloved country, for the many honors it has conferred upon me; still more for the steadfast confidence with which it has supported me; and for the opportunities I have thence enjoyed of manifesting my inviolable attachment, by services faithful and persevering, though in usefulness unequal to my zeal. If benefits have resulted to our country from these services, let it always be remembered to your praise, and as an instructive example in our annals, that, under circumstances in which the Passions agitated in every direction were liable to mislead, amidst appearances sometimes dubious, vicissitudes of fortune often discouraging, in situations in which not unfrequently want of Success has countenanced the spirit of criticism, the constancy of your support was the essential prop of the efforts, and a guarantee of the plans by which they were effected. Profoundly penetrated with this idea, I shall carry it with me to my grave, as a strong incitement to unceasing vows that Heaven may continue to you the choicest tokens of its beneficence; that your Union and brotherly affection may be perpetual; that the free constitution, which is the work of your hands, may be sacredly maintained; that its Administration in every department may be stamped with wisdom and Virtue; that, in fine, the happiness of the people of these States, under the auspices of liberty, may be made complete, by so careful a preservation and so prudent a use of this blessing as will acquire to them the glory of recommending it to the applause, the affection, and adoption of every nation which is yet a stranger to it.

Here, perhaps, I ought to stop. But a solicitude for your welfare, which cannot end but with my life, and the apprehension of danger, natural to that solicitude, urge me on an occasion like the present, to offer to your solemn contemplation, and to recommend to your frequent review, some sentiments; which are the result of much reflection, of no inconsiderable observation, and which appear to me all important to the permanency of your felicity as a People. These will be offered to you with the more freedom, as you can only see in them the disinterested warnings of a parting friend, who can possibly have no personal motive to bias his counsel. Nor can I forget, as an encouragement to it, your indulgent reception of my sentiments on a former and not dissimilar occasion.

Interwoven as is the love of liberty with every ligament of your hearts, no recommendation of mine is necessary to fortify or confirm the attachment.

The Unity of Government which constitutes you one people is also now dear to you. It is justly

so; for it is a main Pillar in the Edifice of your real independence, the support of your tranquility at home; your peace abroad; of your safety; of your prosperity; of that very Liberty which you so highly prize. But as it is easy to foresee, that from different causes and from different quarters, much pains will be taken, many artifices employed, to weaken in your minds the conviction of this truth; as this is the point in your political fortress against which the batteries of internal and external enemies will be most constantly and actively (though often covertly and insidiously) directed, it is of infinite moment, that you should properly estimate the immense value of your national Union to your collective and individual happiness; that you should cherish a cordial, habitual, and immoveable attachment to it; accustoming yourselves to think and speak of it as of the Palladium of your political safety and prosperity; watching for its preservation with jealous anxiety; discountenancing whatever may suggest even a suspicion that it can in any event be abandoned, and indignantly frowning upon the first dawning of every attempt to alienateany portion of our Country from the rest, or to enfeeble the sacred ties which now link together the various parts.

For this you have every inducement of sympathy and interest. Citizens by birth or choice, of a common country, that country has a right to concentrate your affections. The name of American, which belongs to You, in your national capacity, must always exalt the just pride of Patriotism, more than any appellation derived from local discriminations. With slight shades of difference, you have the same Religion, Manners, Habits and political Principles. You have in a common cause fought and triumphed together. The independence and liberty you possess are the work of joint councils, and joint efforts; of common dangers, sufferings and successes.

But these considerations, however powerfully they address themselves to your sensibility are greatly outweighed by those which apply more immediately to your Interest. Here every portion of our country finds the most commanding motives for carefully guarding and preserving the Union of the whole.

The *North,* in an unrestrained intercourse with the *South,* protected by the equal Laws of a common government, finds in the productions of the latter, great additional resources of Maritime and commercial enterprise and precious materials of manufacturing industry.
The *South* in the same Intercourse, benefitting by the Agency of the *North,* sees its agriculture grow and its commerce expand. Turning partly into its own channels the seamen of the *North,* it finds its particular navigation envigorated; and while it contributes, in different ways, to nourish and increase the general mass of the National navigation, it looks forward to the protection of a Maritime strength, to which itself is unequally adapted. The *East,* in a like intercourse with the *West,* already finds, and in the progressive improvement of interior communications, by land and water, will more and more find, a valuable vent for the commodities which it brings from abroad, or manufactures at home. The *West* derives from the *East* supplies requisite to its growth and comfort, and what is perhaps of still greater consequence, it must of necessity owe the *secure* enjoyment of indispensable *outlets* for its own productions to the weight, influence, and the future Maritime strength of the Atlantic side of the Union, directed by an indissoluble community of interest as *one Nation.* Any other tenure by which the *West*can hold this essential advantage, whether derived from its own separate strength, or from an apostate and unnatural connection with any foreign Power, must be intrinsically precarious.

While then every part of our country thus feels an immediate and particular Interest in Union, all the parts combined cannot fail to find in the united mass of means and efforts greater strength, greater resource, proportionably greater security from external danger, a less frequent interruption of their Peace by foreign Nations; and, what is of inestimable value! they must derive from Union an exemption from those broils and Wars between themselves, which so frequently afflict neighboring countries, not tied together by the same government; which their own rivalships alone would be sufficient to produce, but which opposite foreign alliances, attachments, and intrigues would stimulate and embitter. Hence likewise they will avoid the necessity of those overgrown Military establishments, which under any form of Government are inauspicious to liberty, and which are to be regarded as particularly hostile to Republican Liberty: In this sense it is, that your Union ought to be considered as a main prop of your liberty, and that the love of the one ought to endear to you the preservation of the other.

These considerations speak a persuasive language to every reflecting and virtuous mind, and exhibit the continuance of the Union as a primary object of Patriotic desire. Is there a doubt whether a common government can embrace so large a sphere? Let experience solve it. To listen to mere speculation in such a case were criminal. We are authorized to hope that a proper organization of the whole, with the auxiliary agency of governments for the respective Subdivisions, will afford a happy issue to the experiment. 'Tis well worth a fair and full experiment. With such powerful and obvious motives to Union, affecting all parts of our country, while experience shall not have demonstrated its impracticability, there will always be reason, to distrust the patriotism of those, who in any quarter may endeavor to weaken its bands.

In contemplating the causes which may disturb our Union, it occurs as matter of serious concern, that any ground should have been furnished for characterizing parties by *Geographical* discriminations: *Northern* and*Southern—Atlantic* and *Western;* whence designing men may endeavor to excite a belief that there is a real difference of local interests and views.One of the expedients of Party to acquire influence, within particular districts, is to misrepresent the opinions and aims of other Districts. You cannot shield yourselves too much against the jealousies and heart burnings which spring from these misrepresentations. They tend to render Alien to each other those who ought to be bound together by fraternal affection. The inhabitants of our Western country have lately had a useful lesson on this head. They have seen, in the Negotiation by the Executive; and in the unanimous ratification by the Senate, of the Treaty with Spain, and in the universal satisfaction at that event throughout the United States, a decisive proof how unfounded were the suspicions propagated among them of a policy in the General Government and in the Atlantic States unfriendly to their interests [in] regard to the Mississippi. They have been witnesses to the formation of two Treaties, that with Great Britain and that with Spain, which secure to them every thing they could desire, in respect to our Foreign relations, towards confirming their prosperity. Will it not be their wisdom to rely for the preservation of these advantages on the Union by which they were procured? Will they not henceforth be deaf to those advisers, if such there are, who would sever them from their Brethren and connect them with Aliens?

To the efficacy and permanency of your Union, a Government for the whole is indispensable. No alliances however strict between the parts can be an adequate substitute. They must inevitably experience the infractions and interruptions which all Alliances in all times have experienced.

Sensible of this momentous truth, you have improved upon your first essay, by the adoption of a Constitution of Government, better calculated than your former for an intimate Union, and for the efficacious management of your common concerns. This government, the offspring of our own choice uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers, uniting security with energy, and containing within itself a provision for its own amendment, has a just claim to your confidence and your support. Respect for its authority, compliance with its Laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true Liberty. The basis of our political systems is the right of the people to make and to alter their Constitutions of Government. But the Constitution which at any time exists, 'til changed by an explicit and authentic act of the whole People, is sacredly obligatory upon all. The very idea of the power and the right of the People to establish Government presupposes the duty of every Individual to obey the established Government.

All obstructions to the execution of the Laws, all combinations and Associations, under whatever plausible character, with the real design to direct, control, counteract, or awe the regular deliberation and action of the Constituted authorities, are destructive of this fundamental principle and of fatal tendency. They serve to organize faction, to give it an artificial and extraordinary force; to put in the place of the delegated will of the nation, the will of a party; often a small but artful and enterprising minority of the Community; and, according to the alternate triumphs of different parties, to make the public administration the Mirror of the ill-concerted and incongruous projects of faction, rather than the organ of consistent and wholesome plans digested by common councils and modified by mutual interests. However combinations or Associations of the above description may now and then answer popular ends, they are likely, in the course of time and things, to become potent engines, by which cunning, ambitious and unprincipled men will be enabled to subvert the Power of the People, and to usurp for themselves the reins of Government; destroying afterwards the very engines which have lifted them to unjust dominion.

Towards the preservation of your Government and the permanency of your present happy state, it is requisite, not only that you steadily discountenance irregular oppositions to its acknowledged authority, but also that you resist with care the spirit of innovation upon its principles however specious the pretexts. One method of assault may be to effect, in the forms of the Constitution, alterations which will impair the energy of the system, and thus to undermine what cannot be directly overthrown. In all the changes to which you may be invited, remember that time and habit are at least as necessary to fix the true character of Governments, as of other human institutions; that experience is the surest standard, by which to test the real tendency of the existing Constitution of a country; that facility in changes upon the credit of mere hypotheses and opinion exposes to perpetual change, from the endless variety of hypotheses and opinion, and remember, especially, that for the efficient management of your common interests, in a country so extensive as ours, a Government of as much vigor as is consistent with the perfect security of Liberty is indispensable. Liberty itself will find in such a Government, with powers properly distributed and adjusted, its surest Guardian. It is indeed little else than a name, where the Government is too feeble to withstand the enterprises of faction, to confine each member of the Society within the limits prescribed by the Laws, and to maintain all in the secure and tranquil enjoyment of the rights of person and property.

I have already intimated to you the danger of Parties in the State, with particular reference to the founding of them on Geographical discriminations. Let me now take a more comprehensive view, and warn you in the most solemn manner against the baneful effects of the Spirit of Party, generally.

This spirit, unfortunately, is inseparable from our nature, having its root in the strongest passions of the human Mind. It exists under different shapes in all Governments, more or less stifled, controlled, or repressed; but, in those of the popular form, it is seen in its greatest rankness and is truly their worst enemy.

The alternate domination of one faction over another, sharpened by the spirit of revenge natural to party dissention, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism. But this leads at length to a more formal and permanent despotism. The disorders and miseries, which result, gradually incline the minds of men to seek security and repose in the absolute power of an Individual; and sooner or later the chief of some prevailing faction more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation, on the ruins of Public Liberty.

Without looking forward to an extremity of this kind (which nevertheless ought not to be entirely out of sight) the common and continual mischiefs of the spirit of Party are sufficient to make it the interest and the duty of a wise People to discourage and restrain it.

It serves always to distract the Public Councils and enfeeble the Public administration. It agitates the Community with ill-founded jealousies and false alarms, kindles the animosity of one part against another, foments occasionally riot and insurrection. It opens the door to foreign influence and corruption, which find a facilitated access to the government itself through the channels of party passions. Thus the policy and the will of one country, are subjected to the policy and will of another.

There is an opinion that parties in free countries are useful checks upon the Administration of the government and serve to keep alive the spirit of Liberty. This within certain limits is probably true, and in Governments of a Monarchical cast Patriotism may look with indulgence, if not with favor, upon the spirit of party. But in those of the popular character, in Governments purely elective, it is a spirit not to be encouraged. From their natural tendency, it is certain there will always be enough of that spirit for every salutary purpose. And there being constant danger of excess, the effort ought to be, by force of public opinion to mitigate and assuage it. A fire not to be quenched; it demands a uniform vigilance to prevent its bursting into a flame, lest instead of warming, it should consume.

It is important, likewise, that the habits of thinking in a free Country should inspire caution in those entrusted with its administration, to confine themselves within their respective Constitutional spheres; avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create whatever the form of government, a real despotism. A just estimate of that love of power, and proneness to abuse it, which predominates in the human heart is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the

exercise of political power; by dividing and distributing it into different depositories, and constituting each the Guardian of the Public Weal against invasions by the others, has been evinced by experiments ancient and modern, some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them. If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

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. The mere Politician, equally with the pious man ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation *desert*the oaths, which are the instruments of investigation in Courts of Justice?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.

‘Tis substantially true, that virtue or morality is a necessary spring of popular government. The rule indeed extends with more or less force to every species of free Government. Who that is a sincere friend to it, can look with indifference upon attempts to shake the foundation of the fabric.

Promote then as an object of primary importance, Institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.

As a very important source of strength and security, cherish public credit. One method of preserving it is to use it as sparingly as possible: avoiding occasions of expense by cultivating peace, but remembering also that

timely disbursements to prepare for danger frequently prevent much greater disbursements to repel it; avoiding likewise the accumulation of debt, not only by shunning occasions of expense, but by vigorous exertions in time of Peace to discharge the Debts which unavoidable wars may have occasioned, not ungenerously throwing upon posterity the burden which we ourselves ought to bear. The execution of these maxims belongs to your Representatives, but it is necessary that public opinion should cooperate.To facilitate to them the performance of their duty, it is essential that you should practically bear in mind, that towards the payment of debts there must be Revenue; that to have Revenue there must be taxes; that no taxes can be devised which are not more or less inconvenient and unpleasant; that the intrinsic embarrassment inseparable from the selection of the proper objects (which is always a choice of difficulties) ought to be a decisive motive for a candid construction of the Conduct of the Government in making it, and for a spirit

of acquiescence in the measures for obtaining Revenue which the public exigencies may at any time dictate.

Observe good faith and justice towards all Nations. Cultivate peace and harmony with all. Religion and morality enjoin this conduct; and can it be that good policy does not equally enjoin it? It will be worthy of a free, enlightened, and, at no distant period, a great Nation, to give to mankind the magnanimous and too novel example of a People always guided by an exalted justice and benevolence. Who can doubt that in the course of time and things the fruits of such a plan would richly repay any temporary advantages which might be lost by a steady adherence to it? Can it be, that Providence has not connected the permanent felicity of a nation with its virtue? The experiment, at least, is recommended by every sentiment which ennobles human Nature. Alas! is it rendered impossible by its vices?

In the execution of such a plan nothing is more essential than that permanent, inveterate antipathies against particular Nations and passionate attachments for others should be excluded; and that in place of them just and amicable feelings towards all should be cultivated. The Nation, which indulges towards another an habitual hatred, or an habitual fondness, is in some degree a slave. It is a slave to its animosity or to its affection, either of which is sufficient to lead it astray from its duty and its interest. Antipathy in one Nation against another, disposes each more readily to offer insult and injury, to lay hold of slight causes of umbrage, and to be haughty and intractable, when accidental or trifling occasions of dispute occur. Hence frequent collisions, obstinate, envenomed, and bloody contests. The Nation, prompted by ill will and resentment sometimes impels to War the Government, contrary to the best calculations of policy. The Government sometimes participates in the national propensity, and adopts through passion what reason would reject; at other times, it makes the animosity of the Nation subservient to projects of hostility instigated by pride, ambition and other sinister and pernicious motives. The peace often, sometimes perhaps the Liberty, of Nations has been the victim.

So, likewise, a passionate attachment of one Nation for another produces a variety of evils. Sympathy for the favorite nation, facilitating the illusion of an imaginary common interest, in cases where no real common interest exists, and infusing into one the enmities of the other, betrays the former into a participation in the quarrels and Wars of the latter, without adequate inducement or justification: It leads also to concessions to the favorite Nation of privileges denied to others, which is apt doubly to injure the Nation making the concession; by unnecessarily parting with what ought to have been retained, and by exciting jealousy, ill will, and a disposition to retaliate, in the parties from whom equal privileges are withheld: And it gives to ambitious, corrupted, or deluded citizens (who devote themselves to the favorite Nation) facility to betray, or sacrifice the interests of their own country, without odium sometimes even with popularity; gilding with the appearances of a virtuous sense of obligation a commendable deference for public opinion, or a laudable zeal for public good, the base or foolish compliances of ambition[,] corruption, or infatuation.

As avenues to foreign influence in innumerable ways, such attachments are particularly alarming to the truly enlightened and independent Patriot. How many opportunities do they afford to tamper with domestic factions, to practice the arts of seduction, to mislead public opinion, to influence or awe the public Councils! Such an attachment of a small or weak, towards a great

and powerful Nation, dooms the former to be the satellite of the latter.

Against the insidious wiles of foreign influence (I conjure you to believe me, fellow citizens), the jealousy of a free people ought to be *constantly*awake; since history and experience prove that foreign influence is one of the most baneful foes of Republican Government. But that jealousy to be useful must be impartial; else it becomes the instrument of the very influence to be avoided, instead of a defense against it. Excessive partiality for one foreign nation and excessive dislike of another, cause those whom they actuate to see danger only on one side, and serve to veil and even second the arts of influence on the other. Real Patriots, who may resist the intrigues of the favorite, are liable to become suspected and odious; while its tools and dupes usurp the applause and confidence of the people, to surrender their interests.

The Great rule of conduct for us, in regard to foreign Nations is in extending our commercial relations, to have with them as little *political*connections as possible. So far as we have already formed engagements let them be fulfilled, with perfect good faith. Here let us stop.

Europe has a set of primary interests, which to us have none, or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence therefore it must be unwise in us to implicate ourselves, by artificial ties, in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships, or enmities:

Our detached and distant situation invites and enables us to pursue a different course. If we remain one People, under an efficient government, the period is not far off, when we may defy material injury from external annoyance; when we may take such an attitude as will cause the neutrality we may at any time resolve upon to be scrupulously respected; when belligerent nations, under the impossibility of making acquisitions upon us, will not lightly hazard the giving us provocation; when we may choose peace or war, as our interest guided by our justice shall Counsel.

Why forego the advantages of so peculiar a situation? Why quit our own to stand upon foreign ground? Why, by interweaving our destiny with that of any part of Europe, entangle our peace and prosperity in the toils of European Ambition, Rivalship, Interest, Humor or Caprice?

‘Tis our true policy to steer clear of permanent Alliances, with any portion of the foreign world. So far, I mean, as we are now at liberty to do it, for let me not be understood as capable of patronizing infidelity to existing engagements (I hold the maxim no less applicable to public than to private affairs, that honesty is always the best policy). I repeat it therefore, let those engagements be observed in their genuine sense. But in my opinion, it is unnecessary and would be unwise to extend them.

Taking care always to keep ourselves, by suitable establishments, on a respectably defensive posture, we may safely trust to temporary alliances for extraordinary emergencies.

Harmony, liberal intercourse with all Nations, are recommended by policy, humanity and interest. But even our commercial policy should hold an equal and impartial hand: neither

seeking nor granting exclusive favors or preferences; consulting the natural course of things; diffusing and diversifying by gentle means the streams of Commerce, but forcing nothing; establishing with Powers so disposed; in order to give to trade a stable course, to define the rights of our Merchants, and to enable the Government to support them; conventional rules of intercourse, the best that present circumstances and mutual opinion will permit, but temporary, and liable to be from time to time abandoned or varied, as experience and circumstances shall dictate; constantly keeping in view, that 'tis folly in one Nation to look for disinterested favors from another; that it must pay with a portion of its Independence for whatever it may accept under that character; that by such acceptance, it may place itself in the condition of having given equivalents for nominal favors and yet, of being reproached with ingratitude for not giving more. There can be no greater error than to expect, or calculate upon real favors from Nation to Nation. 'Tis an illusion which experience must cure, which a just pride ought to discard.

In offering to you, my Countrymen, these counsels of an old and affectionate friend, I dare not hope they will make the strong and lasting impression, I could wish; that they will control the usual current of the passions, or prevent our Nation from running the course which has hitherto marked the Destiny of Nations. But if I may even flatter myself that they may be productive of some partial benefit, some occasional good; that they may now and then recur to moderate the fury of party spirit, to warn against the mischiefs of foreign intrigue, to guard against the Impostures of pretended patriotism; this hope will be a full recompense for the solicitude for your welfare, by which they have been dictated.

How far in the discharge of my Official duties, I have been guided by the principles which have been delineated, the public Records and other evidences of my conduct must Witness to You and to the world. To myself, the assurance of my own conscience is, that I have at least believed myself to be guided by them.

In relation to the still subsisting War in Europe, my Proclamation of the 22nd of April, 1793 is the index to my Plan. Sanctioned by your approving voice and by that of Your Representatives in both Houses of Congress, the spirit of that measure has continually governed me; uninfluenced by any attempts to deter or divert me from it.

After deliberate examination with the aid of the best lights I could obtain I was well satisfied that our Country, under all the circumstances of the case, had a right to take, and was bound in duty and interest, to take a Neutral position. Having taken it, I determined, as far as should depend upon me, to maintain it, with moderation, perseverance, and firmness.

The considerations, which respect the right to hold this conduct, it is not necessary on this occasion to detail. I will only observe, that according to my understanding of the matter, that right, so far from being denied by any of the Belligerent powers has been virtually admitted by all.

The duty of holding a Neutral conduct may be inferred, without any thing more, from the obligation which justice and humanity impose on every Nation, in cases in which it is free to act, to maintain inviolate the relations of Peace and amity towards other Nations.

The inducements of interest for observing that conduct will best be referred to your own reflections and experience. With me, a predominant motive has been to endeavor to gain time to our country to settle and mature its yet recent institutions, and to progress without interruption, to that degree of strength and consistency, which is necessary to give it, humanly speaking, the command of its own fortunes.

Though in reviewing the incidents of my Administration, I am unconscious of intentional error, I am nevertheless too sensible of my defects not to think it probable that I may have committed many errors. Whatever they may be I fervently beseech the Almighty to avert or mitigate the evils to which they may tend. I shall also carry with me the hope that my Country will never cease to view them with indulgence; and that after forty-five years of my life dedicated to its Service, with an upright zeal, the faults of incompetent abilities will be consigned to oblivion, as myself must soon be to the Mansions of rest.

Relying on its kindness in this as in other things, and actuated by that fervent love towards it, which is so natural to a man who views in it the native soil of himself and his progenitors for several Generations, I anticipate with pleasing expectation that retreat, in which I promise myself to realize, without alloy, the sweet enjoyment of partaking, in the midst of my fellow Citizens, the benign influence of good Laws under a free Government, the ever favorite object of my heart, and the happy reward, as I trust, of our mutual cares, labors and dangers.

1. George Washington, "Farewell Address," September 19, 1796, in W. B. Allen, ed., *George Washington: A Collection* (Indianapolis, IN: Liberty Fund, 1988), 512-17. This material appears on the Online Library of Liberty [http://app.libraryofliberty.org] hosted by Liberty Fund, Inc.

Thursday, March 21, 2013 – Essay #24 – George Washington's Farewell Address – Guest Essayist: Justin Butterfield, Religious Liberty Attorney at the Liberty Institute

At the end of his second presidential administration, after forty-five years serving America, President Washington did not want to leave without imparting some final guidance and wisdom. To do so, Washington, working from drafts written by James Madison and Alexander Hamilton, wrote a letter to the American people titled "The Address of Gen. Washington to the People of America, on his Declining the Presidency of the United States" and more popularly known as "Washington's Farewell Address."

In his Farewell Address, President Washington first expressed his zeal for America and his reasons for declining a third term as President. Immediately following these introductory comments, however, Washington, driven by concern for the welfare of the American people and his apprehension of danger that awaited the nation, offered his advice and observations, for "frequent review," on how America could remain strong. Washington termed these observations

the "disinterested warnings of a parting friend." Washington then set forth six principles that he believed would preserve liberty in America: protecting unity of government, avoiding faction or political parties, preserving checks and balances, maintaining religion and morality, protecting public credit, and cultivating peace with foreign nations.

On the unity of government, President Washington, showing his Federalist sympathies and anticipating the coming Civil War, expressed concern that regional affiliations would threaten the national identity and loyalty. As Washington said, "The name of 'American,' which belongs to you, in your national capacity, must always exalt the just pride of patriotism, more than any [name] derived from local discriminations." Washington supported this appeal to national unity by noting that each geographic region of the United States benefits from the preservation of the "Union of the whole," whether by expanded trade, by greater strength against foreign nations, or by the security that internal peace within the United States brings.

After his discussion of the benefits of unity, Washington then cautioned against the obstruction to unity: faction and political parties. Washington warned that factions and political parties might form for legitimate reasons but then be taken over by "cunning, ambitious, and unprincipled men … to usurp for themselves the reins of government; destroying afterwards the very engines, which have lifted them to unjust dominion." Washington warned that these factions and political parties may use pretexts to "innovat[e]" with the Constitution's principles, or to alter it in a manner that undermines what the faction cannot directly overthrow.

Following his dire warning against allowing factions and political parties to lead to despotism, Washington then addressed another possible source for despotism: encroachment by one branch of government against another. Washington noted that the checks and balances established in the Constitution must be followed, and "[i]f, in the opinion of the people, the distribution … of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way, which the constitution designates. But let there be no change by usurpation; for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed." In other words, as was true of the rise of faction, Washington argued that bypassing the Constitution for a short-term good may lead to a dictatorship. Washington stated that the precedent of bypassing the Constitution outweighs the temporary benefit with a "permanent evil."

Washington then turned from what must be avoided to save liberty to what can be done to preserve liberty. The first "indispensable supports" that Washington addressed are religion and morality. "Where is the security for property, for reputation, for life," Washington asked, "if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice? And let us with caution indulge the supposition, that morality can be maintained without religion." Washington went so far as to say that a person cannot claim to be a patriot if he should try to subvert religion and morality. "[R]eason and experience both forbid us to expect, that national morality can prevail in exclusion of religious principle. … [M]orality is a necessary spring of popular government. … Who, that is a sincere friend to it, can look with indifference upon attempts to shake the foundation of the fabric?"

Following his discussion of religion and morality, Washington briefly touched upon "a very important source of strength and security": public credit. Washington warned against incurring too much debt, but also warned that sometimes a smaller expenditure to prepare for danger prevents a much larger expenditure later.

Finally, Washington concluded his observations with a call to "cultivate peace and harmony with all." To that end, Washington warned against emotional attachment to one nation or emotional hostility towards another that could lead America into a conflict that is not truly in her best interest. Washington also warned against foreign influence in America and political connections with foreign governments.

Many of President Washington's warnings from over two-hundred years ago were prescient. Today, the Constitution is frequently ignored for some short-term good or re-interpreted so that a provision that could not be "directly overthrown" may be sidestepped against the will of the people. This has happened as our nation's faith in God has waned, our virtue crumbled, and our financial restraint ceased. Only time will tell whether the dire consequence of despotism will result or whether we, as a people, will return to our founding principles and the way of liberty.

Justin Butterfield is a religious liberty attorney at the Liberty Institute in Plano, Texas. Mr. Butterfield graduated from Harvard Law School in 2007. During his time at Harvard, Mr. Butterfield served as the student coordinator for the Veritas Forum, was a member of the Federalist Society, and was heavily involved with the Harvard Law School Christian Fellowship. He is also a Blackstone Fellow. A native Texan, Mr. Butterfield completed his undergraduate studies at the University of Texas at El Paso where he graduated summa cum laude with honors and University Banner Bearer with a bachelor's degree in Electrical Engineering.

In addition to his practice in the area of religious liberty, Mr. Butterfield co-authored two scholarly articles: "The Light of Accountability: Why Partisan Elections Are the Best Method of Judicial Selection," published in The Advocate, and "The Parsonage Exemption Deserves Broad Protection," published in the Texas Review of Law & Politics. Mr. Butterfield has also co-written articles for the Washington Times and the Billy Graham Evangelistic Association's Decision Magazine.

Letter to the Danbury Baptist Association by Thomas Jefferson

January 1, 1802

Gentlemen:

The affectionate sentiments of esteem and approbation which you are so good as to express towards me, on behalf of the Danbury Baptist Association, give me the highest satisfaction. My duties dictate a faithful and zealous pursuit of the interests of my constituents, and in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more and more pleasing. Believing with you good as to express towards me, on behalf of the Danbury

Baptist Association, give me the highest satisfaction. My duties dictate a faithful and zealous pursuit of the interests of my constituents, and in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more and more pleasing. Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall seewith sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man, and tender you for yourselves and your religious association, assurances of my high respect and esteem.

1. Thomas Jefferson, "Replies to Public Addresses," January 1, 1802, in A. A. Lipscomb and A. E. Bergh, eds., *The Writings of Thomas Jefferson,* Vol. 16 (Washington, D.C.: Thomas Jefferson Memorial Association, 1907), 281-82.

Friday, March 22, 2013 – Essay #25 – Letter to the Danbury Baptist Association by Thomas Jefferson – Guest Essayist: Tony Williams, Program Director, Washington-Jefferson-Madison Institute

On January 1, 1802, President Thomas Jefferson received a thirteen-foot mammoth cheese weighing some 1,200 pounds. It was delivered by dissenting Baptist minister and long-time advocate of religious liberty, Reverend John Leland, who then preached a sermon to the president and members of Congress at the Capitol two days later. Jefferson took the opportunity to compose a letter to the Danbury Baptists on the relationship between government and religion that would shape the course of twentieth-century jurisprudence.

Jefferson had been a staunch supporter of disestablishment and freedom of conscience for decades. His Bill for Establishing Religious Freedom failed to pass in his home state in 1779, but it would eventually be adopted in 1786 as the Virginia Statute for Religious Freedom. It combined the principles of disestablishment of the official Anglican Church and defended religious liberty as a natural right. It read:

That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free

to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

In his *Notes on the State of Virginia*, Jefferson reaffirmed these principles while answering a series of queries to a European audience. Jefferson again averred that religious liberty was a natural right that was free of coercion by the state particularly in a republic rooted upon popular sovereignty. "Our rulers can have authority over such natural rights," he wrote, "only as we have submitted to them. The rights of conscience we never submitted, we could not submit." The government, he states, cannot impose restrictions or civil liabilities upon the governed for their religious opinions. "We are answerable for them to our God."

Although he was in Paris when the Constitutional Convention was held and the new Constitution ratified, Jefferson kept abreast of events in his country and consistently prodded his friend, James Madison, to include a Bill of Rights to protect the inalienable rights of mankind. Eventually, Madison would introduce amendments in the First Congress and secure their passage, including the First Amendment, which read, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The First Amendment was meant as a limit on the national Congress only. Madison wanted limits on the states but they were rejected. State limitations on religious liberty and establishment persisted after the First Amendment was adopted. Religious tests for office remained in place in most states, and Connecticut (1818) and Massachusetts (1833) did not disestablish their official state churches until decades after. The Supreme Court reinforced the idea that the Bill of Rights did not apply to the states but rather only to the national government in *Barron* v. *Baltimore* (1833).

In the 1800 Election, Federalists attacked Jefferson for atheism and warned their followers to hide their Bibles should Jefferson be elected. While Jefferson certainly had heterodox personal religious views, and he broke with the precedent of Presidents Washington and Adams regarding the constitutionality of issuing days of thanksgiving or fasts, he did not keep religion out of the public square.

In his First Inaugural Address, Jefferson appealed to the unity of Americans centered on the principles of a natural rights republic. He included freedom of religion as one of the "essential principles of our government." Moreover, he finished the address with a prayerful supplication. "May that infinite power which rules the destinies of the universe lead our councils to what is best, and give them a favorable issue for your peace and prosperity."

Jefferson made many other prayerful statements in his official capacity as President of the United States. For example, in his First Annual Message to Congress, Jefferson stated:

While we devoutly return thanks to the beneficient Being who has been pleased to breathe into them the spirit of conciliation and forgiveness, we are bound with peculiar gratitude to be thankful to him that our own peace has been preserved through so perilous a season, and ourselves permitted quietly to cultivate the earth and to practice and improve those arts which tend to increase our comforts.

In his Letter to the Danbury Baptists, Jefferson reiterated his belief in religious liberty free of government interference by supporting the Danbury Baptists who were suffering under establishment in Connecticut. "Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions," he wrote.

While Jefferson personally opposed state establishments of religion, and had been the father of disestablishment in Virginia, he respected American constitutionalism. He recognized that neither he nor Congress had no authority over religious policies of the states, which had their own constitutions and bills of rights. Even though he saw the natural right of religious liberty violated by any establishment, he firmly respected the federal relationship between the national government and the states. The view is analogous to Abraham Lincoln's constitutional belief that while he thought slavery violated natural rights and the principles of the Declaration of Independence, it was an issue that was left to the states, and the president had no authority over slavery.

This helps us understand the rest of the letter in which he wrote about the constitutional limits the First Amendment imposed on Congress: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State." This metaphor has been (mis)used by the Supreme Court in the *Everson* (1947) case and subsequent jurisprudence on issues of school prayer and Bible readings as to read that there should be no religion in the public square. It also helped "incorporate" the Bill of Rights and apply them to the states contrary to the original intention of the founders. Moreover, Jefferson explicitly recognized the Establishment Clause as a limitation on the national Congress not local schools or state governments.

Finally, Jefferson encourages the states to imitate the national Congress and follow the principle of disestablishment in order to protect natural rights. "Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties."

The Supreme Court unfortunately cherry-picked a quote from a letter of a president to a congregation. They could easily have used one of the letters that George Washington wrote to the congregations or from his official Farewell Address in which he states that religion is essential to virtue, morality, and self-government. Instead, the Court decided to pull out a quote which best suited their needs or desires.

In 1800, Jefferson wrote to Benjamin Rush, "I have sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man." Indeed, he was following this promise when he defended religious liberty, promoted disestablishment, and respected constitutionalism in his Letter to the Danbury Baptists.

Tony Williams is the Program Director of the Washington-Jefferson-Madison Institute based in Charlottesville, Virginia. He is the author of: America's Beginnings (2011), The Jamestown Experiment (2011), The Pox and the Covenant (2010), Hurricane of Independence (2008)

On Property by James Madison

March 29, 1792

This term in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."

In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.*

In the former sense, a man's land, or merchandise, or money is called his property.

In the latter sense, a man has a property in his opinions and the free communication of them.

He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.

He has a property very dear to him in the safety and liberty of his person.

He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

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.

Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.

Where there is an excess of liberty, the effect is the same, though from an opposite cause.

Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just*government, which *impartially* secures to every man, whatever is his *own.*

According to this standard of merit, the praise of affording a just securing to property, should be sparingly bestowed on a government which, however scrupulously guarding the possessions of individuals, does not protect them in the enjoyment and communication of their opinions, in which they have an equal, and in the estimation of some, a more valuable property.

More sparingly should this praise be allowed to a government, where a man's religious rights are violated by penalties, or fettered by tests, or taxed by a hierarchy. Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and unalienable right. To guard a man's house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man's conscience which is more sacred than his castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact.

That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest. A magistrate issuing his warrants to a press gang, would be in his proper functions in Turkey or Indostan, under appellations proverbial of the most complete despotism.

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called. What must be the spirit of legislation where a manufacturer of linen cloth is forbidden to bury his own child in a linen shroud, in order to favor his neighbour who manufactures woolen cloth; where the manufacturer and wearer of woolen cloth are again forbidden the economical use of buttons of that material, in favor of the manufacturer of buttons of other materials!

A just security to property is not afforded by that government, under which unequal taxes oppress one species of property and reward another species: where arbitrary taxes invade the domestic sanctuaries of the rich, and excessive taxes grind the faces of the poor; where the keenness and competitions of want are deemed an insufficient spur to labor, and taxes are again applied, by an unfeeling policy, as another spur; in violation of that sacred property, which Heaven, in decreeing man to earn his bread by the sweat of his brow, kindly reserved to him, in the small repose that could be spared from the supply of his necessities.

If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly*even for public use without indemnification to the owner, and yet *directly*violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the influence will have been anticipated, that such a government is not a pattern for the United States.

If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other governments.

1. James Madison, "Property," March 27, 1792, in William T. Hutchinson et al., eds., *The Papers*

of James Madison, Vol. 14 (Chicago: University of Chicago Press, 1962–present), 266–68. Reproduced with permission of University of Chicago Press–Books in the format Textbook via Copyright Clearance Center.

Monday, March 25, 2013 – Essay #26 – On Property by James Madison – Guest Essayist: Tony Williams, Program Director, Washington-Jefferson-Madison Institute

"Conscience is the Most Sacred of Property": James Madison's Essay on Property
by Tony Williams

On January 24, 1774, James Madison wrote to a college friend praising the Boston Tea Party, which had occurred only weeks before. He praised the Boston patriots for their boldness in "defending liberty and property." Equating political and civil liberty, he warned that if the Church of England had established itself as the official religion of all the colonies, then "slavery and subjection might and would have been gradually insinuated among us."

Madison had in mind the religious tyranny that he was then witnessing in Virginia. In an adjacent county to his home, a half dozen itinerant Baptist ministers were in jail for preaching the Gospel to all who would listen, even from their jail cells. Baptists and other dissenting Christians had suffered horrific violations of their religious liberty when they were horsewhipped on stage or violently driven out of towns for preaching without a license. Madison lamented that a "diabolical Hell-conceived principle of persecution rages," and asked his friend to "pray for liberty of conscience to revive among us."

The young Madison believed that religious liberty was an essential right of mankind. Educated at Princeton under the tutelage of Rev. John Witherspoon, he was imbued with the ideas of religious and political liberty from the Scottish Enlightenment. Madison told his friend, "That liberal catholic and equitable way of thinking as to the rights of conscience, which is one of the characteristics of a free people."

In April, 1776, with the war raging, a twenty-five-year-old Madison was elected to the Virginia Convention, the popular government created after the flight of the royal governor. On May 15, the Convention instructed its delegates to the Continental Congress to "propose to that respectable body to declare the United Colonies free and independent states, absolved from all allegiance to, or dependence upon, the crown or parliament of Great Britain." On June 7, 1776, Virginian Richard Henry Lee would offer such a resolution leading to Thomas Jefferson writing the Declaration of Independence and the fateful debate and decision for independence.

On the very same day in May, the Congress adopted a resolution calling on the colonies to "adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents." The resolution, which John Adams believed was "independence itself," was introduced by his preamble which stated that the "exercise of every kind of authority under the said Crown should be totally suppressed." The

Congress thus was stating the Lockean principle that the sovereign people were creating republican self-government with the purpose of protecting their rights.

The Virginia Convention immediately followed Congress' exhortation and appointed a committee to draft a constitution and a Declaration of Rights. George Mason penned the Declaration of Rights, which was, in the words of Edmund Randolph, "a perpetual standard" in the principles of government. It stated that the government was rooted upon a social compact in which the sovereign people were by nature free and equal, and had certain inalienable rights. When the government became destructive of the people's liberties, they could overthrow tyrannical government. The Declaration of Rights then included the principles of separation of powers, free elections, rights of the accused, and freedom of the press.

Mason then expressed what was considered an enlightened view of religious toleration. His draft of the declaration stated, "All men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience." Madison rejected the idea of mere tolerance for another's rights and proposed different amendments that would fundamentally secure the right of religious conscience. The final version read, "That 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 equally entitled to the free exercise of religion, according to the dictates of conscience." Although the declaration did not immediately disestablish the official Anglican Church, Madison's statement that religious conscience was an inalienable right of man meant that it could not long endure.

In fact, Madison would be at the center of the struggle over establishment a decade later when Virginian legislators took up the issue of Patrick Henry's bill for a general assessment for religion. After some brilliant politics that delayed the consideration of the bill and pushed Henry into the governorship, Madison led the forces of disestablishment with his 1785 "Memorial and Remonstrance" against religious taxes. He wrote, "The religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right." Madison continued, stating that, "It is unalienable also, because what is here a right towards men, is a duty towards the Creator." That duty is built into the fabric of human nature and precedes the claims of civil society. "We maintain therefore that in matters of religion, no man's right is abridged by the institution of civil society and that religion is wholly exempt from its cognizance." If there is a sense here of separation of church and state, Madison's understanding is that the government must not interfere with the inalienable rights of liberty of conscience.

In the First Congress, Madison fulfilled the promise of the Federalists to ratify amendments to the Constitution protecting essential liberties though not altering the structure of the government. The First Amendment reflected decades of Madison's serious thought and work protecting religious liberty. Although Madison wanted the Bill of Rights applied to the states, he lost the debate, and the First Amendment specifically limited the power of Congress to establish an official national church or to interfere with freedom of conscience. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." He had been at the forefront of the twin goals of disestablishment and religious liberty as a natural right

in Virginia during the American Revolution and now at the national level during the founding of the American republic.

In 1791 and 1792, Madison wrote a series of essays on the principles of republican government for Philip Freneau's highly partisan *National Gazette*. On March 29, 1792, Madison published his "On Property" essay, which posited a new understanding of a property in natural rights. Madison writes that property is much more than merely land or wealth, and "embraces every thing to which a man may attach a value and have a right." In this sense, every person "has a property in his opinions and the free communication of them." The most essential right in human nature is religious liberty, in Madison's estimation. "He has a peculiar value in his religious opinions, and in the profession and practice dictated by them." He sums up his thinking about property by stating, "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."

Madison then brilliantly explored the very purpose of republican self-government to protect the inalienable rights of mankind, striking another Lockean chord. "Government is instituted to protect property of every sort," he writes, "This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*." For Madison, it was a moral principle that the government must act justly and fulfill its purposes. His social compact thinking mirrored that of the Declaration of Independence. He wrote:

More sparingly should this praise be allowed to a government, where a man's religious rights are violated by penalties, or fettered by tests, or taxed by a hierarchy. Conscience is the most sacred of all property; other property depending in part of positive law, the exercise of that, being a natural and unalienable right . . . [There is] no title to invade a man's conscience which is more sacred than his castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact.

Madison averred that the United States government was not a government that violated the sacred rights of mankind. Indeed, it was instituted to protect those rights. "If there be a government then which prides itself in maintaining the inviolability of property . . . and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties . . . that such a government is not a pattern for the United States." Madison finished his essay with more conditional logic, stating that if the new republic wished to be known for wise and just government, it would "respect the rights of property, and the property in rights."

James Madison spent a lifetime thinking about the natural right of religious liberty and in public service doggedly working to protect it at the state and national level from government intrusion. The current administration shows either a willful ignorance or a remarkable disregard for Madison's career-long defense of freedom of conscience to so openly and blatantly violate the property rights that Roman Catholics and other religious people have in their conscience. Thus, we are reminded of the importance of studying history and the Constitution that we may understand American founding principles and firmly stand united against any violations of religious and civil liberty by the government.

Tony Williams is the Program Director for the Washington-Jefferson-Madison Institute in Charlottesville, VA, and the author of four books including, ***America's Beginnings: The Dramatic Events that Shaped a Nation's Character****.*

The Articles of Confederation

March 1, 1781

To all to whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names, send greeting:

Whereas the Delegates of the United States of America in Congress assembled did on the fifteenth day of November in the Year of our Lord One Thousand Seven Hundred and Seventy-Seven, and in the Second Year of the Independence of America agree to certain articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia in the words following, viz.

Articles of Confederation and perpetual Union between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Pdlantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

Article I

The stile of this confederacy shall be "The United States of America."

Article II

Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

Article III

The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

Article IV

The better to secure and perpetuate mutual friendship and intercourse among the people of the

different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the Governor or Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense.

Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.

Article V

For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

Article VI

No State without the consent of the United States in Congress assembled, shall send any embassy

to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defense of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as to admit of a delay, till the United States in Congress assembled can be consulted: nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue or until the United States in Congress assembled shall determine otherwise.

Article VII

When land-forces are raised by any State for the common defense, all officers of or under the rank of colonel, shall be appointed by the Legislature of each State respectively, by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

Article VIII

All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out

of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled.

Article IX

The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities, whatsoever—of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall

nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection or hope of reward:" provided also that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions as they may respect such lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States.—fixing the standard of weights and measures throughout the United States.—regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated—establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces, in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "a Committee of the States", and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction—to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses—to borrow money, or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted,—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men and clothe, arm and equip them in a soldier-like manner, at the expense of the United States; and the officers and men so clothed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled: but if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men

than the quota thereof, such extra number shall be raised, officered, clothed, armed and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise, officer, cloth, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so clothed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same; nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several States.

Article X

The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine states in the Congress of the United States assembled is requisite.

Article XI

Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

Article XII

All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and

satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

Article XIII

Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation, are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

And whereas it hath pleased the Great Governor of the world to incline the hearts of the Legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual Union. Know Ye that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual Union, and all and singular the matters and things therein contained: and we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said confederation are submitted to them. And that the Articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual.

In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the State of Pennsylvania the ninth day of July, in the year of our Lord, one thousand seven hundred and seventy-eight, and in the third year of the independence of America.

On the part and behalf of the State of New Hampshire:
Josiah Bartlett, John Wentworth, Jr.

On the part and behalf of the State of Massachusetts Bay:
John Hancock, Samuel Adams, Elbridge Gerry, Francis Dana, James Lovell, Samuel Holten

On the part and behalf of the State of Rhode Island and Providence Plantations:
William Ellery, Henry Marchant, John Collins

On the part and behalf of the State of Connecticut:
Roger Sherman, Samuel Huntington, Oliver Wolcott, Titus Hosmer, Andrew Adams

On the part and behalf of the State of New York:
James Duane, Francis Lewis, William Duer, Gouverneur Morris

On the part and behalf of the State of New Jersey:
John Witherspoon, Nathaniel Scudder

On the part and behalf of the State of Pennsylvania:

Robert Morris, Daniel Roberdeau, Jonathan Bayard Smith, William Clingan, Joseph Reed

On the part and behalf of the State of Delaware:
Thomas McKean, John Dickinson, Nicholas Van Dyke

On the part and behalf of the State of Maryland:
John Hanson, Daniel Carroll

On the part and behalf of the State of Virginia:
Richard Henry Lee, John Banister, Thomas Adams, John Harvie, Francis Lightfoot Lee

On the part and behalf of the State of North Carolina:
John Penn, Cornelius Harnett, John Williams

On the part and behalf of the State of South Carolina:
Henry Laurens, William Henry Drayton, John Matthews, Richard Hutson, Thomas Heyward, Jr.

On the part and behalf of the State of Georgia:
John Walton, Edward Telfair, Edward Langworthy

Tuesday, March 26, 2013 – Essay #27 – The Articles of Confederation – Guest Essayist: Dr. Charles K. Rowley, General Director of The Locke Institute and Duncan Black Professor Emeritus of Economics at George Mason University

The Articles of Confederation and Perpetual Union was an agreement among the thirteen founding states that established the United States of America as a confederation of sovereign states and that served as its first constitution. The Second Continental Congress began to draft the Articles on June 12, 1776, and sent an approved version to the states for ratification in late 1777.

The first state to ratify the Articles was Virginia on December 17, 1777. The last state to ratify was Maryland on March 1, 1781, and then only when Virginia and New York agreed to cede their claims in the Ohio River Valley. The ratification process dragged on because several states refused to rescind their claims to land in the west.

Prior to ratification, the Articles provided domestic and international legitimacy for the Continental Congress, enabling it to direct the American Revolutionary War, to conduct diplomacy with European nations, and to deal with territorial issues and Indian relations. War to defend territories against a powerful common enemy is a glue that holds disparate groups together. So it was with the thirteen states, though the adhesive had to be strengthened by the superb diplomatic as well as military skills of General Washington.

Isolated at Yorktown, reinforcements and supplies denied to him by the French fleet, General Cornwallis surrendered on October 19, 1781. So the British, who had begun the war with an

enormous superiority in trained men and with complete control of the sea, ended it outnumbered, outgunned, and with the French ruling the waves. The British still held New York, Savannah and Charleston, but the catastrophic defeat at Yorktown had knocked the stuffing out of the British war-party.

On March 19, 1782, Lord North resigned, making way for a peace coalition which contained Shelby, Fox and Edmund Burke. A series of brilliant British naval victories against France and Spain reasserted Britain's absolute command of the seas, and paved the way for the nation to swallow its pride and to accept an independent America.

The peace by no means brought immediate benefits to all of the former colonies. The struggle had told heavily on their primitive political organizations. The Articles of Confederation had established a weak central government, enjoying only such powers as they might have allowed to the British Crown. Their Congress had neither the power nor the opportunity, across so vast a land, of creating an ordered society out of the wreckage of revolution and war.

The strongest element behind the American effort had been the small farmers from the inland frontier districts. It was they who had supplied the men for the Army and who had in most of the states refashioned the several constitutions on semi-democratic lines. They now dominated the legislatures and jealously guarded the privileges of their respective states.

The newly independent America was rent by powerful conflicting interests. The farmers were heavily in debt to the city interests. The excessive issue of paper money by Congress had fueled inflation. By 1780, one gold dollar exchanged for forty paper dollars. Every state was burdened with enormous debts ands taxes imposed to meet the interest on such debts fell heavily upon the land. Small impoverished farmers were everywhere confronting foreclosure while war profiteers were rampant.

A gulf was widening across America between debtor and creditor, between farmer and merchant-financier. Agitation and unrest marched in tune with the deepening economic crisis. There were widespread movements for postponing or cancelling the collection of debts. In Massachusetts in the fall of 1786, farmers and disbanded soldiers, fearing foreclosure on their mortgages, rose in Shay's rebellion, storming the county courts. Even as fervent a protector of private property as George Washington commented: 'There are combustibles in every state which a spark might set fire to. I feel infinitely more than I can express for the disorders that have arisen.'

Shay's rebellion was the spur to action. In May 1787, a convention of delegates from twelve of the states gathered in Philadelphia to consider the darkening situation. The partisans of a strong national government were in a large majority. Of the potential leaders of the farmers – or agrarian democrats as they now were called – Patrick Henry of Virginia refused to attend and Thomas Jefferson was still dallying in Paris.

In their absence Alexander Hamilton, who represented the powerful financial interests of New York, assumed a leadership role. Hamilton became the recognized leader of those who demanded a capable central government and a limitation of states' powers. He was opposed by delegates from the small states who were anxious to preserve equality among the thirteen states.

All the delegates came from well-established centers on the Eastern seaboard. They all realized, however, that their power and influence would soon be challenged by the growing populace of the West. Here, beyond the Ohio and the Alleghanies, lay vast territories which Congress had ordained should be admitted to the Union on an equal footing with the original states as soon as they each contained 60,000 inhabitants. Population growth across those territories was rapid and the day of reckoning for the original thirteen would soon arrive. The thirteen had fought to expel the British and the thirteen felt, with justification, that they knew more about politics and the true interests of the Union than the denizens of half-settled regions. As Gouverneur Morris of Pennsylvania succinctly put it: 'The busy haunts of men, not the remote wilderness, is the proper school of political talents. If the Western people get the power in their hands they will ruin the Atlantic interests'

The power and the future lay with the West and this recognition, perhaps more than any other, propelled the Convention to address the framing of a new Constitution of the United States. In the meantime, from his watch-tower across the Atlantic Ocean, Thomas Jefferson – author of The Declaration of Independence and the most eloquent defender of decentralized republicanism – fretted about developments in Philadelphia, most especially about the powers that would be vested in the executive branch.

Jefferson's principal fear, correctly, was that the presidency might prove to be the Achilles heel of a democratic republic: 'He may be reelected from 4 years to 4 years for life. Reason and experience prove to us that a chief magistrate, so continuable, is an officer for life. When one or two generations shall have proved that this is an office for life, it becomes on every succession worthy of intrigue, of bribery, of force, and even of foreign interference.' In fewer than 150 years, Franklin Delano Roosevelt would become the personification of Jefferson's nightmare. Fortunately, however the republic had the good sense never to allow an FDR autocracy to recur.

The Articles of Confederation failed, not necessarily because they were inadequate in principle – after all they had worked sufficiently well to overthrow the British Empire – but because the thirteen states did not comprise an optimal economic union immediately following Independence.

When an economic union is ill-formed, and internal stresses begin to dominate, the absence of a strong central government, able to enforce both a common fiscal policy and a common monetary policy and to raise an effective military capable of suppressing internal rebellion and external invasion, is a fatal weakness, as the euro-zone is currently demonstrating

From this perspective, Alexander Hamilton was bound to win the battle for and against strong federal centralism in Philadelphia in 1787. Whether or not, in the light of events that flowed from that victory, Alexander Hamilton, and his federalist co-author, James Madison, still rest easily in their graves must be doubtful. Surely Thomas Jefferson and Patrick Henry must be tossing in their graves to witness the destruction of states' rights and the surrender of individual liberty that have gone hand in hand with the advance of central government and the emergence of the Imperial Presidency.

Charles K. Rowley is Duncan Black Professor Emeritus at George Mason University and General Director of The Locke Institute in Fairfax, Virginia (www.thelockeinstitute.org) . He has written extensively in the fields of classical liberalism, economics, public choice law-and-economics and political history. He publishes a daily blog at www.charlesrowley.com

Wednesday, March 27, 2013 – Essay #28 – The Articles of Confederation – Guest Essayist: Brion McClanahan, Ph.D. Author of: The Founding Fathers Guide to the Constitution

If Jay Leno were to conduct a "Man on the Street" segment and ask random Americans to name the first constitution for the United States, the answers would probably range from, "The Declaration of Independence," to "the Preamble," to "Who cares?" The answer, of course, is The Articles of Confederation and Perpetual Union. American ignorance of the Articles is problematic for several reasons, not the least of which being a lack of understanding about the fundamental structure of the American general government. The Articles of Confederation is, in fact, the most maligned and misunderstood document in American political history. It is the bedrock of the United States Constitution which replaced it, and the Founders' conception of Union and the appropriate powers of government can be found in its Thirteen Articles.

The Articles of Confederation, principally authored by John Dickinson of Delaware, was formally ratified by the States in 1781, though both Dickinson and Benjamin Franklin had drafts in 1776 shortly after the States declared their independence from Great Britain. The central government—or general government as the founding generation called it—did not have an executive or judicial branch under the Articles, and the Congress did not have the power to tax or create a standing army. It could appropriate and borrow money, regulate trade, and make treaties, but the States could ignore these treaties, and the Congress did not have the power to regulate interstate trade. If the Congress needed money or troops, it had to make formal requests to the States and those would often be ignored, though perhaps not maliciously. The States were strapped financially themselves and often did not have the resources to cover the cost of two governments. Any legislation required a two-thirds majority to pass, making new laws difficult to enact. Most important, the general government could not coerce the States into obedience.

Each State had equal representation and could send between two and seven representatives. John Adams called them "ambassadors" of the States, meaning that the founding generation viewed the central government as little more than a pseudo united nations. Often, Congress did not have a quorum, particularly in the months when the Congress met at Annapolis, Maryland. Northerners complained it was too hot and unsanitary and Southern culture (liquor drenched galas and balls) too decadent. Proponents of constitutional reform called the central government weak and ineffective.

Yet, the Constitution retained much of the character of the Articles of Confederation. The word "federal," as in the government established by the United States Constitution in 1788, and "confederation" carried the same meaning in the eighteenth-century. In fact, both Alexander Hamilton and James Madison called the general government under the Constitution a

"confederation" in the *Federalist* essays. The Union was a league of States both during the Articles of Confederation and after the Constitution was ratified in 1788. It became "more perfect," but the nature of the Union itself was unaltered. It was and still is a Union of States—a federal Union or confederation—and as both the text of the Articles and the 10th Amendment to the Constitution make clear, the States retain all powers not delegated to the central government. The Articles included the qualifying word "expressly" in Article 2, and there was an attempt to include the same qualifier in what became the 10th Amendment to the Constitution, but it was deemed redundant. Expressly was implied by both the Preamble to the Bill of Rights and the language of the Amendment itself.

Much of the wording of the Constitution was lifted directly from the Articles as well and carries the same meaning. The now infamous "general welfare clause" of the Constitution can be found in Article 3 and Article 8 of the Articles of Confederation. As Roger Sherman explained in the Philadelphia Convention in 1787, the "general welfare" was defined as "defense against foreign danger…against internal disputes and a resort to force…treaties with foreign nations…regulating foreign commerce and drawing revenue from it….*All other matters, civil and criminal, would be much better in the hands of the states* [emphasis added]." Sherman added the clause to the Constitution, so his understanding has merit. The "general welfare" was for the Union, not individuals, and because both the Articles and the Constitution act on the States (the "them" in both documents) and not individuals, the meaning did not change from one document to the next. The same can be said for the "privileges and immunities" and the "full faith and credit" clauses of the Constitution. Both are found in Article 4 of the Articles of Confederation. There are others, but these are the most cited of the document.

The Articles of Confederation was the first Constitution for the United States. The name of the Union, "The United States of America," is found in Article 1 of the Articles of Confederation and the general temper of the Articles carried forward to the Preamble of the United States Constitution. Article 3 of the Articles and the Preamble are similar in both language and tone. When the Constitution was ratified in 1788, the *proponents* of the document insisted that nothing changed in regard to the *federal* nature of the government. The Union was not altered, the government had not been consolidated, and the States still retained all powers not enumerated in the Constitution, just as in the Articles of Confederation. Constitutional scholars would do well to read the Articles in conjunction with the Constitution. Certainly, the Constitution strengthened the powers of the general government, and astute opponents of the Constitution warned that these powers would ultimately be abused, but the Constitution was sold to and understood by the States in 1788 to be little more than an amended form of the Union established by the Articles in 1783. If that is the case, then the Articles should not be ignored or denigrated, but studied as the foundation of the general government of the United States, both in principle and spirit.

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Circular Letter to the States by George Washington

June 8, 1783

Sir:

The great object for which I had the honor to hold an appointment in the Service of my Country, being accomplished, I am now preparing to resign it into the hands of Congress, and to return to that domestic retirement, which, it is well known, I left with the greatest reluctance, a Retirement, for which I have never ceased to sigh through a long and painful absence, and in which (remote from the noise and trouble of the World) I meditate to pass the remainder of life in a state of undisturbed repose; But before I carry this resolution into effect, I think it a duty incumbent on me, to make this my last official communication, to congratulate you on the glorious events which Heaven has been pleased to produce in our favor, to offer my sentiments respecting some important subjects, which appear to me, to be intimately connected with the tranquility of the United States, to take my leave of your Excellency as a public Character, and to give my final blessing to that Country, in whose service I have spent the prime of my life, for whose sake I have consumed so many anxious days and watchful nights, and whose happiness being extremely dear to me, will always constitute no inconsiderable part of my own.

Impressed with the liveliest sensibility on this pleasing occasion, I will claim the indulgence of dilating the more copiously on the subjects of our mutual felicitation. When we consider the magnitude of the prize we contended for, the doubtful nature of the contest, and the favorable manner in which it has terminated, we shall find the greatest possible reason for gratitude and rejoicing; this is a theme that will afford infinite delight to every benevolent and liberal mind, whether the event in contemplation, be considered as the source of present enjoyment or the parent of future happiness; and we shall have equal occasion to felicitate ourselves on the lot which Providence has assigned us, whether we view it in a natural, a political or moral point of light.

The Citizens of America, placed in the most enviable condition, as the sole Lords and Proprietors of a vast Tract of Continent, comprehending all the various soils and climates of the World, and abounding with all the necessaries and conveniencies of life, are now by the late satisfactory pacification, acknowledged to be possessed of absolute freedom and Independency; They are, from this period, to be considered as the Actors on a most conspicuous Theater, which seems to be peculiarly designated by Providence for the display of human greatness and felicity; Here, they are not only surrounded with every thing which can contribute to the completion of private and domestic enjoyment, but Heaven has crowned all its other blessings, by giving a fairer opportunity for political happiness, than any other Nation has ever been favored with. Nothing can illustrate these observations more forcibly, than a recollection of the happy conjuncture of times and circumstances, under which our Republic assumed its rank among the Nations; The foundation of our Empire was not laid in the gloomy age of Ignorance and Superstition, but at an Epocha when the rights of mankind were better understood and more clearly defined, than at any former period; the researches of the human mind, after social happiness, have been carried to a great extent, the Treasures of knowledge, acquired by the labors of Philosophers, Sages and Legislatures, through a long succession of years, are laid open for our use, and their collected

wisdom may be happily applied in the Establishment of our forms of Government; the free cultivation of Letters, the unbounded extension of Commerce, the progressive refinement of Manners, the growing liberality of sentiment, and above all, the pure and benign light of Revelation, have had a meliorating influence on mankind and increased the blessings of Society. At this auspicious period, the United States came into existence as a Nation, and if their Citizens should not be completely free and happy, the fault will be entirely their own.

Such is our situation, and such are our prospects: but notwithstanding the cup of blessing is thus reached out to us, notwithstanding happiness is ours, if we have a disposition to seize the occasion and make it our own; yet, it appears to me there is an option still left to the United States of America, that it is in their choice, and depends upon their conduct, whether they will be respectable and prosperous, or contemptible and miserable as a Nation; This is the time of their political probation, this is the moment when the eyes of the whole World are turned upon them, this is the moment to establish or ruin their national Character forever, this is the favorable moment to give such a tone to our Federal Government, as will enable it to answer the ends of its institution, or this may be the ill-fated moment for relaxing the powers of the Union, annihilating the cement of the Confederation, and exposing us to become the sport of European politics, which may play one State against another to prevent their growing importance, and to serve their own interested purposes. For, according to the system of Policy the States shall adopt at this moment, they will stand or fall, and by their confirmation or lapse, it is yet to be decided, whether the Revolution must ultimately be considered as a blessing or a curse: a blessing or a curse, not to the present age alone, for with our fate will the destiny of unborn Millions be involved.

With this conviction of the importance of the present Crisis, silence in me would be a crime; I will therefore speak to your Excellency, the language of freedom and of sincerity, without disguise; I am aware, however, that those who differ from me in political sentiment, may perhaps remark, I am stepping out of the proper line of my duty, and they may possibly ascribe to arrogance or ostentation, what I know is alone the result of the purest intention, but the rectitude of my own heart, which disdains such unworthy motives, the part I have hitherto acted in life, the determination I have formed, of not taking any share in public business hereafter, the ardent desire I feel, and shall continue to manifest, of quietly enjoying in private life, after all the toils of War, the benefits of a wise and liberal Government, will, I flatter myself, sooner or later convince my Countrymen, that I could have no sinister views in delivering with so little reserve, the opinions contained in this Address.

There are four things, which I humbly conceive, are essential to the well being, I may even venture to say, to the existence of the United States as an Independent Power:

1st. An indissoluble Union of the States under one Federal Head.

2ndly. A Sacred regard to Public Justice.

3rdly. The adoption of a proper Peace Establishment, and

4thly. The prevalence of that pacific and friendly Disposition, among the People of the United

States, which will induce them to forget their local prejudices and policies, to make those mutual concessions which are requisite to the general prosperity, and in some instances, to sacrifice their individual advantages to the interest of the Community.

These are the Pillars on which the glorious Fabric of our Independency and National Character must be supported; Liberty is the Basis, and whoever would dare to sap the foundation, or overturn the Structure, under whatever specious pretexts he may attempt it, will merit the bitterest execration, and the severest punishment which can be inflicted by his injured Country.

On the three first Articles I will make a few observations, leaving the last to the good sense and serious consideration of those immediately concerned.

Under the first head, although it may not be necessary or proper for me in this place to enter into a particular disquisition of the principles of the Union, and to take up the great question which has been frequently agitated, whether it be expedient and requisite for the States to delegate a larger proportion of Power to Congress, or not, Yet it will be a part of my duty, and that of every true Patriot, to assert without reserve, and to insist upon the following positions, That unless the States will suffer Congress to exercise those prerogatives, they are undoubtedly invested with by the Constitution, every thing must very rapidly tend to Anarchy and confusion,That it is indispensable to the happiness of the individual States, that there should be lodged somewhere, a Supreme Power to regulate and govern the general concerns of the Confederated Republic, without which the Union cannot be of long duration. That there must be a faithful and pointed compliance on the part of every State, with the late proposals and demands of Congress, or the most fatal consequences will ensue, That whatever measures have a tendency to dissolve the Union, or contribute to violate or lessen the Sovereign Authority, ought to be considered as hostile to the Liberty and Independency of America, and the Authors of them treated accordingly, and lastly, that unless we can be enabled by the concurrence of the States, to participate of the fruits of the Revolution, and enjoy the essential benefits of Civil Society, under a form of Government so free and uncorrupted, so happily guarded against the danger of oppression, as has been devised and adopted by the Articles of Confederation, it will be a subject of regret, that so much blood and treasure have been lavished for no purpose, that so many sufferings have been encountered without a compensation, and that so many sacrifices have been made in vain. Many other considerations might here be adduced to prove, that without an entire conformity to the Spirit of the Union, we cannot exist as an Independent Power; it will be sufficient for my purpose to mention but one or two which seem to me of the greatest importance. It is only in our united Character as an Empire, that our Independence is acknowledged, that our power can be regarded, or our Credit supported among Foreign Nations. The Treaties of the European Powers with the United States of America, will have no validity on a dissolution of the Union. We shall be left nearly in a state of Nature, or we may find by our own unhappy experience, that there is a natural and necessary progression, from the extreme of anarchy to the extreme of Tyranny; and that arbitrary power is most easily established on the ruins of Liberty abused to licentiousness.As to the second Article, which respects the performance of Public Justice, Congress have, in their late Address to the United States, almost exhausted the subject, they have explained their Ideas so fully, and have enforced the obligations the States are under, to render complete justice to all the Public Creditors, with so much dignity and energy, that in my opinion, no real friend to the honor and Independency of America, can

hesitate a single moment respecting the propriety of complying with the just and honorable measures proposed; if their Arguments do not produce conviction, I know of nothing that will have greater influence; especially when we recollect that the System referred to, being the result of the collected Wisdom of the Continent, must be esteemed, if not perfect, certainly the least objectionable of any that could be devised; and that if it shall not be carried into immediate execution, a National Bankruptcy, with all its deplorableconsequences will take place, before any different Plan can possibly be proposed and adopted, So pressing are the present circumstances! And such is the alternative now offered to the States!The ability of the Country to discharge the debts which have been incurred in its defense, is not to be doubted, an inclination, I flatter myself, will not be wanting, the path of our duty is plain before us, honesty will be found on every experiment, to be the best and only true policy, let us then as a Nation be just, let us fulfill the public Contracts, which Congress had undoubtedly a right to make for the purpose of carrying on the War, with the same good faith we suppose ourselves bound to perform our private engagements; in the mean time, let an attention to the cheerful performance of their proper business, as Individuals, and as members of Society, be earnestly inculcated on the Citizens of America, that will they strengthen the hands of Government, and be happy under its protection: every one will reap the fruit of his labors, every one will enjoy his own acquisitions without molestation and without danger.In this state of absolute freedom and perfect security, who will grudge to yield a very little of his property to support the common interest of Society, and insure the protection of Government? Who does not remember, the frequent declarations, at the commencement of the War, that we should be completely satisfied, if at the expense of one half, we could defend the remainder of our possessions? Where is the Man to be found, who wishes to remain indebted, for the defense of his own person and property, to the exertions, the bravery, and the blood of others, without making one generous effort to repay the debt of honor and of gratitude? In what part of the Continent shall we find any Man, or body of Men, who would not blush to stand up and propose measures, purposely calculated to rob the Soldier of his Stipend, and the Public Creditor of his due? and were it possible that such a flagrant instance of Injustice could ever happen, would it not excite the general indignation, and tend to bring down, upon the Authors of such measures, the aggravated vengeance of Heaven? If after all, a spirit of disunion or a temper of obstinacy and perverseness, should manifest itself in any of the States, if such an ungracious disposition should attempt to frustrate all the happy effects that might be expected to flow from the Union, if there should be a refusal to comply with the requisitions for Funds to discharge the annual interest of the public debts, and if that refusal should revive again all those jealousies and produce all those evils, which are now happily removed, Congress, who have in all their Transaction shown a great degree of magnanimity and justice, will stand justified in the sight of God and Man, and the State alone which puts itself in opposition to the aggregate Wisdom of the Continent, and follows such mistaken and pernicious Councils, will be responsible for all the consequences.

For my own part, conscious of having acted while a Servant of the Public, in the manner I conceived best suited to promote the real interests of my Country; having in consequence of my fixed belief in some measure pledged myself to the Army, that their Country would finally do them complete and ample Justice; and not wishing to conceal any instance of my official conduct from the eyes of the World, I have thought proper to
transmit to your Excellency the enclosed collection of Papers, relative to the half pay and commutation granted by Congress to the Officers of the Army; From these communications, my

decided sentiment will be clearly comprehended, together with the conclusive reasons which induced me, at an early period, to recommend the adoption of the measure, in the most earnest and serious manner. As the proceedings of Congress, the Army, and myself are open to all, and contain in my opinion, sufficient information to remove the prejudices and errors which may have been entertained by any; I think it unnecessary to say any thing more, than just to observe, that the Resolutions of Congress, now alluded to, are undoubtedly as absolutely binding upon the United States, as the most solemn Acts of Confederation or Legislation. As to the Idea, which I am informed has in some instances prevailed, that the half pay and commutation are to be regarded merely in the odious light of a Pension, it ought to be exploded forever; that Provision, should be viewed as it really was, a reasonable compensation offered by Congress, at a time when they had nothing else to give, to the Officers of the Army, for services then to be performed. It was the only means to prevent a total dereliction of the Service, It was a part of their hire, I may be allowed to say, it was the price of their blood and of your Independency, it is therefore more than a common debt, it is a debt of honor, it can never be considered as a Pension or gratuity, nor be cancelled until it is fairly discharged.

With regard to a distinction between Officers and Soldiers, it is sufficient that the uniform experience of every Nation of the World, combined with our own, proves the utility and propriety of the discrimination. Rewards in proportion to the aids the public derives from them, are unquestionably due to all its Servants; In some Lines, the Soldiers have perhaps generally had as ample a compensation for their Services, by the large Bounties which have been paid to them, as their Officers will receive in the proposed

Commutation, in others, if besides the donation of Lands, the payment of Arrearages of Clothing and Wages (in which Articles all the component parts of the Army must be put upon the same footing) we take into the estimate, the Bounties many of the Soldiers have received and the gratuity of one Year's full pay, which is promised to all, possibly their situation (every circumstance being duly considered) will not be deemed less eligible than that of the Officers. Should a farther reward, however, be judged equitable, I will venture to assert, no one will enjoy greater satisfaction than myself, on seeing an exemption from Taxes for a limited time, (which has been petitioned for in some instances) or any other adequate immunity or compensation, granted to the brave defenders of their Country's Cause; but neither the adoption or rejection of this proposition will in any manner affect, much less militate against, the Act of Congress, by which they have offered five years full pay, in lieu of the half pay for life, which had been before promised to the Officers of the Army.

Before I conclude the subject of public justice, I cannot omit to mention the obligations this Country is under, to that meritorious Class of veteran Non-commissioned Officers and Privates, who have been discharged for inability, in consequence of the Resolution of Congress of the twenty-third of April 1782, on an annual pension for life, their peculiar sufferings, their singular merits and claims to that provision need only be known, to interest all the feelings of humanity in their behalf: nothing but a punctual payment of their annual allowance can rescue them from the most complicated misery, and nothing could be a more melancholy and distressing sight, than to behold those who have shed their blood or lost their limbs in the service

of their Country, without a shelter, without a friend, and without the means of obtaining any of the necessaries or comforts of Life; compelled to beg their daily bread from door to door! suffer me to recommend those of this description, belonging to your State, to the warmest patronage of your Excellency and your Legislature.

It is necessary to say but a few words on the third topic which was proposed, and which regards

particularly the defense of the Republic, As there can be little doubt but Congress will recommend a proper Peace Establishment for the United States, in which a due attention will be paid to the importance of placing the Militia of the Union upon a regular and respectable footing; If this should be the case, I would beg leave to urge the great advantage of it in the strongest terms. The Militia of this Country must be considered as the Palladium of our security, and the first effectual resort in case of hostility; It is essential, therefore, that the same system should pervade the whole; that the formation and discipline of the Militia of the Continent should be absolutely uniform, and that the same species of Arms, Accoutrements and Military Apparatus, should be introduced in every part of the United States; No one, who has not learned it from experience, can conceive the difficulty, expense, and confusion which result from a contrary system, or the vague Arrangements which have hitherto prevailed.

If in treating of political points, a greater latitude than usual has been taken in the course of this Address, the importance of the Crisis, and the magnitude of the objects in discussion, must be my apology: It is, however, neither my wish or expectation, that the preceding observations should claim any regard, except so far as they shall appear to be dictated by a good intention, consonant to the immutable rules of Justice; calculated to produce a liberal system of policy, and founded on whatever experience may have been acquired by a long and close attention to public business. Here I might speak with the more confidence from my actual observations, and, if it would not swell this Letter (already too prolix) beyond the bounds I had prescribed myself: I could demonstrate to every mind open to conviction, that in less time and with much less expense than has been incurred, the War might have been brought to the same happy conclusion, if the resources of the Continent could have been properly drawn forth, that the distresses and disappointments which have very often occurred, have in too many instances, resulted more from a want of energy, in the Continental Government, than a deficiency of means in the particular States. That the inefficiency of measures, arising from the want of an adequate authority in the Supreme Power, from a partial compliance with the Requisitions of Congress in some of the States, and from a failure of punctuality in others, while it tended to damp the zeal of those which were more willing to exert themselves; served also to accumulate the expenses of the War, and to frustrate the best concerted Plans, and that the discouragement occasioned by the complicated difficulties and embarrassments, in which our affairs were, by this means involved, would have long ago produced the dissolution of any Army, less patient, less virtuous and less persevering, than that which I have had the honor to command. But while I mention these things, which are notorious facts, as the defects of our Federal Constitution, particularly in the prosecution of a War, I beg it may be understood, that as I have ever taken a pleasure in gratefully acknowledging the assistance and support I have derived from every Class of Citizens, so shall I always be happy to do justice to the unparalleled
exertion of the individual States, on many interesting occasions.

I have thus freely disclosed what I wished to make known, before I surrendered up my Public trust to those who committed it to me, the task is now accomplished, I now bid adieu to your Excellency as the Chief Magistrate of your State, at the same time I bid a last farewell to the cares of Office, and all the employments of public life.

It remains then to be my final and only request, that your Excellency will communicate these sentiments to your Legislature at their next meeting, and that they may be considered as the Legacy of One, who has ardently wished, on all occasions, to be useful to his Country, and who, even in the shade of Retirement, will not fail to implore the divine benediction upon it.

I now make it my earnest prayer, that God would have you, and the State over which you

preside, in his holy protection, that he would incline the hearts of the Citizens to cultivate a spirit of subordination and obedience to Government, to entertain a brotherly affection and love for one another, for their fellow Citizens of the United States at large, and particularly for their brethren who have served in the Field, and finally, that he would most graciously be pleased to dispose us all, to do Justice, to love mercy, and to demean ourselves with that Charity, humility and pacific temper of mind, which were the Characteristics of the Divine Author of our blessed Religion, and without an humble imitation of whose example in these things, we can never hope to be a happy Nation.

1. George Washington, "Circular to the States," June 8, 1783, in W. W. Abbot et al., eds., *The Papers of George Washington, 1748-1799,* Vol. 26 (Charlottesville, VA: University of Virginia Press, 1976-present), 483-96.

Thursday, March 28, 2013 – Essay #29 – Circular Letter to the States by George Washington – Guest Essayist: Horace Cooper: Legal commentator and Fellow at the Center for Political and Constitutional Studies at Frontiers for Freedom

In 1783, George Washington drafts a letter that he asks to be sent to the state legislatures of all the states that made up colonies of the USA. These states were Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, South Carolina, New Hampshire, Virginia, New York, North Carolina and Rhode Island.

Washington wrote as a retiring general and war hero to commend to his fellow citizens the need to examine its government's existing operational flaws and pursue the kind of improvements that were soon to be found in a newly drafted US Constitution. This letter reminds the reader quite a bit about the character of General Washington. His tone, his attitude and general disposition suggest a humility that quite naturally complemented his leadership skills. He speaks in this letter as one who is prepared to cheerfully leave public service. There is no foreshadowing of any plan to be the first President of the USA; only the admonitions of a leader who hopes to share lessons learned from the time that he'd spent in leadership.

As Washington explains, the old system, which operated under the Articles of Confederation, was all but unworkable. It had relied on maximizing state or colonial authority at the expense of the protection and promotion of the nation as a whole.

In so many ways the document simply failed to consider the essential needs that a charter should have in terms of operational authority. Consider, at the conclusion of the Revolutionary War, the Treaty of Paris (1783) — which ended the war with Great Britain — was formally submitted to the Confederation Congress and yet no action was taken because state delegates failed to attend sessions of the national legislature. Perhaps the most consequential act of the Confederated Congress couldn't occur for several months because of the poor design of government charter – The Articles of Confederation.

In his letter Washington tries to remind readers of many of the practical challenges he faced in prosecuting the war and the similar challenges the new nation would have unless the charter were modified.

Washington opens with the good news for his fellow citizens: Now is an amazing time to form a new union and North America is a particularly great place to do it:

Here, they are not only surrounded with every thing which can contribute to the completion of private and domestic enjoyment, but Heaven has crowned all its other blessings, by giving a fairer opportunity for political happiness, than any other Nation has ever been favored with. Nothing can illustrate these observations more forcibly, than a recollection of the happy conjuncture of times and circumstances, under which our Republic assumed its rank among the Nations; The foundation of our Empire was not laid in the gloomy age of Ignorance and Superstition, but at an Epocha when the rights of mankind were better understood and more clearly defined, than at any former period;

At this point, Washington explains the political leaders in America have more understanding about fundamental freedoms and liberty than perhaps has existed in any other time. And taking advantage of this opportunity requires a willingness to act to codify rules and a charter that will protect and promote the interests of the nation as a whole, rather than let the nation go asunder as it is riven by divisions and special interest.

….. it is in their choice, and depends upon their conduct, whether they will be respectable and prosperous, or contemptible and miserable as a Nation; This is the time of their political probation, this is the moment when the eyes of the whole World are turned upon them, this is the moment to establish or ruin their national Character forever, this is the favorable moment to give such a tone to our Federal Government, as will enable it to answer the ends of its institution, or this may be the ill-fated moment for relaxing the powers of the Union, annihilating the cement of the Confederation, and exposing us to become the sport of European politics, which may play one State against another to prevent their growing importance….

And indeed a choice needed to be made. A choice to expand the nation and allow it to prosper or to have it collapse. As amazed as many were – including Washington – with the resounding victory against the British, the young nation wasn't out of the water. Washington saw in practical ways that the challenges that went unmet during the Revolutionary War were the kinds of things that signaled the country post-war remained in jeopardy.

First and foremost was its military might. Having defeated one of the greatest military powers in existence in the 18th century many Americans might think that the defense of its nation was the one thing the Confederation Congress excelled at. But as Washington points out, nothing could be further from the truth. And he argues that the key to protecting the nation was to insure unity of the states and operational authority of the federal government:

In what part of the Continent shall we find any Man, or body of Men, who would not blush to stand up and propose measures, purposely calculated to rob the Soldier of his Stipend, and the Public Creditor of his due? and were it possible that such a flagrant instance of Injustice could

ever happen, would it not excite the general indignation, and tend to bring down, upon the Authors of such measures, the aggravated vengeance of Heaven?

Yet the paralysis of the Articles of Confederation had created just such a situation. Washington notes that the present system had left the government teetering on bankruptcy because the federal government didn't have the authority to compel states to make payments to support the war or to directly assess the public to get those resources for the citizenry at large. Victory over Britain was something that all Americans could share in, but the cost to pay salaries and pensions for soldiers was something that the present government had failed to ensure that all citizens shared in being responsible for.

Washington urges the nation to go forward with a national government that can meet its commitments, ensure that its contractual obligations are met and can establish its military readiness in a uniform manner. This once again reflects the ideals of a distinguished leader who can rightfully claim to be "considered as the Legacy of One, who has ardently wished, on all occasions, to be useful to his Country, and who, even in the shade of Retirement, will not fail to implore the divine benediction upon it." Ultimately America would take his advice to heart and the US Constitution would be formally ratified in 1788.

Horace Cooper is a legal commentator and a fellow at the Center for Political and Constitutional Studies at Frontiers for Freedom.

Letter to John Jay by George Washington

August 15, 1786

Dear Sir:

I have to thank you very sincerely for your interesting letter of the twenty-seventh of June, as well as for the other communications you had the goodness to make at the same time.

I am sorry to be assured, of what indeed I had little doubt before, that we have been guilty of violating the treaty in some instances. What a misfortune it is the British should have so well grounded a pretext for their palpable infractions? —and what a disgraceful part, out of the choice of difficulties before us, are we to act?

Your sentiments, that our affairs are drawing rapidly to a crisis, accord with my own. What the event will be is also beyond the reach of my foresight. We have errors to correct. We have probably had too good an opinion of human nature in forming our confederation. Experience has taught us, that men will not adopt and carry into execution, measures the best calculated for their own good without the intervention of a coercive power. I do not conceive we can exist long as a nation, without having lodged somewhere a power which will pervade the whole Union in as energetic a manner, as the authority of the different state governments extends over the several States. To be fearful of vesting Congress, constituted as that body is, with ample

authorities for national purposes, appears to me the very climax of popular absurdity and madness. Could Congress exert them for the detriment of the public without injuring themselves in an equal or greater proportion? Are not their interests inseparably connected with those of their constituents? By the rotation of appointment must they not mingle frequently with the mass of citizens? Is it not rather to be apprehended, if they were possessed of the power before described, that the individual members would be induced to use them, on many occasions, very timidly and inefficaciously for fear of losing their popularity and future election? We must take human nature as we find it. Perfection falls not to the share of mortals. Many are of opinion that Congress have too frequently made use of the suppliant humble tone of requisition, in applications to the States, when they had a right to assume their imperial dignity and command obedience. Be that as it may, requisitions are a perfect nihility, where thirteen sovereign, independent, disunited States are in the habit of discussing and refusing compliance with them at their option. Requisitions are actually little better than a jest and a byword throughout the Land. If you tell the Legislatures they have violated the treaty of peace and invaded the prerogatives of the confederacy they will laugh in your face. What then is to be done? Things cannot go on in the same train forever. It is much to be feared, as you observe, that the better kind of people being disgusted with the circumstances will have their minds prepared for any revolution whatever. We are apt to run from one extreme into another. To anticipate and prevent disastrous contingencies would be the part of wisdom and patriotism.

What astonishing changes a few years are capable of producing! I am told that even respectable characters speak of a monarchical form of government without horror. From thinking proceeds speaking, thence to acting is often but a single step. But how irrevocable and tremendous!What a triumph for the advocates of despotism to find that we are incapable of governing ourselves, and that systems founded on the basis of equal liberty are merely ideal and fallacious! Would to God that wise measures may be taken in time to avert the consequences we have but too much reason to apprehend.

Retired as I am from the world, I frankly acknowledge I cannot feel myself an unconcerned spectator. Yet having happily assisted in bringing the ship into port and having been fairly discharged; it is not my business to embark again on a sea of troubles. Nor could it be expected that my sentiments and opinions would have much weight on the minds of my Countrymen—they have been neglected, though given as a last legacy in the most solemn manner. I had then perhaps some claims to public attention. I consider myself as having none at present. With sentiments of sincere esteem and friendship I am, my dear Sir, Your Most Obedient and Affectionate Humble Servant.

George Washington

1. George Washington, “To John Jay,” August 15, 1786, in W. W. Abbot et al., eds., *The Papers of George Washington,* ”Confederation Series,” Vol. 4 (Charlottesville, VA: University of Virginia Press, 1976-present), 212-13

Friday, March 29, 2013 – Essay #30 – Letter to John Jay by George Washington – Guest Essayist: James Legee, Graduate Fellow at the Matthew J. Ryan Center for the study of Free Institutions and the Public Good, Villanova University

Five years after the surrender at Yorktown, circumstances were all but calm for the young republic. George Washington, retired to Mount Vernon, wrote a letter to the second Secretary of Foreign Affairs under the Articles of Confederation, John Jay, articulating his concerns over the state of events. Washington began the letter disquieted by the divergent foreign policies the states pursued. The focus of the letter quickly shifted from foreign policy, to alarm over the failure of the Articles of Confederation to hold the confederation and the need for a more energetic national government. Washington seemed aware of a growing discontent domestically with the weak confederation produced by the revolution. He was equally aware of the significance of the success of the American experiment, not only for her citizens, but also for the fate of self-governance in all the world.

Washington's correspondence with Jay confirmed his fear that the United States was "guilty of violating the treaty [of Paris] in some instances. What a misfortune it is the British should have so well grounded a pretext for their palpable infractions?" As of 1786, the British Navy was still the dominant power on the seas. They pursued mercantilist and protectionist policies limiting the ability of the American States to export raw materials or compete with British manufactured goods. This was compounded by the inability of the Continental Congress to negotiate a binding treaty with the British. Instead, each state pursued their own foreign policy with the British, often at the expense of the Confederation as a whole. States often ignored provisions of the treaty, such as the return of land seized from loyalists.

The weakness of the Articles of Confederation concerned both Jay and Washington. Washington alluded to "a crisis…beyond the reach of my foresight." To intercept this impending crisis, Washington saw the need to empower "…Congress, constituted as that body is, with ample authorities for national purposes…" the failure to do so was the "very climax of popular absurdity and madness." There was a need for "a power which will pervade the whole Union in as energetic a manner as the authority of the different state governments extends over the several states." Such statements may provide pause for advocates of limited government, particularly given the eight-year crusade led by Washington himself against a monarchical and arbitrary government. Washington though provided a glimpse here into his theory and vision of representation. Any harm Congress wrought upon the public would be equally wrought upon themselves. "Are not their interests inseparably connected with those of their constituents?" Those elected to Congress are dependent upon the people for their position, their power, and their authority to govern. Should they abuse the public trust, they would risk "losing their popularity and future election…"

Washington wrote, "We must take human nature as we find it. Perfection falls not to the share of mortals." This sentiment, echoed by other founders, acknowledges the imperfection of human nature, the need for a national government capable of bridging "thirteen sovereign, independent, disunited States." The states had thus far acted independent of the concerns for long-term stability and peace; instead they behaved in a shortsighted manner, and focused on regional

interests. He noted "If you tell the Legislatures they have violated the treaty of peace and invaded the prerogatives of the confederacy they will laugh in your face." The nation could not long endure on this path.

Washington understood that stability and consistency in governance and the laws was necessary for prosperity and domestic tranquility. Without such security "the better kind of people being disgusted with the circumstances will have their minds prepared for any revolution whatever." Ever prescient, Shay's Rebellion began in Massachusetts just days after Washington penned this letter to John Jay. Washington continues the train of thought in the next paragraph, as he noted, "I am told that even respectable characters speak of a monarchical form of government without horror." The inability of the Congress to form a cohesive policy for trade, for domestic institutions, stable currency, or to regulate trade between the states was lending itself to instability such that citizens who just waged a just war against an unjust regime contemplated a return to that hated system.

Washington understood a return to monarchy was an obvious refutation of the principle articulated in the Declaration that underpins the American experiment, that "All men are created equal." Tied in with this, he understood the central place of America in the role of securing human liberty around the world. He lamented, "What a triumph for the advocates of despotism to find that we are incapable of governing ourselves, and that systems founded on the basis of equal liberty are merely ideal and fallacious!" This mantle is again taken up, but by Lincoln, when he describes America is the "last best hope of the earth" to prove that man is capable of self-government and of holding onto his own liberty. The centrality of the American experiment in proving that we can govern ourselves remains as true a principle today as when Washington and Lincoln were here to defend it.

The letter ends with Washington's characteristic humility and statesmanship. He likens America to a ship in a storm that he "assisted in bringing…into port and having been fairly discharged; it is not [Washington's] business to embark again on a sea of troubles." He has left public life and does not believe he has "claims to public attention." Yet, this letter to Jay highlights his apprehension over the fate of America. Washington wrote in the preceding paragraph, "Would to God that wise measures may be taken in time to avert the consequences we have but too much reason to apprehend." He would helm those measures as President of the Constitutional Convention and first President of the United States, before finally retiring from public life to enjoy Mount Vernon.

Today we face similar circumstances to those Washington surveyed in 1786. Widespread economic troubles and insecurity lead even "the better kind of people" to disgust. Politicians laugh and engage in mockery when they are directed to the Constitution in response to their actions, and expediency dominates public policy. The nation wrestled with a massive public war debt, as today it faces an unprecedented federal debt. Washington was wise enough to see the crucial role America plays in proving to the enemies of liberty that man is capable of self-government. It is up to us, today, to continue that legacy and remedy these ills.

James Legee recently completed his Master of Arts in Political Science at Villanova University, where he was a Graduate Fellow at the Matthew J. Ryan Center for the study of Free Institutions and the Public Good. You can find him on twitter @JamesLegee.

Letter to James Madison by George Washington

March 31, 1787

My dear Sir:

At the same time that I acknowledge the receipt of your obliging favor of the 21st. Ult. from New York, I promise to avail myself of your indulgence of writing only when it is convenient to me. If this should not occasion a relaxation on your part, I shall become very much your debtor—and possibly like others in similar circumstances (when the debt is burdensome) may feel a disposition to apply the spunge—or, what is nearly a-kin to it—pay you off in depreciated paper, which being a legal tender, or what is tantamount, being *that* or *nothing,* you cannot refuse. You will receive the nominal value, and that you know quiets the conscience, and makes all things easy—with the debtors.

I am glad to find that Congress have recommended to the States to appear in the Convention proposed to be holden in Philadelphia in May. I think the reasons in favor, have the preponderancy of those against the measure. It is idle in my opinion to suppose that the Sovereign can be insensible of the inadequacy of the powers under which it acts—and that seeing, it should not recommend a revision of the Federal system, when it is considered by many as the *only* Constitutional mode by which the defects can be remedied. Had Congress proceeded to a delineation of the Powers, it might have sounded an Alarm; but as the case is, I do not conceive that it will have that effect.

From the acknowledged abilities of the Secretary for Foreign Affairs, I could have had no doubt of his having ably investigated the infractions of the Treaty on both sides.—Much is it to be regretted however, that there should have been any on ours. We seem to have forgotten, or never to have learnt, the policy of placing one's enemy in the wrong. Had we observed good faith on our part, we might have told our tale to the world with a good grace; but complaints illy become those who are found to be the first aggressors.

I am fully of opinion that those who lean to a Monarchical government have either not consulted the public mind, or that they live in a region where the levelling principles in which they were bred, being entirely eradicated, is much more productive of Monarchical ideas than are to be found in the Southern States, where from the habitual distinctions which have always existed among the people, one would have expected the first generation, and the most rapid growth of them. I also am clear, that even admitting the utility; nay necessity of the form—yet that the period is not arrived for adopting the change without shaking the Peace of this Country to its foundation.

That a thorough reform of the present system is indispensable, none who have capacities to judge will deny—and with hand and heart I hope the business will be essayed in a full Convention—After which, if more powers, and more decision is not found in the existing form—If it still wants energy and that secrecy and dispatch (either from the non-attendance, or the local views of its members) which is characteristic of good Government—And if it shall be found (the contrary of which however I have always been more afraid of, than of the abuse of them) that Congress

will upon all proper occasions exercise the powers with a firm and steady hand, instead of frittering them back to the Individual States where the members in place of viewing themselves in their national character, are too apt to be looking. I say after this essay is made if the system proves inefficient, conviction of the necessity of a change will be disseminated among all classes of the People—Then, and not till then, in my opinion can it be attempted without involving all the evils of civil discord.

I confess however that my opinion of public virtue is so far changed that I have my doubts whether any system without the means of coercion in the Sovereign, will enforce obedience to the Ordinances of a General Government; without which, every thing else fails. Laws or Ordinances unobserved, or partially attended to, had better never have been made; because the first is a mere nihil—and the second is productive of much jealousy and discontent. But the kind of coercion you may ask —This indeed will require thought; though the non-compliance of the States with the late requisition, is an evidence of the necessity.

It is somewhat singular that a State (New York) which used to be foremost in all federal measures, should now turn her face against them in almost every instance.

I fear the State of Massachusetts have exceeded the bounds of good policy in its disfranchisements—punishment is certainly due to the disturbers of a government, but the operations of this act is too extensive. It embraces too much—and probably may give birth to new, instead of destroying the old leven.

Some Acts passed at the last Session of our Assembly respecting the trade of this Country, has given great, and general discontent to the Merchants of it. An application from the whole body of those at Norfolk has been made, I am told, to convene the Assembly.

I had written thus far, and was on the point of telling you how much I am your obliged Servant, when your favor of the eighteenth calls upon me for additional acknowledgments.

I thank you for the Indian Vocabulary which I dare say will be very acceptable in a general comparison. Having taken a copy, I return you the original with thanks.

It gives me great pleasure to hear that there is a probability of a full representation of the States in Convention; but if the delegates come to it under fetters, the salutary ends proposed will in my opinion be greatly embarrassed and retarded, if not altogether defeated. I am anxious to know how this matter really is, as my wish is, that the Convention may adopt no

temporizing expedient, but probe the defects of the Constitution to the bottom, and provide radical cures, whether they are agreed to or not—a conduct like this, will stamp wisdom and dignity on the proceedings, and be looked to as a luminary, which sooner or later will shed its influence.

I should feel pleasure, I confess in hearing that Vermont is received into the Union upon terms agreeable to all parties—I took the liberty years ago to tell some of the first characters in the State of New York, that sooner or later it would come to that. That the longer it was delayed the

terms on their part, would, probably be more difficult—and that the general interest was suffering by the suspense in which the business was held; as the asylum which it afforded, was a constant drain from the Army in place of an aid which it offered to afford, and lastly, considering the proximity of it to Canada if they were not with us, they might become a sore thorn in our sides, which I verily believe would have been the case if the War had continued. The Western Settlements without good and wise management of them, may be equally troublesome. With sentiments of the sincerest friendship I am—Dear Sir Your Affectionate Servant,

George Washington

1. George Washington, "To James Madison," March 31, 1787, in W. W Abbot et al., eds., *The Papers of George Washington,* "Confederation Series," Vol. 5 (Charlottesville, VA: University of Virginia Press, 1976-present), 114-17.

Monday, April 1, 2013 – Essay #31 – Letter to James Madison – George Washington – Guest Essayist: William C. Duncan, Director of the Marriage Law Foundation

George Washington's elegant and courteous letter to James Madison illustrates what America's most eminent man thought about the existing government, or more properly, the need for reform of the system just prior to the Constitutional Convention of 1787 (as well as providing sage counsel about moderation in dealing with civil unrest and integrity in foreign relations, among other matters).

For Washington, the need for reform centered in the "inadequacy of the powers under which [the Confederation Congress] acts."

The Articles of Confederation provided to the national government, embodied exclusively in a unicameral legislature, specific powers to Make war and peace, appoint ambassadors, enter treaties and alliances, coin money, govern Indian affairs, and run a post office. Congress, however, had no powers in relationship to taxation or foreign and domestic commerce and the Articles provided for no executive or judiciary. Added to this was the practical reality that the states commonly refused to cooperate and seemed to scoff at requests from Congress. The Articles had no supremacy clause so Congress could not compel the States to contribute money to national projects leading to an underfunded military. The lack of any ability to regulate commerce, it was feared at the time, was hampering prosperity as the States squabbled with one another over trade. Its critics pointed to an empty treasury and a national government unable to defend its frontiers.

What some considered the fatal flaw of the Confederation system was that it allowed for no significant change in response to problems, at least as a practical matter, because it required the vote of nine state delegations for simple legislation and unanimity for amending the Articles.

In his letter, Washington expressed his opinion that "a thorough reform of the present system is indispensable" to provide the national government with "more powers, and more decision" than was "found in the existing form." The specific need, he felt, was for the national government to have "the means of coercion in the Sovereign" to enforce obedience to the Ordinances of a General Government." Without this, "Laws or Ordinances" would be "unobserved, or partially attended to," a situation he thought inferior to the laws never having been made since unobserved laws are "a mere nihil" and laws only partly enforced are "productive of much jealousy and discontent."

Thus, Washington welcomed the prospect of a convention in Philadelphia to propose reforms since he thought it the "only Constitutional mode by which the defects [in the Confederation system] can be remedied." His ideal was "that the Convention may adopt no temporizing expedient, but probe the defects of the Constitution to the bottom, and provide radical cures."

The letter provides a hint as to the type of government that Washington felt should result from the convention's revisions when he hoped that "Congress will upon all proper occasions exercise the power with a firm and steady hand, instead of frittering them back to the Individual States." This suggests that he felt a new national government would have ends to pursue and that when it was pursuing these ("proper occasions"), it would do so firmly without delegating appropriately national authority to the states. A later passage in the letter suggests that he felt trade matters could be handled by this new government. His experience as Commander in Chief of the continental army during the War for Independence probably also would have inclined him to view favorably national uniformity in military and foreign relations matters.

Finally, the letter is interesting in its specific disavowal of any reintroduction of monarchy in the United States which he recognized was inconsistent with "the public mind."

George Washington, it is clear, was a true statesman and his motives in favoring the convention that eventually resulted in the Constitution was yet another example of his statesmanship and wisdom.

William C. Duncan is director of the Marriage Law Foundation (www.marriagelawfoundation.org). He formerly served as acting director of the Marriage Law Project at the Catholic University of America's Columbus School of Law and as executive director of the Marriage and Family Law Research Grant at J. Reuben Clark Law School, Brigham Young University, where he was also a visiting professor.

Notes on the State of Virginia, Query XIII: Constitution by Thomas Jefferson

1784

The Constitution of the State and its Several Charters

…This constitution was formed when we were new and unexperienced in the science of

government. It was the first, too, which was formed in the whole United States. No wonder then that time and trial have discovered very capital defects in it.

1. The majority of the men in the State, who pay and fight for its support, are unrepresented in the legislature, the roll of freeholders entitled to vote not including generally the half of those on the roll of the militia, or of the tax-gatherers.

2. Among those who share the representation, the shares are very unequal. Thus the county of Warwick, with only one hundred fighting men, has an equal representation with the county of Loudon, which has 1,746. So that every man in Warwick has as much influence in the government as seventeen men in Loudon. But lest it should be thought that an equal interspersion of small among large counties, through the whole State, may prevent any danger of injury to particular parts of it, we will divide it into districts, and show the proportions of land, of fighting men, and of representation in each.

An inspection of this table will supply the place of commentaries on it. It will appear at once that nineteen thousand men, living below the falls of the rivers, possess half the senate, and want four members only of possessing a majority of the house of delegates; a want more than supplied by the vicinity of their situation to the seat of government, and of course the greater degree of convenience and punctuality with which their members may and will attend in the legislature. These nineteen thousand, therefore, living in one part of the country, give law to upwards of thirty thousand living in another, and appoint all their chief officers, executive and judiciary. From the difference of their situation and circumstances, their interests will often be very different.

3. The senate is, by its constitution, too homogeneous with the house of delegates. Being chosen by the same electors, at the same time, and out of the same subjects, the choice falls of course on men of the same description. The purpose of establishing different houses of legislation is to introduce the influence of different interests or different principles. Thus in Great Britain it is said their constitution relies on the house of commons for honesty, and the lords for wisdom; which would be a rational reliance, if honesty were to be bought with money, and if wisdom were hereditary. In some of the American States, the delegates and senators are so chosen, as that the first represent the persons, and the second, the property of the State. But with us, wealth and wisdom have equal chance for admission into both houses. We do not, therefore, derive from the separation of our legislature into two houses, those benefits which a proper complication of principles are capable of producing, and those which alone can compensate the evils which may be produced by their dissensions.

4. 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. One hundred seventy-three despots would surely be as oppressive as one. Let those who doubt it turn their eyes on the republic of Venice. As little will it avail us that they are chosen by ourselves. An *elective despotism* was not the government we fought for, but one which should not only be founded upon free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no

one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. But no barrier was provided between these several powers. The judiciary and executive members were left dependent on the legislative, for their subsistence in office, and some of them for their continuance in it. If, therefore, the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have, accordingly, in many instances, decided rights which should have been left to judiciary controversy; and the direction of the executive, during the whole time of their session, is becoming habitual and familiar. And this is done with no ill intention. The views of the present members are perfectly upright. When they are led out of their regular province, it is by art in others, and inadvertence in themselves. And this will probably be the case for some time to come. But it will not be a very long time. Mankind soon learn to make interested uses of every right and power which they possess, or may assume. The public money and public liberty, intended to have been deposited with three branches of magistracy, but found inadvertently to be in the hands of one only, will soon be discovered to be sources of wealth and dominion to those who hold them; distinguished, too, by this tempting circumstance, that they are the instrument, as well as the object of acquisition. With money we will get men, said Caesar, and with men we will get money. Nor should our assembly be deluded by the integrity of their own purposes, and conclude that these unlimited powers will never be abused, because themselves are not disposed to abuse them. They should look forward to a time, and that not a distant one, when a corruption in this, as in the country from which we derive our origin, will have seized the heads of government, and be spread by them through the body of the people; when they will purchase the voices of the people, and make them pay the price. Human nature is the same on every side of the Atlantic, and will be alike influenced by the same causes. The time to guard against corruption and tyranny, is before they shall have gotten hold of us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and claws after he shall have entered. To render these considerations the more cogent, we must observe in addition:

5. That the ordinary legislature may alter the constitution itself. On the discontinuance of assemblies, it became necessary to substitute in their place some other body, competent to the ordinary business of government, and to the calling forth the powers of the State for the maintenance of our opposition to Great Britain. Conventions were therefore introduced, consisting of two delegates from each county, meeting together and forming one house, on the plan of the former house of burgesses, to whose places they succeeded. These were at first chosen anew for every particular session. But in March 1775, they recommended to the people to choose a convention, which should continue in office a year. This was done, accordingly, in April 1775, and in the July following that convention passed an ordinance for the election of delegates in the month of April annually. It is well known, that in July 1775, a separation from Great Britain and establishment of republican government, had never yet entered into any person's mind. A convention, therefore, chosen under that ordinance, cannot be said to have been chosen for purposes which certainly did not exist in the minds of those who passed it. Under this ordinance, at the annual election in April 1776, a convention for the year was chosen.

Independence, and the establishment of a new form of government, were not even yet the objects of the people at large. One extract from the pamphlet called *Common Sense* had appeared in the Virginia papers in February, and copies of the pamphlet itself had got in a few hands. But the idea had not been opened to the mass of the people in April, much less can it be said that they had made up their minds in its favor.

So that the electors of April 1776, no more than the legislators of July 1775, not thinking of independence and a permanent republic, could not mean to vest in these delegates powers of establishing them, or any authorities other than those of the ordinary legislature. So far as a temporary organization of government was necessary to render our opposition energetic, so far their organization was valid. But they received in their creation no powers but what were given to every legislature before and since. They could not, therefore, pass an act transcendent to the powers of other legislatures. If the present assembly pass an act, and declare it shall be irrevocable by subsequent assemblies, the declaration is merely void, and the act repealable, as other acts are. So far, and no farther authorized, they organized the government by the ordinance entitled a constitution or form of government. It pretends to no higher authority than the other ordinances of the same session; it does not say that it shall be perpetual; that it shall be unalterable by other legislatures; that it shall be transcendent above the powers of those who they knew would have equal power with themselves. Not only the silence of the instrument is a pr proof they thought it would be alterable, but their own practice also; for this very convention, meeting as a house of delegates in general assembly with the Senate in the autumn of that year, passed acts of assembly in contradiction to their ordinance of government; and every assembly from that time to this has done the same. I am safe, therefore, in the position that the constitution itself is alterable by the ordinary legislature….

6. That the assembly exercises a power of determining the quorum of their own body which may legislate for us. After the establishment of the new form they adhered to the *Lex majoris partis,* founded in common law as well as common right. It is the natural law of every assembly of men, whose numbers are not fixed by any other law. They continued for some time to require the presence of a majority of their whole number, to pass an act. But the British parliament fixes its own quorum; our former assemblies fixed their own quorum; and one precedent in favor of power is stronger than an hundred against it. The house of delegates, therefore, have lately voted that, during the present dangerous invasion, forty members shall be a house to proceed to business. They have been moved to this by the fear of not being able to collect a house. But this danger could not authorize them to call that a house which was none; and if they may fix it at one number, they may at another, till it loses its fundamental character of being a representative body. As this vote expires with the present invasion, it is probable the former rule will be permitted to revive; because at present no ill is meant. The power, however, of fixing their own quorum has been avowed, and a precedent set. From forty it may be reduced to four, and from four to one; from a house to a committee, from a committee to a chairman or speaker, and thus an oligarchy or monarchy be substituted under forms supposed to be regular. "*Omnia mala exempla ex bonis orta sunt; sed ubi imperium ad ignaros aut minus bonos pervenit, novum illud exemplum ab dignis et edoneis abindignos et non ideoneos fertur."*2 When, therefore, it is considered, that there is no legal obstacle to the assumption by the assembly of all the powers legislative, executive, and judiciary, and that these may come to the hands of the smallest rag of delegation, surely the people will say, and their representatives, while yet they have honest

representatives, will advise them to say, that they will not acknowledge as laws any acts not considered and assented to by the major part of their delegates.

In enumerating the defects of the Constitution, it would be wrong to count among them what is only the error of particular persons. In December 1776, our circumstances being much distressed, it was proposed in the house of delegates to create a *dictator,* invested with every power legislative, executive and judiciary, civil and military, of life and of death, over our persons and over our properties; and in June 1781, again under calamity, the same proposition was repeated, and wanted a few votes only of being passed. One who entered into this contest from a pure love of liberty, and a sense of injured rights, who determined to make every sacrifice, and to meet every danger, for the re-establishment of those rights on a firm basis, who did not mean to expend his blood and substance for the wretched purpose of changing this master for that, but to place the powers of governing him in a plurality of hands of his own choice, so that the corrupt will of no one man might in future oppress him, must stand confounded and dismayed when he is told, that a considerable portion of that plurality had mediated the surrender of them into a single hand, and, in lieu of a limited monarchy, to deliver him over to a despotic one! How must we find his efforts and sacrifices abused and baffled, if he may still, by a single vote, be laid prostrate at the feet of one man! In God's name, from whence have they derived this power? Is it from our ancient laws? None such can be produced. Is it from any principle in our new Constitution expressed or implied? Every lineament expressed or implied, is in full opposition to it. Its fundamental principle is, that the State shall be governed as a commonwealth. It provides a republican organization, proscribes under the name of *prerogative* the exercise of all powers undefined by the laws; places on this basis the whole system of our laws; and by consolidating them together, chooses that they shall be left to stand or fall together, never providing for any circumstances, nor admitting that such could arise, wherein either should be suspended; no, not for a moment. Our ancient laws expressly declare, that those who are but delegates themselves shall not delegate to others powers which require judgment and integrity in their exercise. Or was this proposition moved on a supposed right in the movers, of abandoning their posts in a moment of distress? The same laws forbid the abandonment of that post, even on ordinary occasions; and much more a transfer of their powers into other hands and other forms, without consulting the people. They never admit the idea that these, like sheep or cattle, may be given from hand to hand without an appeal to their own will. Was it from the necessity of the case? Necessities which dissolve a government, do not convey its authority to an oligarchy or a monarchy. They throw back, into the hands of the people, the powers they had delegated, and leave them as individuals to shift for themselves. A leader may offer, but not impose himself, nor be imposed on them. Much less can their necks be submitted to his sword, their breath to be held at his will or caprice. The necessity which should operate these tremendous effects should at least be palpable and irresistible. Yet in both instances, where it was feared, or pretended with us, it was belied by the event. It was belied, too, by the preceding experience of our sister States, several of whom had grappled through greater difficulties without abandoning their forms of government. When the proposition was first made, Massachusetts had found even the government of committees sufficient to carry them through an invasion. But we at the time of that proposition, were under no invasion. When the second was made, there had been added to this example those of Rhode Island, New York, New Jersey, and Pennsylvania, in all of which the republican form had been found equal to the task of carrying them through the severest trials. In this State alone did there exist so little virtue, that fear was to be fixed in the hearts of the people, and to become

the motive of their exertions, and principle of their government? The very thought alone was treason against the people; was treason against mankind in general; as riveting for ever the chains which bow down their necks, by giving to their oppressors a proof, which they would have trumpeted through the universe, of the imbecility of republican government, in times of pressing danger, to shield them from harm. Those who assume the right of giving away the reins of government in any case, must be sure that the herd, whom they hand on to the rods and hatchet of the dictator, will lay their necks on the block when he shall nod to them. But if our assemblies supposed such a recognition in the people, I hope they mistook their character. I am of opinion, that the government, instead of being braced and invigorated for greater exertions under their difficulties, would have been thrown back upon the bungling machinery of county committees for administration, till a convention could have been called, and its wheels again set into regular motion. What a cruel moment was this for creating such an embarrassment, for putting to the proof the attachment of our countrymen to republican government! Those who meant well, of the advocates for this measure, (and most of them meant well, for I know them personally, had been their fellow-laborer in the common cause, and had often proved the purity of their principles) had been seduced in their judgment by the example of an ancient republic, whose constitution and circumstances were fundamentally different. They had sought this precedent in the history of Rome, where alone it was to be found, and where at length, too, it had proved fatal. They had taken it from a republic rent by the most bitter factions and tumults, where the government was of a heavy-handed unfeeling aristocracy, over a people ferocious, and rendered desperate by poverty and wretchedness; tumults which could not be allayed under the most trying circumstances, but by the omnipotent hand of a single despot. Their constitution, therefore, allowed a temporary tyrant to be erected, under the name of a dictator; and that temporary tyrant, after a few examples, became perpetual. They misapplied this precedent to a people mild in their dispositions, patient under their trial, united for the public liberty, and affectionate to their leaders. But if from the constitution of the Roman government there resulted to their senate a power of submitting all their rights to the will of one man; does it follow that the assembly of Virginia have the same authority? What clause in our constitution has substituted that of Rome, by way of residuary provision, for all cases not otherwise provided for? Or, if they may step *ad libitum* into any other form of government for precedents to rule us by, for what oppression may not a precedent be found in this world of the *bellum omnium in omnia?*Searching for the foundations of this proposition, I can find none which may pretend a color of right or reason, but the defect before developed, that there being no barrier between the legislative, executive, and judiciary departments, the legislature may seize the whole; that having seized it, and possessing a right to fix their own quorum, they may reduce that quorum to one, whom they may call a chairman, speaker, dictator, or by any other name they please. Our situation is indeed perilous, and I hope my countrymen will be sensible of it, and will apply, at a proper season, the proper remedy; which is a convention to fix the constitution, to amend its defects, to bind up the several branches of government by certain laws, which, when they transgress, their acts shall become nullities; to render unnecessary an appeal to the people, or in other words a rebellion, on every infraction of their rights, on the peril that their acquiescence shall be construed into an intention to surrender those rights.

1. Thomas Jefferson, *Notes on the State of Virginia,* "Query XIII: Constitution," in A. A. Lipscomb and A. E. Bergh, eds., *The Writings of Thomas Jefferson,* Vol. 2 (Washington, D.C.: Thomas Jefferson Memorial Association, 1907), 160-67, 172-78.

2. "All bad examples are derived from good ones; but when power comes to the ignorant or the less good, the new example is transferred from the worthy and fit to the unworthy and unfit."

Tuesday, April 2 – Essay #32 – Thomas Jefferson's Notes on the State of Virginia Query XIII: Constitution – Guest Essayist: James Legee, Graduate Fellow at the Matthew J. Ryan Center for the study of Free Institutions and the Public Good, Villanova University

Thomas Jefferson's *Notes on the State of Virginia* provides an examination of the difficulties the State of Virginia faced in governing itself over the course of the Revolutionary period. Self-government, as the United States has learned over the last two centuries, is no mean feat. It was made all the more difficult as there were no enduring examples to look to for guidance, and one of the greatest militaries the world had known had waged a war across the Thirteen Colonies. *Query XIII: Constitution* addresses a wide range of issues, from justice in representation, the separation of powers, to a warning against expediency in deviating from the rule of law.

If this reads like a list of issues tackled at the 1787 Constitutional Convention in Philadelphia, it should; James Madison and George Mason had a hand in drafting the Virginia Constitution in 1776, and Madison's Virginia plan was of course the foundation for our Constitution. Mason was a leading exponent of a Bill of Rights. Notably, Thomas Jefferson was at the meeting of the Continental Congress in 1776 and in France for the Constitutional Convention in 1787, meaning he served in the creation of neither the Virginia's nor the United States' constitution. Undoubtedly, his close friendship with James Madison influenced his writing of *Notes on the State of Virginia*, just as he influenced Madison. Regardless, Jefferson's observations illustrate an acute awareness and concern for self-government, of which justice is one of the greatest and most difficult pursuits.

Jefferson began *Query XIII* with an examination of the representation that constituted Virginia's Senate and House of Delegates. He immediately pointed out in Section One that "The majority of the men in the state who pay and fight for its support are underrepresented in the legislature…" He goes on in Section Two to point out the inequity in representation between counties where more men paid taxes and fought for Virginia, but had equal representation to counties with far fewer taxpayers or members of the militia. He points out how close one region of Virginia, with 19,000 fighting men, came to dominate the rest of the state through a near majority in both houses. He wrote, "These nineteen thousand, therefore, living in one part of the country, give law to upwards of thirty thousand living in another…" Jefferson saw injustice as a result of how representation was allotted. Should then, voice in government be dependent upon contribution to it- that is taxes or military service? Perhaps more pointedly we can ask whether representation should be based upon the size of your population – so as to adequately reflect the will of the people— or should it be evenly distributed between counties to prevent a heavily populated area from trampling the rights and will of a rural region? Ideally, the point of a bicameral legislature is to introduce an element of both of these into a government, but Jefferson

realized their plan for representation was flawed in execution: "We do not, therefore, derive from the separation of our legislature into two houses, those benefits which a proper complication of principles are capable of producing…"

The next major topic of discourse is the failure to properly separate and divide the powers of the Virginia government. Jefferson finds that too much power is put in the hands of the legislature; he notes "One hundred seventy-three despots would surely be as oppressive as one…an *elective despotism* was not the government we fought for…" The branches of government must restrain one another from exceeding their authority; for this to be possible, one branch must not depend on another for power. The problem with the Virginia Constitution was that the "judiciary and executive members were left dependent on the legislature, for their subsistence in office, and some of them for their continuance in it." Jefferson notes that the concentration of power in so few hands lends itself to the abuse of "public money and public liberty." While those in power at the time were good men, they should not "be deluded by the integrity of their own purposes, and conclude that these unlimited powers will never be abused, because themselves are not disposed to abuse them." The nobility and honesty of those in power is not guaranteed from election to election. Thus, it is necessary to set the branches of government in opposition to check their power and ensure the liberty of the people. Remedying this quandary and setting the branches in opposition is the brilliance of the United States Constitution.

Section Six of *Query XIII* is a harsh criticism of the Virginia House of Delegates who had set their own quorum at forty. This was an expedient measure taken to do business while the war raged. Jefferson viewed this as a dangerous precedent, detrimental to the character of a deliberative body: "if they may fix it at one number, they may at another, till it loses its fundamental character of being a representative body." When only forty members meet to conduct business, it is not a full expression of the will of the people, and thus not truly representative body. The legislature derives its just authority to govern not from special status or a claim of God's favor, but from the consent of the governed. Did these representatives, who have had their authority delegated to them by the people, have the authority to further delegate that authority into fewer hands? Jefferson's answer was no.

Jefferson is concerned that a dangerous precedent for concentrating power has been set, and "one precedent in favor of power is stronger than an hundred against it." Expediency and crisis, in this instance combined with the war, lent an opportunity to dictators to arise and usurp the sovereignty of the people. This temporary concentration of power into the hands of the few lends itself to a permanent restriction of rights. The example Jefferson immediately turns to is that of Rome, when the Senate placed all the power in the hands of one man, Caesar, which marked the death of the republic. There is a great lesson here for us to learn today; no matter how troubled circumstances appear, the rights of the people should not be surrendered, and our republican form of government must be maintained so as to protect liberty and ensure just representation of the citizenry.

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Vices of the Political System of the United States by James Madison

April 1787

1. Failure of the States to comply with the Constitutional requisitions.

This evil has been so fully experienced both during the war and since the peace, results so naturally from the number and independent authority of the States and has been so uniformly exemplified in every similar Confederacy, that it may be considered as not less radically and permanently inherent in, than it is fatal to the object of, the present System.

2. Encroachments by the States on the federal authority.

Examples of this are numerous and repetitions may be foreseen in almost every case where any favorite object of a State shall present a temptation. Among these examples are the wars and Treaties of Georgia with the Indians—The unlicensed compacts between Virginia and Maryland, and between Pennsylvania and New Jersey—the troops raised and to be kept up by Massachusetts.

3. Violations of the law of nations and of treaties.

From the number of Legislatures, the sphere of life from which most of their members are taken, and the circumstances under which their legislative business is carried on, irregularities of this kind must frequently happen. Accordingly not a year has passed without instances of them in some one or other of the States. The Treaty of peace—the treaty with France—the treaty with Holland have each been violated. The causes of these irregularities must necessarily produce frequent violations of the law of nations in other respects.

As yet foreign powers have not been rigorous in animadverting on us. This moderation however cannot be mistaken for a permanent partiality to our faults, or a permanent security against those disputes with other nations, which being among the greatest of public calamities, it ought to be least in the power of any part of the Community to bring on the whole.

4. Trespasses of the States on the rights of each other.

These are alarming symptoms, and may be daily apprehended as we are admonished by daily experience. See the law of Virginia restricting foreign vessels to certain ports—of Maryland in favor of vessels belonging to her own citizens—of New York in favor of the same.

Paper money, installments of debts, occlusion of Courts, making property a legal tender, may likewise be deemed aggressions on the rights of other States. As the Citizens of every State aggregately taken stand more or less in the relation of Creditors or debtors, to the Citizens of every other States, Acts of the debtor State in favor of debtors, affect the Creditor State, in the same manner, as they do its own citizens who are relatively creditors towards other citizens. This remark may be extended to foreign nations. If the exclusive regulation of the value and alloy of coin was properly delegated to the federal authority, the policy of it equally requires a control on

the States in the cases above mentioned. It must have been meant 1. to preserve uniformity in the circulating medium throughout the nation. 2. to prevent those frauds on the citizens of other States, and the subjects of foreign powers, which might disturb the tranquility at home, or involve the Union in foreign contests.

The practice of many States in restricting the commercial intercourse with other States, and putting their productions and manufactures on the same footing with those of foreign nations, though not contrary to the federal articles, is certainly adverse to the spirit of the Union, and tends to beget retaliating regulations, not less expensive and vexatious in themselves, than they are destructive of the general harmony.

5. Want of concert in matters where common interest requires it.

This defect is strongly illustrated in the state of our commercial affairs. How much has the national dignity, interest, and revenue suffered from this cause? Instances of inferior moment are the want of uniformity in the laws concerning naturalization and literary property; of provision for national seminaries, for grants of incorporation for national purposes, for canals and other works of general utility, which may at present be defeated by the perverseness of particular States whose concurrence is necessary.

6. Want of Guaranty to the States of their Constitutions and laws against internal violence.

The confederation is silent on this point and therefore by the second article the hands of the federal authority are tied. According to Republican Theory, Right and power being both vested in the majority, are held to be synonymous. According to fact and experience a minority may in an appeal to force, be an overmatch for the majority. 1. If the minority happen to include all such as possess the skill and habits of military life, and such as possess the great pecuniary resources, one third only may conquer the remaining two thirds. 2. One third of those who participate in the choice of the rulers, may be rendered a majority by the accession of those whose poverty excludes them from a right of suffrage, and who for obvious reasons will be more likely to join the standard of sedition than that of the established Government. 3. Where slavery exists the republican Theory becomes still more fallacious.

7. Want of sanction to the laws, and of coercion in the Government of the Confederacy.

A sanction is essential to the idea of law, as coercion is to that of Government. The federal system being destitute of both, wants the great vital principles of a Political Constitution. Under the form of such a Constitution, it is in fact nothing more than a treaty of amity of commerce and of alliance, between so many independent and Sovereign States. From what cause could so fatal an omission have happened in the articles of Confederation? from a mistaken confidence that the justice, the good faith, the honor, the sound policy, of the several legislative assemblies would render superfluous any appeal to the ordinary motives by which the laws secure the obedience of individuals: a confidence which does honor to the enthusiastic virtue of the compilers, as much as the inexperience of the crisis apologizes for their errors. The time which has since elapsed has had the double effect, of increasing the light and tempering the warmth, with which the arduous work may be revised. It is no longer doubted that a unanimous and punctual obedience of thirteen independent bodies, to the acts of the federal Government, ought not be calculated on.

Even during the war, when external danger supplied in some degree the defect of legal and coercive sanctions, how imperfectly did the States fulfill their obligations to the Union? In time of peace, we see already what is to be expected. How indeed could it be otherwise? In the first place, Every general act of the Union must necessarily bear unequally hard on some particular member or members of it. Secondly the partiality of the members to their own interests and rights, a partiality which will be fostered by the Courtiers of popularity, will naturally exaggerate the inequality where it exists, and even suspect it where it has no existence. Thirdly a distrust of the voluntary compliance of each other may prevent the compliance of any, although it should be the latent disposition of all. Here are causes and pretexts which will never fail to render federal measures abortive. If the laws of the States, were merely recommendatory to their citizens, or if they were to be rejudged by County authorities, what security, what probability would exist, that they would be carried into execution? Is the security or probability greater in favor of the acts of Congress which depending for their execution on the will of the state legislatures, which are though nominally authoritative, in fact recommendatory only.

8. Want of ratification by the people of the articles of Confederation.

In some of the States the Confederation is recognized by, and forms a part of the constitution. In others however it has received no other sanction than that of the Legislative authority. From this defect two evils result: 1. Whenever a law of a State happens to be repugnant to an act of Congress, particularly when the latter is of posterior date to the former, it will be at least questionable whether the latter must not prevail; and as the question must be decided by the Tribunals of the State, they will be most likely to lean on the side of the State. 2. As far as the Union of the States is to be regarded as a league of sovereign powers, and not as a political Constitution by virtue of which they are become one sovereign power, so far it seems to follow from the doctrine of compacts, that a breach of any of the articles of the confederation by any of the parties to it, absolves the other parties from their respective obligations, and gives them a right if they choose to exert it, of dissolving the Union altogether.

9. Multiplicity of laws in the several States.

In developing the evils which vitiate the political system of the United States, it is proper to include those which are found within the States individually, as well as those which directly affect the States collectively, since the former class have an indirect influence on the general malady and must not be overlooked in forming a complete remedy. Among the evils then of our situation may well be ranked the multiplicity of laws from which no State is exempt. As far as laws are necessary, to mark with precision the duties of those who are to obey them, and to take from those who are to administer them a discretion, which might be abused, their number is the price of liberty. As far as the laws exceed this limit, they are a nuisance: a nuisance of the most pestilent kind. Try the Codes of the several States by this test, and what a luxuriancy of legislation do they present. The short period of independency has filled as many pages as the century which preceded it. Every year, almost every session, adds a new volume. This may be the effect in part, but it can only be in part, of the situation in which the revolution has placed us. A review of the several codes will show that every necessary and useful part of the least voluminous of them might be compressed into one tenth of the compass, and at the same time be rendered tenfold as perspicuous.

10. Mutability of the laws of the States.

This evil is intimately connected with the former yet deserves a distinct notice as it emphatically denotes a vicious legislation. We daily see laws repealed or superseded, before any trial can have been made of their merits; and even before a knowledge of them can have reached the remoter districts within which they were to operate. In the regulations of trade this instability becomes a snare, not only to our citizens but to foreigners also.

11. Injustice of the laws of States.

If the multiplicity and mutability of laws prove a want of wisdom, their injustice betrays a defect still more alarming: more alarming not merely because it is a greater evil in itself, but because it brings more into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights. To what causes is this evil to be ascribed?

These causes lie: 1. In the Representative bodies. 2. In the people themselves.

1. Representative appointments are sought from three motives: 1. ambition, 2. personal interest, 3. public good. Unhappily the two first are proved by experience to be most prevalent. Hence the candidates who feel them, particularly, the second, are most industrious, and most successful in pursuing their object: and forming often a majority in the legislative Councils, with interested views, contrary to the interest, and views, of their Constituents, join in a perfidious sacrifice of the latter to the former. A succeeding election it might be supposed, would displace the offenders, and repair the mischief. But how easily are base and selfish measures, masked by pretexts of public good and apparent expediency? How frequently will a repetition of the same arts and industry which succeeded in the first instance, again prevail on the unwary to misplace their confidence?

How frequently too will the honest but unenlightened representative be the dupe of a favorite leader, veiling his selfish views under the professions ofpublic good, and varnishing his sophistical arguments with the glowing colors of popular eloquence?

2. A still more fatal if not more frequent cause lies among the people themselves. All civilized societies are divided into different interests and factions, as they happen to be creditors or debtors—Rich or poor—husbandmen, merchants or manufacturers—members of different religious sects—followers of different political leaders—inhabitants of different districts—owners of different kinds of property, etc., etc. In republican Government the majority however composed, ultimately give the law. Whenever therefore an apparent interest or common passion unites a majority what is to restrain them from unjust violations of the rights and interests of the minority, or of individuals? Three motives only: 1. a prudent regard to their own good as involved in the general and permanent good of the Community. This consideration although of decisive weight in itself, is found by experience to be too often unheeded. It is too often forgotten, by nations as well as by individuals that honesty is the best policy. Secondly respect for character. However strong this motive may be in individuals, it is considered as very insufficient to restrain them from injustice. In a multitude its efficacy is diminished in proportion to the number which is to share the praise or the blame. Besides, as it has reference to public

opinion, which within a particular Society, is the opinion of the majority, the standard is fixed by those whose conduct is to be measured by it. The public opinion without the Society, will be little respected by the people at large of any Country. Individuals of extended views, and of national pride, may bring the public proceedings to this standard, but the example will never be followed by the multitude. Is it to be imagined that an ordinary citizen or even an assemblyman of Rhode Island in estimating the policy of paper money, ever considered or cared in what light the measure would be viewed in France or Holland; or even in Massachusetts or Connecticut? It was a sufficient temptation to both that it was for their interest: it was a sufficient sanction to the latter that it was popular in the State; to the former that it was so in the neighbourhood. Thirdly will Religion, the only remaining motive be a sufficient restraint? It is not pretended to be such on men individually considered. Will its effect be greater on them considered in an aggregate view? quite the reverse. The conduct of every popular assembly acting on oath, the strongest of religious Ties, proves that individuals join without remorse in acts, against which their consciences would revolt if proposed to them under the like sanction, separately in their closets. When indeed Religion is kindled into enthusiasm, its force like that of other passions, is increased by the sympathy of a multitude. But enthusiasm is only a temporary state of religion, and while it lasts will hardly be seen with pleasure at the helm of Government. Besides as religion in its coolest state, is not infallible, it may become a motive to oppression as well as a restraint from injustice. Place three individuals in a situation wherein the interest of each depends on the voice of the others, and give to two of them an interest opposed to the rights of the third? Will the latter be secure? The prudence of every man would shun the danger.The rules and forms of justice suppose and guard against it. Will two thousand in a like situation be less likely to encroach on the rights of one thousand? The contrary is witnessed by the notorious factions and oppressions which take place in corporate towns limited as the opportunities are, and in little republics when uncontrolled by apprehensions of external danger. If an enlargement of the sphere is found to lessen the insecurity of private rights, it is not because the impulse of a common interest or passion is less predominant in this case with the majority; but because a common interest or passion is less apt to be felt and the requisite combinations less easy to be formed by a great than by a small number. The Society becomes broken into a greater variety of interests, of pursuits, of passions, which check each other, whilst those who may feel a common sentiment have less opportunity of communication and concert. It may be inferred that the inconveniences of popular States contrary to the prevailing Theory, are in proportion not to the extent, but to the narrowness of their limits.

The great desideratum in Government is such a modification of the Sovereignty as will render it sufficiently neutral between the different interests and factions, to control one part of the society from invading the rights of another, and at the same time sufficiently controlled itself, from setting up an interest adverse to that of the whole society. In absolute Monarchies, the prince is sufficiently neutral towards his subjects, but frequently sacrifices their happiness to his ambition or his avarice. In small Republics, the sovereign will is sufficiently controlled from such a Sacrifice of the entire Society, but is not sufficiently neutral towards the parts composing it. As a limited Monarchy tempers the evils of an absolute one; so an extensive Republic meliorates the administration of a small Republic.

An auxiliary desideratum for the melioration of the Republican form is such a process of elections as will most certainly extract from the mass of the Society the purest and noblest

characters which it contains; such as will at once feel most strongly the proper motives to pursue the end of their appointment, and be most capable to devise the proper means of attaining it….

1. James Madison, "Vices of the Political System of the United States," April 1787, in William T. Hutchison et al., eds., *The Papers of James Madison,* Vol. 9 (Chicago: University of Chicago Press, 1962–present), 348–57. Reproduced with permission of University of Chicago Press–Books in the format Textbook via Copyright Clearance Center.

Wednesday, April 3, 2013 – Essay #33 – Vices of the Political System of the United States by James Madison – Guest Essayist: Kevin R. C. Gutzman, J.D., Ph.D. Professor and Director of Graduate Studies Department of History Western Connecticut State University And Author, James Madison and the Making of America

James Madison spent much of late 1786 and early 1787 at work on what one historian called his "research project." Having participated in helping bring about the interstate convention that was going to meet in Philadelphia in May 1787, he intended to apply both historical knowledge and practical experience to the task of shaping proposals he would make as a member of Virginia's delegation to the convention.

To that end, he drafted a memorandum on the history of federal governments. He also gathered his notes on problems in the American federal system under the Articles of Confederation into an eleven-point memorandum.

Historians have somewhat ironically taken to referring to that second memorandum, "Vices of the Political System of the United States," as "Madison's 'Vices'" in light of their author's rather prim and reserved personality. Although that sobriquet is ironic, the "Vices" illustrates the central characteristic of Madison's statesmanship: his thorough preparation.

A Georgian Philadelphia Convention colleague of the Virginian Madison's wrote in the Convention's wake that Madison was always the best prepared man in any public body. In the Convention itself, Madison was constantly at the center of the debates, always with a wealth of information at hand.

Madison put the "Vices" to use even before the assemblage opened. His fellow Virginia delegates, led by George Washington, Governor Edmund Randolph, and George Mason, joined him in crafting what came to be called the "Virginia Plan" (but in the Convention was called "Randolph's Resolutions") to remedy the shortcomings outlined in the "Vices."

Vice #1 was "Failure of the States to Comply with the Constitutional Requisitions." Madison's explanation of this vice said that not only had it been suffered by the Confederation throughout

its history, but it was endemic to all federal governments. He also called it "fatal to the object of" the Confederation. Partly on the basis of this claim, some historians have seen the Philadelphia Convention as being spurred chiefly by the desire to secure more reliable funding for the central government.

Vice #2 is "Encroachments by the States on the Federal Authority," among which Madison listed Georgia's Indian wars, Massachusetts' raising and keeping troops, and four other states' making interstate compacts. All of these, Madison believed, should have been Confederation functions.

Vice #3 is "Violations of the Law of Nations and of Treaties," a matter nearly as significant as the first two. The treaty with Great Britain, the treaty with France, and the treaty with the Netherlands had all been violated, Madison said. He added that other nations' not having taken measures of reprisal yet should not be understood as proving America was exempt from the consequences that all countries could expect when they habitually flouted international conventions.

Vice #4 was "Trespasses of the States on the Rights of Each Other." Different states had adopted rules about access to their ports, about payment of debts, etc., that contravened the rightful expectations of their fellow members of the American union. #6, "Want of Guaranty to the States of their Constitutions and laws against internal violence," reflected Madison's and others' unhappiness with the Congress's impotence to intervene on behalf of the state government during Shays' Rebellion. Washington as well had been distraught over the events in Massachusetts, and Madison determined to do something about it.

Vice #7 had to do with the absence of sanction in the Confederation's laws. When Congress adopted a requisition or other policy, it had to rely on the state governments for enforcement, and every state had failed to meet its obligations at one time or another. This shortcoming would lead the Virginians to propose that the central government have an executive and a judicial branch to enforce its laws.

Vice #8 was "Want of ratification by the people of the articles of Confederation," and here Madison intended to harness an American political invention for federal ends. Since the popular ratification of the Massachusetts Constitution of 1780 (which is still in effect today), Americans had come to think that the people should ratify constitutions through special processes separate from their drafting. For Madison, this meant there ought to be state-wide ratification conventions for whatever product the Philadelphia Convention produced. If the Constitution were given effect through such a process, there would never be another instance of a state court's choosing to enforce state policy instead of federal policy, for the federal policy would be clearly superior to it.

The next three vices concerned the "multiplicity," "mutability," and "injustice" of state laws. Here Madison developed what eventually would become his immortal *Federalist* #10 argument that an "extension of the sphere," or linking the entire country into one federated republic, would by making it more difficult for local faction to dominate make it less likely that oppressive laws would be adopted. He mentioned that this conclusion was contrary to "the prevailing theory," by which he meant the baron de Montesquieu's postulate that republican government could only

survive over the long term if confined to a small area. Madison's practical application of his novel idea was that the central government must be strengthened markedly.

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Letter Transmitting the Constitution by George Washington

September 17, 1787

Sir:

We have now the honor to submit to the consideration of the United States in Congress assembled, that Constitution which has appeared to us the most advisable.

The friends of our country have long seen and desired, that the power of making war, peace and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually vested in the general government of the Union: but the impropriety of delegating such extensive trust to one body of men is evident—Hence results the necessity of a different organization.

It is obviously impracticable in the federal government of these States, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all—Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; and on the present occasion this difficulty was increased by a difference among the several States as to their situation, extent, habits, and particular interests.

In all our deliberations on this subject we kept steadily in our view, that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each State in the Convention to be less rigid on points of inferior magnitude, than might have been otherwise expected; and thus the Constitution, which we now present, is the result of a spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable.

That it will meet the full and entire approbation of every State is not perhaps to be expected; but each will doubtless consider, that had her interests been alone consulted, the consequences might have been particularly disagreeable or injurious to others; that it is liable to as few exceptions as could reasonably have been expected, we hope and believe; that it may promote the lasting welfare of that country so dear to us all, and secure her freedom and happiness, is our most

ardent wish.

With great respect, We have the honor to be, Sir, Your Excellency's most Obedient and humble Servants,

George Washington, President

By unanimous Order of the Convention

1. George Washington, "Letter Transmitting the Proposed Constitution from the Federal Convention to the Confederation Congress," September 17, 1787, in George Anastaplo, *The Constitution of 1787: A Commentary* (Baltimore, MD: Johns Hopkins University Press, 1989), 283-84

Thursday, April 4, 2013 – Essay #34 – George Washington's Letter Transmitting the Constitution – Guest Essayist: Geordan Kushner, Fellow at the Mathew J. Ryan Center for the study of Free Institutions and the Public Good, Villanova University

George Washington's letter transmitting the Constitution to Congress marked a milestone achievement in the founding of the modern United States. George Washington, the President of the Second Continental Congress, sent his letter on September 17, 1787 after four months of having been locked in a crucible of sweltering summer heat, clashing political interests, grueling debate, tenacious deadlock, and demanding compromise. Even though a majority of the convention's delegates agreed to and drafted a new Constitution, it was well known that the real battle was soon to be realized. The battle to come would be the struggle to ratify the Constitution in at least nine states, which was the minimum number required in order for it to have the force of law. Many at the time knew that this was going to be a tremendous hurdle to surmount, and you would be hard pressed to find a person who comprehended the current state of affairs better than General George Washington. He astutely realized that there was going to be much opposition against the ratification of the Constitution because it significantly reduced the authority and sovereignty of the various States. It was this obstacle, which fueled Washington's motivation for writing a letter of transmittal to ensure that the Constitution was ratified, and the American experiment in self-government would be perpetuated into the future.

George Washington begins his letter of transmittal by stating that there had long been a desire that "the powers of making war, peace and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually vested in the general government of the Union." This statement by Washington clearly refers to the principle problems plaguing the United States under the Articles of Confederation. The government under the Articles of Confederation primarily failed because of the subordinate position and lack of authority the central government held in the political system.

Most of this was by design because of the fear many people had of falling back under another tyranny, similar to what had been experienced under British rule. However, fashioning a central government that was so devoid of any power would prove disastrous. As a result, economic hardship and internal insurrection were rampant under the Articles of Confederation. It did not take a long time for it to become clear that a strong central authority was needed to demand uniformity and cooperation. However, George Washington points out that delegating such authority could produce its own evident problems. Thus, Washington states, "results the necessity of a different organization."

Washington continues in his letter by mentioning the principle difficulties that had to be faced at the Convention in order to correct the flaws and shortcomings of the Articles of Confederation. There were many problems and issues that needed to be addressed, but in general they were all more or less about the diminution of State sovereignty. George Washington asserts that it is impossible for a federal government of the States to ensure the rights of state sovereignty, while at the same time provide for the general interest and welfare of the whole. Washington alludes, by way of analogy, that it is necessary for the States to relinquish some of their sovereignty in the interest of ensuring and preserving the general prosperity of the Union. Just how much authority to be relinquished is very difficult to define according to Washington, but it is dependent upon the end goal to be achieved. Not only was this the problem faced in the Convention, but also Washington states that there was the added difficulty of difference among the States regarding their own interests, and situations.

Washington closes his letter to Congress by stating that in all of the discussions at the Convention (on the subjects previously mentioned), they (the delegates) ensured that they never lost sight of their mission to consolidate the Union. The Founders at the Constitutional Convention knew that the mission they were charged to carry out was of the upmost importance because their success or failure would dictate whether or not a country founded by "We the People" would be able to endure into the ages. Washington mentions that it was this imperative that informed each state delegation's decisions, and thus they were "less ridged" on those matters of lesser importance. Thus the Constitution that is being proposed "is the result of a spirit of amity." It is at the end of Washington's letter that his real motivation and intention becomes apparent. Washington states that of course this new Constitution is not going to satisfy all of the needs, desires, and interests of each individual state. However, even though no state is going to be completely satisfied and that it (the Constitution) will not be agreeable in every which way, it is Washington's and the Convention's belief that this new Constitution will promote the welfare, freedom and happiness of the United States. It is quite clear that Washington's purpose and motivation for this letter to Congress was to alleviate the apprehension and trepidation regarding the new Constitution, and that in ratifying the Constitution the "great experiment in self-government" will continue.

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Essay I by Brutus

October 18, 1787

To the Citizens of the State of New-York:

When the public is called to investigate and decide upon a question in which not only the present members of the community are deeply interested, but upon which the happiness and misery of generations yet unborn is in great measure suspended, the benevolent mind cannot help feeling itself peculiarly interested in the result….

Perhaps this country never saw so critical a period in their political concerns. We have felt the feebleness of the ties by which these United States are held together, and the want of sufficient energy in our present confederation, to manage, in some instances, our general concerns. Various expedients have been proposed to remedy these evils, but none have succeeded. At length a Convention of the states has been assembled, they have formed a constitution which will now, probably, be submitted to the people to ratify or reject, who are the fountain of all power, to whom alone it of right belongs to make or unmake constitutions, or forms of government, at their pleasure. The most important question that was ever proposed to your decision, or to the decision of any people under heaven, is before you, and you are to decide upon it by men of your own election, chosen specially for this purpose. If the constitution, offered to your acceptance, be a wise one, calculated to preserve the invaluable blessings of liberty, to secure the inestimable rights of mankind, and promote human happiness, then, if you accept it, you will lay a lasting foundation of happiness for millions yet unborn; generations to come will rise up and call you blessed. You may rejoice in the prospects of this vast extended continent becoming filled with freemen, who will assert the dignity of human nature. You may solace yourselves with the idea, that society, in this favored land, will fast advance to the highest point of perfection; the human mind will expand in knowledge and virtue, and the golden age be, in some measure, realised. But if, on the other hand, this form of government contains principles that will lead to the subversion of liberty—if it tends to establish a despotism, or, what is worse, a tyrannic aristocracy; then, if you adopt it, this only remaining asylum for liberty will be shut up, and posterity will execrate your memory.

Momentous then is the question you have to determine, and you are called upon by every motive which should influence a noble and virtuous mind, to examine it well, and to make up a wise judgment. It is insisted, indeed, that this constitution must be received, be it ever so imperfect. If it has its defects, it is said, they can be best amended when they are experienced. But remember, when the people once part with power, they can seldom or never resume it again but by force. Many instances can be produced in which the people have voluntarily increased the powers of their rulers; but few, if any, in which rulers have willingly abridged their authority. This is a sufficient reason to induce you to be careful, in the first instance, how you deposit the powers of government.

With these few introductory remarks, I shall proceed to a consideration of this constitution:

The first question that presents itself on the subject is, whether a confederated government be the

best for the United States or not? Or in other words, whether the thirteen United States should be reduced to one great republic, governed by one legislature, and under the direction of one executive and judicial; or whether they should continue thirteen confederated republics, under the direction and control of a supreme federal head for certain defined national purposes only?

This enquiry is important, because, although the government reported by the convention does not go to a perfect and entire consolidation, yet it approaches so near to it, that it must, if executed, certainly and infallibly terminate in it.

This government is to possess absolute and uncontrollable power, legislative, executive and judicial, with respect to every object to which it extends, for by the last clause of section 8th, article 1st, it is declared "that the Congress shall have power to make all laws which shall be necessary and proper for carryinginto execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States; or in any department or office thereof." And by the 6th article, it is declared "that this constitution, and the laws of the United States, which shall be made in pursuance thereof, and the treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution, or law of any state to the contrary notwithstanding." It appears from these articles that there is no need of any intervention of the state governments, between the Congress and the people, to execute any one power vested in the general government, and that the constitution and laws of every state are nullified and declared void, so far as they are or shall be inconsistent with this constitution, or the laws made in pursuance of it, or with treaties made under the authority of the United States.—The government then, so far as it extends, is a complete one, and not a confederation. It is as much one complete government as that of New-York or Massachusetts, has as absolute and perfect powers to make and execute all laws, to appoint officers, institute courts, declare offenses, and annex penalties, with respect to every object to which it extends, as any other in the world. So far therefore as its powers reach, all ideas of confederation are given up and lost. It is true this government is limited to certain objects, or to speak more properly, some small degree of power is still left to the states, but a little attention to the powers vested in the general government, will convince every candid man, that if it is capable of being executed, all that is reserved for the individual states must very soon be annihilated, except so far as they are barely necessary to the organization of the general government. The powers of the general legislature extend to every case that is of the least importance—there is nothing valuable to human nature, nothing dear to freemen, but what is within its power. It has authority to make laws which will affect the lives, the liberty, and property of every man in the United States; nor can the constitution or laws of any state, in any way prevent or impede the full and complete execution of every power given. The legislative power is competent to lay taxes, duties, imposts, and excises;—there is no limitation to this power, unless it be said that the clause which directs the use to which those taxes, and duties shall be applied, may be said to be a limitation: but this is no restriction of the power at all, for by this clause they are to be applied to pay the debts and provide for the common defense and general welfare of the United States; but the legislature have authority to contract debts at their discretion; they are the sole judges of what is necessary to provide for the common defense, and they only are to determine what is for the general welfare; this power therefore is neither more nor less, than a power to lay and collect taxes, imposts, and excises, at their pleasure; not only [is] the power to lay taxes unlimited, as to the amount they may require,

but it is perfect and absolute to raise them in any mode they please. No state legislature, or any power in the state governments, have any more to do in carrying this into effect, than the authority of one state has to do with that of another. In the business therefore of laying and collecting taxes, the idea of confederation is totally lost, and that of one entire republic is embraced….

It might be here shown, that the power in the federal legislative, to raise and support armies at pleasure, as well in peace as in war, and their control over the militia, tend, not only to a consolidation of the government, but the destruction of liberty.—I shall not, however, dwell upon these, as a few observations upon the judicial power of this government, in addition to the preceding, will fully evince the truth of the position.

The judicial power of the United States is to be vested in a supreme court, and in such inferior courts as Congress may from time to time ordain and establish. The powers of these courts are very extensive; their jurisdiction comprehends all civil causes, except such as arise between citizens of the same state; and it extends to all cases in law and equity arising under the constitution. One inferior court must be established, I presume, in each state, at least, with the necessary executive officers appendant thereto. It is easy to see, that in the common course of things, these courts will eclipse the dignity, and take away from the respectability, of the state courts. These courts will be, in themselves, totally independent of the states, deriving their authority from the United States, and receiving from them fixed salaries; and in the course of human events it is to be expected, that they will swallow up all the powers of the courts in the respective states.

How far the clause in the 8th section of the 1st article may operate to do away all idea of confederated states, and to effect an entire consolidation of the whole into one general government, it is impossible to say. The powers given by this article are very general and comprehensive, and it may receive a construction to justify the passing almost any law. A power to make all laws, which shall be *necessary and proper,* for carrying into execution, all powers vested by the constitution in the government of the United States, or any department or officer thereof, is a power very comprehensive and indefinite, and may, for ought I know, be exercised in a such manner as entirely to abolish the state legislatures. Suppose the legislature of a state should pass a law to raise money to support their government and pay the state debt, may the Congress repeal this law, because it may prevent the collection of a tax which they may think proper and necessary to lay, to provide for the general welfare of the United States? For all laws made, in pursuance of this constitution, are the supreme law of the land, and the judges in every state shall be bound thereby, any thing in the constitution or laws of the different states to the contrary notwithstanding.—By such a law, the government of a particular state might be overturned at one stroke, and thereby be deprived of every means of its support.

It is not meant, by stating this case, to insinuate that the constitution would warrant a law of this kind; or unnecessarily to alarm the fears of the people, by suggesting, that the federal legislature would be more likely to pass the limits assigned them by the constitution, than that of an individual state, further than they are less responsible to the people. But what is meant is, that the legislature of the United States are vested with the great and uncontrollable powers, of laying and collecting taxes, duties, imposts, and excises; of regulating trade, raising and supporting armies,

organizing, arming, and disciplining the militia, instituting courts, and other general powers. And are by this clause invested with the power of making all laws, *proper and necessary,* for carrying all these into execution; and they may so exercise this power as entirely to annihilate all the state governments, and reduce this country to one single government. And if they may do it, it is pretty certain they will; for it will be found that the power retained by individual states, small as it is, will be a clog upon the wheels of the government of the United States; the latter therefore will be naturally inclined to remove it out of the way. Besides, it is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way. This disposition, which is implanted in human nature, will operate in the federal legislature to lessen and ultimately to subvert the state authority, and having such advantages, will most certainly succeed, if the federal government succeeds at all. It must be very evident then, that what this constitution wants of being a complete consolidation of the several parts of the union into one complete government, possessed of perfect legislative, judicial, and executive powers, to all intents and purposes, it will necessarily acquire in its exercise and operation.

Let us now proceed to enquire, as I at first proposed, whether it be best the thirteen United States should be reduced to one great republic, or not? It is here taken for granted, that all agree in this, that whatever government we adopt, it ought to be a free one; that it should be so framed as to secure the liberty of the citizens of America, and such an one as to admit of a full, fair, and equal representation of the people. The question then will be, whether a government thus constituted, and founded on such principles, is practicable, and can be exercised over the whole United States, reduced into one state?

If respect is to be paid to the opinion of the greatest and wisest men who have ever thought or wrote on the science of government, we shall be constrained to conclude, that a free republic cannot succeed over a country of such immense extent, containing such a number of inhabitants, and these increasing in such rapid progression as that of the whole United States. Among the many illustrious authorities which might be produced to this point, I shall content myself with quoting only two. The one is the Baron de Montesquieu, *Spirit of Laws,* chap. xvi. vol. I [book VIII]. “It is natural to a republic to have only a small territory, otherwise it cannot long subsist. In a large republic there are men of large fortunes, and consequently of less moderation; there are trusts too great to be placed in any single subject; he has interest of his own; he soon begins to think that he may be happy, great and glorious, by oppressing his fellow citizens; and that he may raise himself to grandeur on the ruins of his country. In a large republic, the public good is sacrificed to a thousand views; it is subordinate to exceptions, and depends on accidents. In a small one, the interest of the public is easier perceived, better understood, and more within the reach of every citizen; abuses are of less extent, and of course are less protected.” Of the same opinion is the marquis Beccarari.

History furnishes no example of a free republic, any thing like the extent of the United States. The Grecian republics were of small extent; so also was that of the Romans. Both of these, it is true, in process of time, extended their conquests over large territories of country; and the consequence was, that their governments were changed from that of free governments to those of the most tyrannical that ever existed in the world.

Not only the opinion of the greatest men, and the experience of mankind, are against the idea of an extensive republic, but a variety of reasons may be drawn from the reason and nature of things, against it. In every government, the will of the sovereign is the law. In despotic governments, the supreme authority being lodged in one, his will is law, and can be as easily expressed to a large extensive territory as to a small one. In a pure democracy the people are the sovereign, and their will is declared by themselves; for this purpose they must all come together to deliberate, and decide. This kind of government cannot be exercised, therefore, over a country of any considerable extent; it must be confined to a single city, or at least limited to such bounds as that the people can conveniently assemble, be able to debate, understand the subject submitted to them, and declare their opinion concerning it.

In a free republic, although all laws are derived from the consent of the people, yet the people do not declare their consent by themselves in person, but by representatives, chosen by them, who are supposed to know the minds of their constituents, and to be possessed of integrity to declare this mind.

In every free government, the people must give their assent to the laws by which they are governed. This is the true criterion between a free government and an arbitrary one. The former are ruled by the will of the whole, expressed in any manner they may agree upon; the latter by the will of one, or a few. If the people are to give their assent to the laws, by persons chosen and appointed by them, the manner of the choice and the number chosen, must be such, as to possess, be disposed, and consequently qualified to declare the sentiments of the people; for if they do not know, or are not disposed to speak the sentiments of the people, the people do not govern, but the sovereignty is in a few. Now, in a large extended country, it is impossible to have a representation, possessing the sentiments, and of integrity, to declare the minds of the people, without having it so numerous and unwieldly, as to be subject in great measure to the inconveniency of a democratic government.

The territory of the United States is of vast extent; it now contains near three millions of souls, and is capable of containing much more than ten times that number. Is it practicable for a country, so large and so numerous as they will soon become, to elect a representation, that will speak their sentiments, without their becoming so numerous as to be incapable of transacting public business? It certainly is not.

In a republic, the manners, sentiments, and interests of the people should be similar. If this be not the case, there will be a constant clashing of opinions; and the representatives of one part will be continually striving against those of the other. This will retard the operations of government, and prevent such conclusions as will promote the public good. If we apply this remark to the condition of the United States, we shall be convinced that it forbids that we should be one government. The United States includes a variety of climates. The productions of the different parts of the union are very variant, and their interests, of consequence, diverse. Their manners and habits differ as much as their climates and productions; and their sentiments are by no means coincident. The laws and customs of the several states are, in many respects, very diverse, and in some opposite; each would be in favor of its own interests and customs, and, of consequence, a legislature, formed of representatives from the respective parts, would not only be too numerous to act with any care or decision, but would be composed of such heterogenous and discordant

principles, as would constantly be contending with each other.

The laws cannot be executed in a republic, of an extent equal to that of the United States, with promptitude.

The magistrates in every government must be supported in the execution of the laws, either by an armed force, maintained at the public expense for that purpose; or by the people turning out to aid the magistrate upon his command, in case of resistance.

In despotic governments, as well as in all the monarchies of Europe, standing armies are kept up to execute the commands of the prince or the magistrate, and are employed for this purpose when occasion requires: But they have always proved the destruction of liberty, and [are] abhorrent to the spirit of a free republic. In England, where they depend upon the parliament for their annual support, they have always been complained of as oppressive and unconstitutional, and are seldom employed in executing of the laws; never except on extraordinary occasions, and then under the direction of a civil magistrate.

A free republic will never keep a standing army to execute its laws. It must depend upon the support of its citizens. But when a government is to receive its support from the aid of the citizens, it must be so constructed as to have the confidence, respect, and affection of the people. Men who, upon the call of the magistrate, offer themselves to execute the laws, are influenced to do it either by affection to the government, or from fear; where a standing army is at hand to punish offenders, every man is actuated by the latter principle, and therefore, when the magistrate calls, will obey: but, where this is not the case, the government must rest for its support upon the confidence and respect which the people have for their government and laws. The body of the people being attached, the government will always be sufficient to support and execute its laws, and to operate upon the fears of any faction which may be opposed to it, not only to prevent an opposition to the execution of the laws themselves, but also to compel the most of them to aid the magistrate; but the people will not be likely to have such confidence in their rulers, in a republic so extensive as the United States, as necessary for these purposes. The confidence which the people have in their rulers, in a free republic, arises from their knowing them, from their being responsible to them for their conduct, and from the power they have of displacing them when they misbehave: but in a republic of the extent of this continent, the people in general would be acquainted with very few of their rulers: the people at large would know little of their proceedings, and it would be extremely difficult to change them. The people in Georgia and New-Hampshire would not know one another's mind, and therefore could not act in concert to enable them to affect a general change of representatives. The different parts of so extensive a country could not possibly be made acquainted with the conduct of their representatives, nor be informed of the reasons upon which measures were founded. The consequence will be, they will have no confidence in their legislature, suspect them of ambitious views, be jealous of every measure they adopt, and will not support the laws they pass. Hence the government will be nerveless and inefficient, and no way will be left to render it otherwise, but by establishing an armed force to execute the laws at the point of the bayonet—a government of all others the most to be dreaded.

In a republic of such vast extent as the United States, the legislature cannot attend to the various

concerns and wants of its different parts. It cannot be sufficiently numerous to be acquainted with the local condition and wants of the different districts, and if it could, it is impossible it should have sufficient time to attend to and provide for all the variety of cases of this nature, that would be continually arising.

In so extensive a republic, the great officers of government would soon become above the control of the people, and abuse their power to the purpose of aggrandizing themselves, and oppressing them. The trust committed to the executive offices, in a country of the extent of the United States, must be various and of magnitude. The command of all the troops and navy of the republic, the appointment of officers, the power of pardoning offenses, the collecting of all the public revenues, and the power of expending them, with a number of other powers, must be lodged and exercised in every state, in the hands of a few. When these are attended with great honor and emolument, as they always will be in large states, so as greatly to interest men to pursue them, and to be proper objects for ambitious and designing men, such men will be ever restless in their pursuit after them. They will use the power, when they have acquired it, to the purposes of gratifying their own interest and ambition, and it is scarcely possible, in a very large republic, to call them to account for their misconduct, or to prevent their abuse of power.

These are some of the reasons by which it appears, that a free republic cannot long subsist over a country of the great extent of these states. If then this new constitution is calculated to consolidate the thirteen states into one, as it evidently is, it ought not to be adopted.

Though I am of opinion, that it is a sufficient objection to this government, to reject it, that it creates the whole union into one government, under the form of a republic, yet if this objection was obviated, there are exceptions to it, which are so material and fundamental, that they ought to determine every man, who is a friend to the liberty and happiness of mankind, not to adopt it. I beg the candid and dispassionate attention of my countrymen while I state these objections—they are such as have obtruded themselves upon my mind upon a careful attention to the matter, and such as I sincerely believe are well founded. There are many objections, of small moment, of which I shall take no notice—perfection is not to be expected in any thing that is the production of man—and if I did not in my conscience believe that this scheme was defective in the fundamental principles—in the foundation upon which a free and equal government must rest—I would hold my peace.

1. Anonymous, "Essays of Brutus, I," October 18, 1787, in Herbert J. Storing, ed., *The Complete Anti-Federalist,* Vol. 2 (Chicago: University of Chicago Press, 1981), 363-72.

Friday, April 5, 2013 – Essay #35 – Essay I by Brutus – Guest Essayist: Justin Dyer, Ph.D., Author and Professor of Political Science, University of Missouri

Scholars generally attribute the authorship of the letters of Brutus to Robert Yates (1738-1801), a prominent New York politician and judge who was a delegate to the Philadelphia Convention in 1787. After voicing his opposition to the plan of the Convention, Yates returned home to New

York. During the state ratification debates, he then became an outspoken opponent of the proposed Constitution. In his polemical essays against the Constitution, Yates' chosen pen name was Brutus, and his objective was to slay Ceasar. Of the men writing against the Constitution in 1787 and 1788, Brutus was the most far-sighted and prescient. The late Herbert Storing, a scholar who was instrumental in collecting and editing many of the Anti-Federalists' writings, noted that Brutus "very accurately anticipated the breadth with which the Supreme Court would construe its own powers and those of the general legislature and the line of reasoning that would be used."

The new government, Brutus warned in his first essay, would consolidate power in the national government and render the states largely inconsequential. Although legislative power was limited to the objects listed in the Constitution, Brutus predicted that two provisions in the Constitution would unravel this scheme of limited powers. First, the Constitution grants Congress the power to "make all laws which shall be necessary and proper for carrying into execution" its enumerated powers. Second, the national Constitution and "laws of the United States" are the "supreme law of the land." The powers of the national government, Brutus asserted, would be vast and comprehensive, supreme over state laws, and limited only to what the government *itself* decides is necessary and proper for its own purposes.

Brutus thought that the only way for power to be consolidated over so a vast a territory (comprising the original 13 colonies and a total population 100 times smaller than the United States today) was for the government to maintain a standing army or national police force. "In so extensive a republic," Brutus insisted, "the great officers of government would soon become above the controul of the people, and abuse their power to the purpose of aggrandizing themselves, and oppressing them." The Constitution would, over time, create an unaccountable executive branch whose officers exercise power to satisfy their own interests; federal judges who interpret the Constitution broadly to empower the national government at the expense of the states; and a Congress that is unrestrained by the enumerated powers in Article I of the Constitution.

Although Brutus exaggerated the threat of national power and did not seem to appreciate the threat raised by powerful state and local governments, his letters are a challenge to us today precisely because he got so many things *right*. When Robert Yates' notes on the Philadelphia Convention were published in 1821, the editor began his preface by observing that the historians of kings have always paid particular attention to infant monarchs so to prognosticate "what they would be on the throne, by what they have been in the nursery." In the same way, the editor writes,

The historians of free nations ought not to be less attentive to collect whatever may throw light on the origin of their government, on the principles which have guided their legislators, and on the seeds of disease from which human prudence has never been able to guard entirely human institutions.

Under the pseudonym Brutus, Yates was among those early critics of the Constitution who identified some the seeds of disease "from which human prudence has never been able to guard entirely human institutions." It is for us today, as friends of the Constitution, to speak candidly

about what is good, what is bad, and what can be made better in our fundamental law. Pairing the *Federalist Papers* with some of the Constitution's most articulate critics is a necessary first step.

Justin Dyer teaches political science at the University of Missouri. He is the author, most recently, of Slavery, Abortion, and the Politics of Constitutional Meaning. *Follow him on Twitter: @JustinBDyer.*

Letters I and II by Federal Farmer

October 8, 1787

Letter I

Dear Sir:

…The present moment discovers a new face in our affairs. Our object has been all along, to reform our federal system, and to strengthen our governments —to establish peace, order and justice in the community—but a new object now presents. The plan of government now proposed is evidently calculated totally to change, in time, our condition as a people. Instead of being thirteen republics, under a federal head, it is clearly designed to make us one consolidated government. Of this, I think, I shall fully convince you, in my following letters on this subject. This consolidation of the states has been the object of several men in this country for some time past. Whether such a change can ever be affected in any manner; whether it can be affected without convulsions and civil wars; whether such a change will not totally destroy the liberties of this country—time only can determine….

In the first place, I shall premise, that the plan proposed is a plan of accommodation—and that it is in this way only, and by giving up a part of our opinions, that we can ever expect to obtain a government founded in freedom and compact. This circumstance candid men will always keep in view, in the discussion of this subject.

The plan proposed appears to be partly federal, but principally however, calculated ultimately to make the states one consolidated government.

The first interesting question, therefore suggested, is, how far the states can be consolidated into one entire government on free principles. In considering this question extensive objects are to be taken into view, and important changes in the forms of government to be carefully attended to in all their consequences. The happiness of the people at large must be the great object with every honest statesman, and he will direct every movement to this point. If we are so situated as a people, as not to be able to enjoy equal happiness and advantages under one government, the consolidation of the states cannot be admitted.

There are three different forms of free government under which the United States may exist as one nation; and now is, perhaps, the time to determine to which we will direct our views. 1.

Distinct republics connected under a federal head. In this case the respective state governments must be the principal guardians of the peoples' rights, and exclusively regulate their internal police; in them must rest the balance of government. The congress of the states, or federal head, must consist of delegates amenable to, and removeable by the respective states: This congress must have general directing powers; powers to require men and monies of the states; to make treaties, peace and war; to direct the operations of armies, etc. Under this federal modification of government, the powers of congress would be rather advisary or recommendatory than coercive. 2. We may do away the several state governments, and form or consolidate all the states into one entire government, with one executive, one judiciary, and one legislature, consisting of senators and representatives collected from all parts of the union: In this case there would be a complete consolidation of the states. 3. We may consolidate the states as to certain national objects, and leave them severally distinct independent republics, as to internal police generally. Let the general government consist of an executive, a judiciary, and balanced legislature, and its powers extend exclusively to all foreign concerns, causes arising on the seas to commerce, imports, armies, navies, Indian affairs, peace and war, and to a few internal concerns of the community; to the coin, post-offices, weights and measures, a general plan for the militia, to naturalization, *and, perhaps to bankruptcies,* leaving the internal police of the community, in other respects, exclusively to the state governments; as the administration of justice in all causes arising internally, the laying and collecting of internal taxes, and the forming of the militia according to a general plan prescribed. In this case there would be a complete consolidation, *quoad*certain objects only.

Touching the first, or federal plan, I do not think much can be said in its favor: The sovereignty of the nation, without coercive and efficient powers to collect the strength of it, cannot always be depended on to answer the purposes of government; and in a congress of representatives of sovereign states, there must necessarily be an unreasonable mixture of powers in the same hands.

As to the second, or complete consolidating plan, it deserves to be carefully considered at this time, by every American: If it be impracticable, it is a fatal error to model our governments, directing our views ultimately to it.

The third plan, or partial consolidation, is, in my opinion, the only one that can secure the freedom and happiness of this people. I once had some general ideas that the second plan was practicable, but from long attention, and the proceedings of the convention, I am fully satisfied, that this third plan is the only one we can with safety and propriety proceed upon. Making this the standard to point out, with candor and fairness, the parts of the new constitution which appear to be improper, is my object. The convention appears to have proposed the partial consolidation evidently with a view to collect all powers ultimately, in the United States into one entire government; and from its views in this respect, and from the tenacity of the small states to have an equal vote in the senate, probably originated the greatest defects in the proposed plan.

Independent of the opinions of many great authors, that a free elective government cannot be extended over large territories, a few reflections must evince, that one government and general legislation alone, never can extend equal benefits to all parts of the United States: Different laws, customs, and opinions exist in the different states, which by a uniform system of laws would be unreasonably invaded. The United States contain about a million of square miles, and in half a

century will, probably, contain ten millions of people; and from the center to the extremes is about 800 miles.

Before we do away the state governments, or adopt measures that will tend to abolish them, and to consolidate the states into one entire government, several principles should be considered and facts ascertained:—These, and my examination into the essential parts of the proposed plan, I shall pursue in my next.

Letter II

October 9, 1787

Dear Sir:

The essential parts of a free and good government are a full and equal representation of the people in the legislature, and the jury trial of the vicinage in the administration of justice—a full and equal representation, is that which possesses the same interests, feelings, opinions, and views the people themselves would were they all assembled—a fair representation, therefore, should be so regulated, that every order of men in the community, according to the common course of elections, can have a share in it—in order to allow professional men, merchants, traders, farmers, mechanics, etc. to bring a just proportion of their best informed men respectively into the legislature, the representation must be considerably numerous—We have about 200 state senators in the United States, and a less number than that of federal representatives cannot, clearly, be a full representation of this people, in the affairs of internal taxation and police, were there but one legislature for the whole union. The representation cannot be equal, or the situation of the people proper for one government only—if the extreme parts of the society cannot be represented as fully as the central—It is apparently impracticable that this should be the case in this extensive country—it would be impossible to collect a representation of the parts of the country five, six, and seven hundred miles from the seat of government….

Anonymous, "Letters from the Federal Farmer I, II," in Herbert J. Storing, ed., *The Complete Anti-Federalist,* Vol. 2 (Chicago: University of Chicago Press, 1981), 223, 226, 228-30.

Monday, April 8, 2013 – Essay #36 – Federal Farmer Letters: The Debate about the Size and Scope of the Federal Government is Not New – Guest Essayist: George Landrith, President, Frontiers of Freedom

Today, much of the national political debate centers on the size and scope of the federal government. Whether the discussion is focused on federal spending, the debt, or the merits and demerits of a nationalized healthcare system, at its core, the debate is about how much power the federal government should properly wield.

This is not a new debate. More than 225 years ago, when the Constitution was written, debated and ratified, how best to limit the power and growth of the federal government was central. The Founders knew that if federal government grew in power, the people's liberty would necessarily shrink.

As part of that debate, James Madison, John Jay and Alexander Hamilton wrote under the pseudonym Publius and published a series of letters now famously known as the Federalist papers. They argued in support of ratifying the Constitution as written.

Those who argued on the other side of this debate became known as Anti-Federalists. But they did not oppose the Constitution *per se*. They, like the Federalists, wanted a federal system of government as provided in the Constitution. But the Anti-Federalists argued that the Constitution needed *additional* protections to ensure that the federal government would not concentrate political power in its hands and effectively reduce the states to mere geographical subdivisions. One of the most articulate and persuasive voices for the Anti-Federalist view was the Federal Farmer, a pseudonym, it is believed for Virginia's Richard Henry Lee. The Federal Farmer wrote a series of letters arguing that America needed a federal form of government as contemplated in the Constitution but with greater, more effective limits on federal power. Otherwise, he argued the growth of the federal government would lead to the virtual annihilation of the states as sovereign political entities and the national government would consolidate power to itself.

The Anti-Federalists believed that as power was concentrated at the national level, government would become more distant from the people, less accountable to the people, and deleterious to their liberties. More specifically, the Anti-Federalists were concerned that future Congresses would abuse the "necessary and proper clause" of the Constitution to wield more and more power. They were also concerned that the executive branch held too much power. With the advantage of 225 years of history, it appears the Anti-Federalists had a good point.

Additionally, the Anti-Federalists wanted a Bill of Rights that would place further limits on federal power and enshrine such rights as free speech and press, freedom of religion, the right to bear arms, fair and speedy trials, and no unreasonable searches or seizures – to name only a few. The addition of the Bill of Rights to the Constitution was the Anti-Federalists greatest victory. George Mason, a prominent Anti-Federalist, is credited with drafting our Bill of Rights.

Both Federalists and Anti-Federalists agreed that they did not want an all-powerful federal government that would erode the liberties of the people. The point of debate between them was whether the Constitution, as originally drafted, sufficiently limited the powers of the federal government.

Today, more than 225 years later, it is difficult to argue that the Federal Farmer was wrong. The federal government has grown in size and claimed powers that none of the Founders would have believed possible.

The national government is now demanding that people set aside their deeply held religious beliefs and participate in a nationally mandated healthcare program that requires abortion and

contraception benefits – a practice that is religiously offensive to many. When this issue was raised to those in power, they derided the concept of religious liberty.

As the federal government ramps up its regulatory power to take over the nation's private healthcare system, it will eventually control what healthcare is available, and mandate to both states and the people how and where healthcare money will be spent. Most of the promises made to reduce opposition – you can keep your insurance and your doctor – are now proven to be false. The federal government has grabbed the power it sought and is now exercising it with little regard for the people's rights or consent.

The federal government now provides food stamps to 46.37 million Americans. According to a recent study by the Pew Research Center, 55% of Americans receive federal "entitlements." In the past five years, the federal government has used taxpayer dollars to bailout "too big to fail" banks, investment and brokerage firms, insurance companies, car manufactures, union retirement funds, etc. The federal government essentially runs the home mortgage market and clearly contributed to – if not caused – the housing bubble that triggered our recent economic troubles. The national government has became so large and intrusive that in one recent year it spent 25% of the nation's total economic output. That means the federal government was spending one dollar of every four spent anywhere in the U.S. – that is staggering.

One can always argue that some good is done by these programs and expenditures. But that, of course, ignores the good that would be done if the resources and liberty were left with the people, rather than taken from them.

The Federalists and to an even greater extent the Anti-Federalists feared precisely what has happened — an immense, unresponsive, unaccountable federal government that has a voracious appetite for the people's money and little regard for their liberties.

While the Anti-Federalist's greater concerns were justified, this author would argue that the primary reason the federal government has grown so large, become so distant and unresponsive, and at times become an adversary of the people's liberties, is because for more than 100 years there has been little regard for the limits on federal power provided under the Constitution. Were James Madison here today, I suspect he would pen additional Federalist papers arguing that it is wholly improper for the federal government to do much of what it does today. He would ask why Article I, Section 8 of the Constitution – which enumerates only eighteen specific and limited powers for Congress – is almost entirely ignored today. He would also ask why the Tenth Amendment – which provides that "the powers not delegated to the United States by the Constitution … are reserved to the states … or to the people" – is so thoroughly ignored by all three branches of government.

Simply stated, Madison would argue that the provisions in the Constitution that protect against such abuses have been systematically ignored. He would be correct. For example, when then-Speaker of the House Nancy Pelosi was asked from what provision in the Constitution Congress derived its authority to pass President Obama's healthcare bill, she treated the question with contempt and asked sarcastically, "Are you kidding?"

The Federal Farmer would support Madison's conclusions, but would also argue that the national government's growth and consolidation of power were sadly predictable and that greater limits on federal power should have been included from the start.

The value today of both the Federalist Papers and Federal Farmer Letters is that they both highlight the need to limit the power of government. Government will always, if left to its own devices, grow itself and amass power without regard for the liberties of the people. That is an axiomatic truth. The Founders knew this and debated how best to limit government power with vigor.

Remembering the Federal Farmer Letters, we would do well to renew this debate and again capture the spirit of the Founders — both the Federalists and Anti-Federalists — who wisely wanted a national government strong enough to protect the nation from threats, but small enough to ensure that the people's liberties would not be infringed and that the States would be vibrant and innovative laboratories for freedom.

George Landrith is the President of Frontiers of Freedom

Essay XI by Brutus

January 31, 1788

The nature and extent of the judicial power of the United States, proposed to be granted by this constitution, claims our particular attention. Much has been said and written upon the subject of this new system on both sides, but I have not met with any writer, who has discussed the judicialpowers with any degree of accuracy. And yet it is obvious, that we can form but very imperfect ideas of the manner in which this government will work, or the effect it will have in changing the internal police and mode of distributing justice at present subsisting in the respective states, without a thorough investigation of the powers of the judiciary and of the manner in which they will operate. This government is a complete system, not only for making, but for executing laws. And the courts of law, which will be constituted by it, are not only to decide upon the constitution and the laws made in pursuance of it, but by officers subordinate to them to execute all their decisions. The real effect of this system of government, will therefore be brought home to the feelings of the people, through the medium of the judicial power. It is, moreover, of great importance, to examine with care the nature and extent of the judicial power, because those who are to be vested with it, are to be placed in a situation altogether unprecedented in a free country. They are to be rendered totally independent, both of the people and the legislature, both with respect to their offices and salaries. No errors they may commit can be corrected by any power above them, if any such power there be, nor can they be removed from office for making ever so many erroneous adjudications.

The only causes for which they can be displaced, is, conviction of treason, bribery, and high crimes and misdemeanors.

This part of the plan is so modeled, as to authorize the courts, not only to carry into execution the powers expressly given, but where these are wanting or ambiguously expressed, to supply what is wanting by their own decisions.

That we may be enabled to form a just opinion on this subject, I shall, in considering it,

1st. Examine the nature and extent of the judicial powers—and

2nd. Inquire, whether the courts who are to exercise them, are so constituted as to afford reasonable ground of confidence, that they will exercise them for the general good….

In article 3rd, section 2nd, it is said, "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, etc."…

This article…vests the judicial with a power to resolve all questions that may arise on any case on the construction of the constitution, either in law or in equity.

1st. They are authorized to determine all questions that may arise upon the meaning of the constitution in law. This article vests the courts with authority to give the constitution a legal construction, or to explain it according to the rules laid down for construing a law.—These rules give a certain degree of latitude of explanation. According to this mode of construction, the courts are to give such meaning to the constitution as comports best with the common, and generally received acceptation of the words in which it is expressed, regarding their ordinary and popular use, rather than their grammatical propriety. Where words are dubious, they will be explained by the context….

2nd. The judicial are not only to decide questions arising upon the meaning of the constitution in law, but also in equity.

By this they are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter….

From these remarks, the authority and business of the courts of law, under this clause, may be understood.

They will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or control their adjudications. From this court there is no appeal. And I conceive the legislature themselves, cannot set aside a judgment of this court, because they are authorized by the constitution to decide in the last resort. The legislature must be controlled by the constitution, and not the constitution by them. They have therefore no more right to set aside any judgment pronounced upon the construction of the constitution, than they have to take from the president,

the chief command of the army and navy, and commit it to some other person. The reason is plain; the judicial and executive derive their authority from the same source, that the legislature do theirs; and therefore in all cases, where the constitution does not make the one responsible to, or controllable by the other, they are altogether independent of each other.

The judicial power will operate to affect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution:—I mean, an entire subversion of the legislative, executive and judicial powers of the individual states. Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of the state jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted.

That the judicial power of the United States, will lean strongly in favor of the general government, and will give such an explanation to the constitution, as will favor an extension of its jurisdiction, is very evident from a variety of considerations.

1st. The constitution itself strongly countenances such a mode of construction. Most of the articles in this system, which convey powers of any considerable importance, are conceived in general and indefinite terms, which are either equivocal, ambiguous, or which require long definitions to unfold the extent of their meaning. The two most important powers committed to any government, those of raising money, and of raising and keeping up troops, have already been considered, and shown to be unlimited by any thing but the discretion of the legislature. The clause which vests the power to pass all laws which are proper and necessary, to carry the powers given into execution, it has been shown, leaves the legislature at liberty, to do every thing, which in their judgment is best. It is said, I know, that this clause confers no power on the legislature, which they would not have had without it—though I believe this is not the fact, yet, admitting it to be, it implies that the constitution is not to receive an explanation strictly, according to its letter; but more power is implied than is expressed. And this clause, if it is to be considered, as explanatory of the extent of the powers given, rather than giving a new power, is to be understood as declaring, that in construing any of the articles conveying power, the spirit, intent and design of the clause, should be attended to, as well as the words in their common acceptation.

This constitution gives sufficient color for adopting an equitable construction, if we consider the great end and design it professedly has in view—these appear from its preamble to be, “to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and posterity.” The design of this system is here expressed, and it is proper to give such a meaning to the various parts, as will best promote the accomplishment of the end; this idea suggests itself naturally upon reading the preamble, and will countenance the court in giving the several articles such a sense, as will the most effectually promote the ends the constitution had in view—how this manner of explaining the constitution will operate in practice, shall be the subject of future inquiry.

2nd. Not only will the constitution justify the courts in inclining to this mode of explaining it, but they will be interested in using this latitude of interpretation. Every body of men invested with

office are tenacious of power; they feel interested, and hence it has become a kind of maxim, to hand down their offices, with all its rights and privileges, unimpaired to their successors; the same principle will influence them to extend their power, and increase their rights; this of itself will operate strongly upon the courts to give such a meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own authority. Every extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the courts; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise. I add, it is highly probable the emolument of the judges will be increased, with the increase of the business they will have to transact and its importance. From these considerations the judges will be interested to extend the powers of the courts, and to construe the constitution as much as possible, in such a way as to favor it; and that they will do it, appears probable.

3rd. Because they will have precedent to plead, to justify them in it. It is well known, that the courts in England, have by their own authority, extended their jurisdiction far beyond the limits set them in their original institution, and by the laws of the land….

When the courts will have a precedent before them of a court which extended its jurisdiction in opposition to an act of the legislature, is it not to be expected that they will extend theirs, especially when there is nothing in the constitution expressly against it? and they are authorized to construe its meaning, and are not under any control?

This power in the judicial, will enable them to mold the government, into almost any shape they please….

1. Anonymous, "Essays, of Brutus, XI," January 31, 1788, in Herbert J. Storing, ed., *The Complete Anti-Federalist,* Vol. 2 (Chicago: University of Chicago Press, 1981), 417-22.

Tuesday, April 9, 2013 – Essay #37 – Essay XI by Brutus – Guest Essayist: Mr. Robert Frank Pence, Founder, the Pence Group

He was crying from all six of his eyes. Tears gushed together with a bloody froth. Within each mouth, with gnashing teeth, he tore to bits a sinner so that he brought much pain to three at once. The first was Judas Iscariot; the second is Brutus; and the other is Cassius.

In the Ninth Circle of Dante's Hell are punished traitors against their lords. Judas, the principal offender against religious/ecclesiastic law, is being chewed by Lucifer for having betrayed Christ. Cassius and Brutus are ground down by Lucifer for having murdered their temporal lord, Julius Caesar (who, by the way, merits only a passing mention in *Inferno* 4 wherein he reposes with other virtuous pagans).

It ought to strike us as strange that the leader of the Roman Empire will remain forever in Limbo while several other pagans were placed by Dante in purgatory or paradise. Cassius and Brutus are not excused by Dante for having killed the tyrant who subjugated all of Rome, including the senate and all means of civil governance. In Caesar we have one of history's greatest examples of a tyranny wherein are unified all executive, legislative, and judicial powers. Dante was not afraid to put six popes and a number of imperial rulers in hell. He clearly understood the necessity of separating civil and religious powers. While Dante advocated a world emperor, he would brook no imperial crushing of religion.

Robert Yates, a/k/a the *Brutus* of Essay XI, decided to date his essay January 31, 1788. The date has a certain prescience attached to it. Thirteen years later, on January 31, 1801, John Marshall would be appointed as the Chief Justice of the Supreme Court of the United States of America. January 31st also marks the anniversary of another event that would have still been resonating in the minds of American colonists, including our Brutus. In 1606 Guy Fawkes was executed on January 31st for plotting against the English parliament and King James. Yates' choice of *Brutus* as his *nome de plume* evokes deep emotions in Western culture.

Yates was born in Schenectady, New York in 1738 and died in 1801 in Albany. He was an attorney, politician, and surveyor. He was one of New York's representatives at the Philadelphia convention to revise the Articles of Confederation. Yates was particularly interested in representation in the legislature. Alas, the convention intended much more than merely tightening the Articles. He warned against the dangers of centralized power and opposed the adoption of the Constitution. In 1777 he became a justice of the New York State Supreme Court and, in 1790, the Chief Justice. He ran for Governor of New York twice and lost.

The name *Brutus* congers up other images that would not have been lost on Robert Yates and his readers. The first is drawn from Shakespeare whose memorable line, "Et tu, Brute!" (*Julius Caesar* 3.1.77), punctuates the wrath that Caesar directs at one of the men who had just put a blade in him. The second example is drawn from one of Cicero's rhetorical treatises, *Brutus*.[1] It was written c. 46 BC, about two years before Caesar's murder on March 15, 44 BC.

Cicero's Marcus Junius Brutus was born circa 85 BC and took his own life after the defeat at Philippi in 42 BC. Cicero's Brutus wishes to hear of others still living while Cicero usually declines to write about living persons. Yates, in choosing to write as 'Brutus,' intends to deal with contemporary citizens and institutions. Cicero writes of great men who were unappreciated by an ungrateful population (*Brutus*, x, 41).

"Who, for example, can suppose that Lucius Brutus, the founder of your noble family, was lacking in ready wit, who interpreted so acutely and shrewdly the oracle of Apollo about kissing his mother; show concealed under the guise of stupidity great wisdom; who drove from the state a powerful king, son of a famous king, and freeing it from the domination of an absolute ruler affixed its constitution by establishing annual magistrates, laws, and courts; who abrogated the authority of his colleague so that the very memory of the regal name might be obliterated?" (*Brutus*, xiv, 53).

Thus, the name *Brutus* is further defined and refined by *another* Brutus who helped dethrone a king and preserved a constitution of "magistrates, laws, and courts."

Alfred Kelly and Winfred Harbison wrote that the judiciary had no more claim to the final right of constitutional interpretation than the President or Congress. They criticized the Progressives' distain of 5-4 decisions as particularly obnoxious. The Progressives viewed judicial review as undemocratic in that a few men, removed from popular control, could formulate the law of the land (that is, in their minds, constitutional questions should be based in part on evolving social needs).[2]

Who best, then, shall determine what the law is as it shifts on the sands of time?

The constitutionality of the Alien and Sedition Acts provoked just such a great controversy concerning the reach and power of the Supreme Court. In resolutions drafted by Thomas Jefferson for the Kentucky Legislature and James Madison for Virginia, they argued "the case for states' rights, or, more properly, the primacy of state sovereignty and a limited national government."[3] They argued against the granting of quasi-judicial powers to the executive branch. Stoutly opposed by the Anti-Federalists, "Even some Federalists joined the opposition. Speaking out against the Sedition Law, Hamilton warned 'Let us not establish a tyranny,' and John Marshall broke party discipline to cast the deciding vote against the law's extension" (Kittrie, 89). In short, the executive branch did not have the power to deprive a person of liberty or the right to trial.[4]

In a speech delivered on February 15, 1913 at the Harvard Law School Association of New York, Justice Oliver Wendell Holmes, Jr. observed that "Vanity is the most philosophical of those feelings that we are taught to despise. For vanity recognizes that if a man is in the minority of one we lock him up, and therefore longs for an assurance from others that one's work has not been in vain. . . .But let me turn to more palpable realities . . . . but in these days no one can complain if any institution, system, or belief is called on to justify its continuance in life. Of course we are not excepted and have not escaped. Doubts are expressed that go to our very being. Not only are we told that when Marshall pronounced an Act of Congress unconstitutional he usurped a power that the Constitution did not give, but we are told that we are the representatives of a class — a tool of the money power. . . .The attacks upon the Court are merely an expression of the unrest that seems to wander vaguely whether law and order pay."[5]

Justin Butterfield (Essay #24) repeated George Washington's warning that the Constitution might be ignored or re-interpreted (but not 'directly overthrown') and, thus, "sidestepped against the will of the people. . . ." I would add that it would be an equally egregious violation of the Constitution to make an end-run around the Constitution even in support of the (*current*) popular will of the people, even as transitory as it might be. The judiciary **must**, if it is to be true to its constitutional mandate, judge the law, and not make new ones, or shade, because of popular support for, or railing against, a perceived change in condition which, somehow, ought to be given legal sanction. The Constitution must be enforced as written or amended in the manner it allowed. If America wants to govern by plebiscite, we can do away with all the laws, the government, and the judiciary. Then we can enjoy the chaos. But chaos will trample liberty. The judiciary is designed to be the final safeguard of our liberties and, in doing so, it will safeguard

its prerogatives and duties as set forth in the Constitution. Cato of Utica went in search of liberty and decided to kill himself with honor rather than submit to the rising tyranny of Caesar. Brutus sought to end Caesar's tyranny in the only way he knew how. [6]

The Constitution, as wisely amended, put impediments in the way of those who sought lifelong appointments in the Executive and Legislative Branches; as to the former, elections and term limits on the presidency; as to the later, the requirement for continuous elections which reserve to the people the right to change leaders. This is not so with respect to members of the judiciary who, vested with lifetime appointments except for impeachable offenses, represent an *attempt* to shield judges from the power of the Executive and the Legislative Branches, and, of increasing importance today, from public pressure.

Brutus' fear is that "the judicial power will operate to affect, in the most certain, but yet silent and imperceptible manner what is evidently the tendency of the constitution – I mean, an entire subversion of the legislative, executive, and judicial powers of the individual states" (*Essay XI*, 375-376). His fear, of course, is nothing less than his inability to decide who should have the last say on what the Constitution means.

At the end of the day, that is why the President must nominate justices wisely and why the Senate must exercise great wisdom, discretion, and unrelenting diligence in rendering its approval of, and not just its deference to, the President's nominee.

Robert Frank Pence
Yale University

Robert Frank Pence is founder of the Pence Group, a developer of shopping centers, hotels and the Dulles Expo Center. His civic interests include staging concerts for the troops, as well as serving on the board of educational and cultural institutions including The Kennedy Center, Wolf Trap, George Mason University, and American University. Mr. Pence is expected to receive his Ph.D. in Italian from Yale University this year. His dissertation is entitled, "Dante Alighieri's Literary Debt to Marcus Tullius Cicero."

Mr. Pence's wife Suzy serves on the National Advisory Board of Constituting America. The Pences are generous contributors to Constituting America, and their support has helped make our 90 Day Study of the Classics That Inspired the Constitution possible. We thank you, Mr. Pence!

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[1] Marcus Tullius Cicero. *Brutus*; *Orator*. Trans. G.L. Hendrickson and H.M. Hubbell, respectively. Cambridge, Mass.: Harvard UP, 2001.

[2] Alfred H. Kelly & Winfred A. Harbison. *The American Constitution Its Origins and Development.* Third Edition. New York: W. W. Norton & Company, Inc., 1963. 628-630.

[3] *The Tree of Liberty: a Documentary History of Rebellion and Political Crime in America*. Ed. Nicholas N. Kittrie and Eldon D. Wedlock, Jr. Baltimore and London: Johns Hopkins UP, 1986. 89.

[4] Subsequent administrations have tried, with varying degrees of success, in precluding civil trials. This has often occurred in war and/or in respect of military operations (i.e., during the presidencies of Lincoln and F.D.R. to name but two), cases involving Indian nations and treaties with them, and, most recently and most ridiculously, with warrants issued pursuant to the Patriot Act. Judicial review is at its best when it acts to bar the exercise of *judicial* power by the executive and legislative branches.

[5] Oliver Wendell Holmes, Jr. *The Common Law & Other Writings*. Birmingham Ala.: The Legal Classics Library, 1982. 89-99.

[6] Hence, the phrase, "*Sic semper tyrannis*." The full quotation is, "*Sic semper evello mortem Tyrannis"* (literally: "Thus always I eradicate tyrants' lives"). It is a rallying cry against abuses of power. It is the official motto of the Commonwealth of Virginia and the City of Allentown, Pennsylvania. John Wilkes Booth wrote in his diary that he shouted the phrase after shooting President Abraham Lincoln on April 14, 1865, in part because of the association with the assassination of Caesar. Timothy McVeigh was wearing a T-shirt with this phrase and a picture of Lincoln on it when he was arrested for the Oklahoma City bombing. The phrase is also the motto of the United States Navy attack submarine named for the state, the *USS Virginia* (SSN-774) and the nuclear-powered cruiser *USS Virginia*.

Draft of the Declaration of Independence by Thomas Jefferson

1776

…He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither. This piratical warfare, the opprobrium of *infidel* powers, is the warfare of the Christian king of Great Britain. Determined to keep open a market where men should be bought and sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce: and that this assemblage of horrors might want no fact of distinguished die, he is now exciting those very people to rise in arms among us, and to purchase that liberty of which *he* has deprived them, by murdering the people upon whom *he* also obtruded them; thus paying off former crimes committed against the *liberties* o fone people, with crimes which he urges them to commit against the *lives* of another….

6. Thomas Jefferson, "Original Rough Draught," in Julian P. Boyd, ed., *The Papers of Thomas Jefferson,* Vol. 1 (Princeton, NJ: Princeton University Press, 1950-1992), 426.

Wednesday, April 10, 2013 – Essay #38 – Draft of the Declaration of Independence by Thomas Jefferson – Guest Essayist: Brian J. Pawlowski, former Claremont Institute Lincoln Fellow

Each year millions of Americans walk through the Charters of Freedom at the National Archives building in Washington D.C. The Archives house our nation's founding documents – the Declaration of Independence, Constitution, and Bill of Rights. The combination of architectural beauty, august ambiance, and history is incredibly powerful. There is something, however, that is not housed in the Charters of Freedom, something most Americans know nothing about: a deleted portion of the Declaration of Independence. This part constituted the lengthiest section of Thomas Jefferson's draft, was the most controversial, and was arguably the most vicious charge against the King of Great Britain. The passage was about slavery. Jefferson wrote: *"He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating & carrying them into slavery in another hemisphere or to incur miserable death in their transportation thither. This piratical warfare, the opprobrium of infidel powers, is the warfare of the Christian King of Great Britain. Determined to keep open a market where Men should be bought & sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or restrain this execrable commerce. And that this assemblage of horrors might want no fact of distinguished die, he is now exciting those very people to rise in arms among us, and to purchase that liberty of which he has deprived them, by murdering the people on whom he has obtruded them: thus paying off former crimes committed again the Liberties of one people, with crimes which he urges them to commit against the lives of another."* These words assign blame for the introduction of American slavery and the perpetuation of the slave trade to the King of Great Britain. Some scholars have argued that this charge was dubious at best and suggest that is why it was ultimately deleted. Of course, Americans were not without blame and were complicit in the tragedy of slavery, but there were attempts to end the trade in the colonies. Great Britain blocked all such attempts lending credibility to Jefferson's charge. Furthermore, the political history of the time suggests the founders and other politically interested parties continually made the charge a centerpiece of their argument in favor of ending the slave trade. Early abolitionists as well as Whigs had long sought abolition and indicted slavery in moral terms similar to Jefferson's. They utilized natural rights to emphasize the negatives of slavery and its inconsistency with Christian values. For these reasons the notion that the charge was simply too obtuse to be sustained does not fully explain its deletion. More important than the obvious charge and more central to its deletion is how much further Jefferson's passage took the argument. Waging "cruel war against human nature itself" and "violating its most sacred rights of life and liberty" go far beyond assigning blame. Far from being solely aimed at the King, Jefferson's passage implicitly denounced slavery itself. This was far more objectionable to the southern colonies and those in the north with economic interests in the trade. Jefferson eventually blamed South Carolina and Georgia as well as "our Northern brethren" who "also felt a little tender" due to their longstanding subsistence of the slave trade. South Carolina and Georgia imported the majority of slaves while northern ship makers supplied the means to transport them. Blaming the King was one thing, charging that slavery was a moral wrong and perpetual evil was quite another. Whereas arguments against the King would simply add another charge to the list of reasons for revolution arguments against slavery as such would mean absolute change in culture and economic realities for the South as well as portions of the North. Jefferson no doubt had all

this history in mind when he wrote the opening phrase of the Declaration. There was no more poignant contrast between the promise of American liberty where "all men are created equal" and the "assemblage of horrors" that was slavery. To support the latter would be to implicitly reject the former. For this reason the passage was deleted. The bottom line is that without deletion of the slavery clause there very likely would have been no revolution, no independence, no United States of America. The cracking of the colonial alliance would have instantly undermined the unity of effort necessary to the American cause. Jefferson and the Founders accepted the stain of slavery for the perpetuation of the union. Arguably, Jefferson saw this as the quintessential necessary evil. But the founders saw America, the American idea, as a project. In Jefferson's famous letter to Roger Weightman he wrote that "all eyes are opened or opening to the rights of man" and the "palpable truth that 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" clearly articulating that the truth of the declaration hadn't yet been fully realized. Later, Abraham Lincoln, in a letter written roughly one year before he would fight a Civil War to uphold the union Jefferson had created wrote "All honor to Jefferson – to the man who, in the concrete pressure of a struggle for national independence by a single people, had the coolness, forecast, and capacity to introduce into a merely revolutionary document, an abstract truth, applicable to all and all times, and so to embalm it there, that today, and in all coming days, it shall be a rebuke and a stumbling block to the very harbingers of re-appearing tyranny and oppression". The deleted portion of the Declaration was an early attempt to uphold that abstract truth but for the sake of union was forsaken.

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The Northwest Ordinance by Congress of the Confederation

July 13, 1787

Article VI

…There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: *Provided always,* That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid….

Thursday, April 11, 2013 – Essay #39 – The Northwest Ordinance – Guest Essayist: Kyle Scott, Professor of Constitutional Law, University of Houston

The Northwest Ordinance—adopted in 1787 by the Congress of the Confederation and passed again by Congress in 1789 after the ratification of the U.S. Constitution to govern the Northwest

Territories which included modern day Ohio, Indiana, Illinois, Michigan, and Wisconsin—is undeniably an ordinance that inherits and extends the common law tradition. This means property rights take center stage and due process of law is established as a means of protecting property rights and the rights constituent to property such as life and liberty.

Private property is man's liberty manifested on the natural world. Thus, property is an instrumental and an intrinsic right. It is instrumental—which is the common law's focus—because the right to own private property creates a buffer between an individual and other individuals and an individual and the government. Property rights, properly protected, guarantee that what one labors for remains in the possession of the one who labored and thus earned the property. Protection of private property is essential to the protection of liberty as understood in the common law tradition beginning with Magna Carta.

Understood in this light we should not be surprised that the first substantive section of the Northwest Ordinance deals with inheritance. This section makes sure that even when one passes from the temporal world that the fruit of their labors remain with their posterity as they have more of a right to it than anyone else since once property becomes private it can no longer be returned to the commons without the consent of the owner.

Merely asserting a right and codifying it in a constitution or ordinance is not enough to protect that right. The protection of rights requires that the government is restrained from acting tyrannically which requires a republican form of government as well as one that separates the powers of legislating, executing, and judging into separate branches. The Northwest Ordinance provides for a republican form of government with a separation of powers thus continuing the intellectual heritage of governing documents that would lead to the U.S. Constitution.

But even the correct institutional design isn't enough which is why the Northwest Ordinance makes clear that the laws passed by the governments of the Northwest Territory will be valid only to the extent that they protect liberty. "And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected."

This guiding principle is then implemented by the system of government established in the articles that follow this proclamation. But in case the governing bodies have any question, or if the people have any question, about what laws constitute good laws the Northwest Ordinance provides some guidance by stipulating common law provisions that were also adopted in the U.S. Constitution and the Bill of Rights.

Read the following passage from the Northwest Ordinance and look for the similarities between it and the U.S. Bill of Rights, particularly the 4th and 5th Amendments.

"The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus,* and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishment shall be inflicted. No man

shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be paid for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide,* and without fraud previously formed."

The familiar strands that run from common law to the U.S. Constitution should give confidence to U.S. citizens that we are the inheritors of a government and values that are not the product of radical revolution or reactionary politics but of long-tested and persistent truths established through practice, tradition, and right reason. To protect what we have been given we must not rely just on institutions and laws but must cultivate the character that is required to appreciate and protect what we have been given. To do this we should reflect on one more passage from the Northwest Ordinance. "Religion, morality, and knowledge being necessary to good government and the happiness of mankind…"

Kyle Scott teaches political science and constitutional law at the University of Houston and has just published his fourth book, The Federalist Papers: A Reader's Guide. In addition to his academic writing Kyle's work has appeared in The Washington Times, Christian Science Monitor, Houston Chronicle, Huffington Post, and Foxnews.com. Kyle is also a member of Constituting America's College Level Advisory Board and has contributed to the Constitution in 90 Days and the Federalist Papers in 90 Days.

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George Washington, John Adams, Benjamin Franklin, Alexander Hamilton, and James Madison on Slavery

George Washington
Letter to Robert Morris 1
April 12, 1786

"…[T]here is not a man living who wishes more sincerely than I do, to see a plan adopted for the abolition of it…."

John Adams
Letter to Robert J. Evans 2
June 8, 1819

"…Every measure of prudence, therefore, ought to be assumed for the eventual total extirpation

of slavery from the United States…. I have, through my whole life, held the practice of slavery in…abhorrence….”

Benjamin Franklin
An Address to the Public from the Pennsylvania Society 3
November 9, 1789

“…Slavery is such an atrocious debasement of human nature, that its very extirpation, if not performed with solicitous care, may sometimes open a source of serious evils….”

Alexander Hamilton
Philo Camillus no. 2 4
August 1795

“…The laws of certain states which give an ownership in the service of negroes as personal property, constitute a similitude between them and other articles of personal property, and thereby subject them to the right of capture by war. But being men, by the laws of God and nature, they were capable of acquiring liberty—and when the captor in war, to whom by the capture the ownership was transferred, thought fit to give them liberty, the gift was not only valid, but irrevocable….”

James Madison
Speech at the Constitutional Convention 5
June 6, 1787

“…We have seen the mere distinction of color made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man….”

1. George Washington, “To Robert Morris,” April 12, 1786, in W. W. Abbot et al., eds., *The Papers of George Washington, 1748-1799,* “Confederation Series,” Vol. 4 (Charlottesville, VA: University of Virginia Press, 1976-present), 16.
2. John Adams, “To Robert J. Evans,” June 8, 1819, in Adrienne Koch et al., eds., *Selected Writings of John and John Quincy Adams* (New York: Knopf, 1946), 209–10.
3. Benjamin Franklin, “An Address to the Public from the Pennsylvania Society for Promoting the Abolition of Slavery, and the Relief of Free Negroes Unlawfully Held in Bondage,” November 9, 1789, in John Bigelow, ed., *The Works of Benjamin Franklin,* Vol. 12 (New York: G. P. Putnam’s Sons, 1904), 157–58.
4. Alexander Hamilton, “Philo Camillus no. 2,” August 1795, in Harold C. Syrett, ed., *The Papers of Alexander Hamilton,* Vol. 19 (New York: Columbia University Press, 1961–

present), 101–2.

5. James Madison, "Speech at the Constitutional Convention," June 6, 1787, in Max Farrand, ed., *Records of the Federal Convention of 1787,* Vol. 1 (New Haven, CT: Yale University Press, 1937), 135.

Friday, April 12, 2013 – Essay #40 – George Washington, John Adams, Benjamin Franklin, Alexander Hamilton, and James Madison on Slavery – Guest Essayist: Julie Silverbrook, Executive Director of The Constitutional Sources Project

George Washington, John Adams, Benjamin Franklin, Alexander Hamilton and James Madison on Slavery

Historian William Freehling has famously said, "[i[f men were evaluated in terms of dreams rather than deeds everyone would concede the antislavery credentials of the Founding Fathers."[i] While the Founding generation unquestionably aspired to create a nation founded on universal freedom, the challenges of creating a nation, maintaining a profitable economy – both personally and nationally, and overcoming personal prejudices made that dream a distant reality.

The overriding interest in 1787 was the creation of a stable and unified American Republic. In order to ensure that Georgia, South Carolina, and other southern states agreed to the 1787 Federal Constitution, the text provided explicit safeguards for the institution of slavery – including the three-fifths clause, fugitive slave clause, and the slave trade clause. These clauses, seen as essential compromises in 1787, would later cause abolitionist Frederick Douglass to remark that the Constitution was "thus marked with blood, and stained with pollution[.]"[ii]

George Washington: The Only Unavoidable Subject of Regret

*"The unfortunate condition of the persons, whose labour in part I employed, has been the only unavoidable subject of regret. To make the Adults among them as easy and as comfortable in their circumstances as their actual state of ignorance and improvidence would admit; and to lay the foundation to prepare the rising generation for a destiny different from that in which they were born; afforded some satisfaction to my mind, and could not I hoped be displeasing to the justice of the Creator." – George Washington**[iii]***

Douglass was not alone in his dismay over the slavery clauses in the Constitution. George Washington would later lament that his participation in the maintenance of the institution of slavery was his "only unavoidable subject of regret." Despite these later feelings of remorse, slavery was always an intricate part of Washington's life. Like other Virginia planters, he lived with and off of the labor of slaves. For Washington, particularly in his earlier years, slave ownership was almost certainly viewed as a commercial enterprise. Washington became a slave owner at age 11 when he inherited 10 or 11 slaves as a result of his father's untimely death.[iv] At the time of his own death in 1799, there were approximately 316 slaves working on Washington's estate at Mount Vernon.

Although a slave-owner, Washington did have a reputation as a comparatively kind and humane master.[v] Indeed, Washington frequently referred to his slaves as part of his family; as human beings rather than mere property, Washington also expressed concern about slave families and so began recognizing the validity of slave marriages and other personal relationships. Washington also disliked the practice of splitting up slaves who had established personal and familial ties, and did what he could to keep his slaves together.[vi]

Heavily influenced by the rhetoric of the American Revolution, George Washington became increasingly critical of the institution of slavery. While his growing opposition to slavery was genuine, almost all of his anti-slavery remarks were expressed in private correspondences or conversations.[vii] Washington never took a public stance against slavery or called for its end.[viii]

Although we cannot know for sure, it seems that Washington's reticence to take a public stance on the eradication of chattel slavery was based on his overarching desire to create and maintain a united American republic. He feared that an early attack on the institution would destroy the nation before it could be properly and fully established.[ix]

Despite a lack of contemporary public remarks on the subject, Washington did leave a powerful parting note for posterity. In his last will and testament, he freed all of his personal slaves. By law, he could not free those slaves belonging to his wife and her family's estate. Ultimately, Martha Washington did free the Custis slaves prior to her death – although not for purely altruistic reasons. Her husband, however, showed great courage and kindness in his final statement on slavery – providing not only for the emancipation of his personal slaves but also for their education, clothing, and daily food provisions.[x]

John Adams: A Massachusetts Man who Never Owned a Slave

Unlike the President he served under, slavery never figured prominently into the greater part of John Adams's life. John and Abigail never used slaves in their household or on their farm. John would later recall with great pride that he resisted the temptation of slave labor, even when most of New England society accepted the practice.[xi]

Because slavery was not a major part of Adams's daily life, it would not be until 1819, when the slavery issue erupted as a result of Missouri's application for admission to the union, that Adams would begin to significantly question the issue of chattel slavery. During this time, Adams began corresponding with family and friends about the perils of the institution.[xii]

In particular, Adams feared that slavery would disrupt the unity of the country by exacerbating long-standing sectional divisions. He warned that America's enemies, including the recently defeated British, would attempt to exploit these divisions by encouraging slave revolts. Adams predicted that a widespread insurrection of black slaves against white slave-owners would not only threaten the union but would also tempt slave-owners to seek the extermination of slaves.[xiii] Either catastrophic scenario was unpalatable to Adams – both practically and morally.

Although to Adams these apprehensions were as real as his desire for the "eventual extirpation" of slavery, our nation's second president favored no precipitate action. Adams advocated for a slow and careful emancipation – one that allowed for due regard of the effects on southern slaveholders. While Adams acted cautiously in the realm of emancipation, he allowed for no equivocation on his stance against slavery's expansion. He stood firmly against the admission of slavery into Missouri and the other western territories.[xiv]

Adams concerns over slavery and its expansion would ultimately impact the views of his son John Quincy Adams, who would later become one of the most eloquent and powerful voices of the abolition movement.

Benjamin Franklin: From Slave Owner to Abolitionist

Like his colleague John Adams, Benjamin Franklin was less concerned with slavery than were his southern counterparts. In 1750, the slave population of Pennsylvania was a mere 8 percent, compared to 60 percent in a state like South Carolina.[xv] Unlike Adams, however, Franklin did, in fact, participate in the slave trade. Franklin sold slaves for other owners and bought them from time to time as an investment. Franklin also kept slaves for domestic use.[xvi]

Franklin first indicated anti-slavery sentiment in 1751 in his essay *Observations Concerning the Increase of Mankind*. Here, slavery was first attacked from an economic standpoint: "Reckon then the Interest of the first Purchase of a Slave, ... Expences in his sickness and Loss of Time, ... Expence of a Driver to keep him at Work, and his Pilfering from Time to Time, almost every Slave being *by Nature* a Thief, and . . . you will see that Labour is much cheaper there [in England] than it ever can be by Negroes here."[xvii] Franklin also objected to slavery on the ground that "[s]laves also pejorate the Families that use them; the white Children become proud, disgusted with labour, and being educated in Idleness, are rendered unfit to get a Living by Industry."[xviii]

While Franklin's views counseled against the use of slave labor, his observations were not based on the notion of universal freedom or even on humanitarian concerns for slaves. Indeed, like most of his contemporaries, Franklin viewed black slaves as racially inferior. In his economic argument against slavery, he stated that slaves were "by nature" thieves. He also wrote, "Why should we in the sight of Superior Beings, darken its People? Why increase the Sons of Africa. . . .?"[xix]

Franklin's views on slavery and racial inferiority began to change, however, as he continued to interact with abolitionists and humanitarians in Pennsylvania and London. Some of his most influential interactions were with those who participated in Britain's most respected philanthropic society, the Associates of Dr. Bray. Bray's Associates hoped to inculcate Christian behavior in slaves through formal education. In promoting the mission of Bray's Associates, Franklin helped establish separate schools for blacks in the colonies. Through his association in this philanthropic effort, Franklin grew to respect the black individuals he interacted with and began to contribute to improving their welfare.[xx]

Writing to John Waring in 1758, Franklin remarked that he "was on the whole much pleas'd and from what I then saw, have conceiv'd a higher Opinion of the natural Capacities of the black Race than I had ever before entertained."[xxi]

Franklin's new views were expressed in several of his writings. In the 1796 edition of his *Observations Concerning the Increase of Mankind*, the last paragraph, quoted above, which clearly stated Franklin's racial preference, was omitted in its entirety. He also revised his original statement that every slave is a thief "by Nature," instead suggesting that slaves are made thieves "from the nature of [the institution] of slavery."[xxii]

As Franklin aged, he became more involved in the abolition movement, eventually becoming the president of the Pennsylvania Abolition Society. In the last years of his life, he published a number of anti-slavery documents, including *A Plan for Improving the Condition of the Free Blacks*, and a memorial to Congress entreating it to abolish the slave trade.[xxiii] At the time of his death, Franklin had come a long way since his slave trading and holding days. Like many Americans, his view on the institution of slavery evolved as he spent more time exploring the philosophical underpinnings of liberty and interacting with black persons in America.

Alexander Hamilton: A Man for Manumission

Unlike Benjamin Franklin, whose views on slavery evolved over time, Alexander Hamilton was a strong and early opponent of slavery – although, he devoted most of his energy to the immediate task of nation-building. Hamilton was a founding member of the New York Manumission Society, an organization founded to promote the abolition of slavery. The Society's founding charter contained broad statements of universal freedom and humanitarian principles. The preamble, for instance, stated:

"The benevolent Creator and Father of Men having given to them all, an equal Right to Life, Liberty, and Property; no Sovereign Power, on Earth, can justly deprive them of either; but in Conformity to impartial Government and laws to which they have expressly or tacitly consented."[xxiv]

The charter later went on to say:

"It is our Duty, therefore, both as free citizens and Christians, not only to regard, with compassion and Injustice done to those, among us, who are held as Slaves, but to endeavor by lawful ways and means, to enable them to Share, equally with us, in that civil and religious Liberty with which an indulgent Providence has blessed these States. . . ."[xxv]

Hamilton, with his tremendous intellectual talent, became a natural leader in the organization, chairing important committees, including one tasked with making recommendations for the Society's code of conduct. Hamilton and his committee proposed that members undertake a gradual emancipation of their personal slaves – freeing their oldest slaves immediately and their youngest ones by the age of 35. The proposal did not pass, but in 1809, the society denied membership to anyone owning slaves.[xxvi]

Hamilton remained an active member of the Society throughout his life, and became its second president. The Society actively pressed state legislatures to allow for the gradual emancipation of slaves. Hamilton was also involved in the drafting of a petition to end the slave trade, which was described in the petition as "a commerce so repugnant to humanity, and so inconsistent with the liberality and justice which should distinguish a free and enlightened people."[xxvii] In 1787, the year the Constitution was drafted, the society opened the doors of the African Free School in New York City to educate black children. The school had the imprimatur of a distinguished group of founding-era statesmen, including Hamilton, John Jay, James Duane, Melancton Smith, Robert Troup, and Noah Webster.[xxviii]

It is not entirely clear whether or not Hamilton himself owned slaves. Historian Forrest McDonald argues that there is no credible evidence to suggest that Hamilton was slave-owner. Despite his strong anti-slavery credentials, Hamilton was also concerned with the rights of property owners and was deeply committed to preserving the union at all costs.[xxix]

As such, he considered the Constitution's slavery clauses as the "result of the spirit of accommodation, which governed the Convention; and without its indulgence, no union could possibly have been formed." He did, however, caveat this statement by adding that "[i]t will however by no means be admitted, that slaves are considered altogether as property. They are men, though degraded to the condition of slavery."[xxx]

While continuing to support the work of the New York Manumission Society, Hamilton also began to establish an institutional framework capable of providing a viable economic alternative to slavery. The solution, in Hamilton's mind, was a transition to an *industrial* economy. In truth, Hamilton viewed an industrial economy as a panacea for many of America's early ailments, but he also believed the commercial ethos of industrialization would put an end to the system of slave labor.[xxxi]

James Madison: A Conflicted Champion of Liberty

In contrast to the cosmopolitan abolitionist views of Alexander Hamilton were the more provincial and locally contingent views of James Madison. In the Southern culture that Madison was raised in, slavery was viewed as an integral part of the Southern economy. When Madison was only eight years old, his grandmother gifted him his first slave, Jemmy. Madison's lifetime experience with and economic dependence on chattel slavery ultimately prevented him from becoming a full and true champion of liberty and equality for black slaves.

Madison's letters reveal a man who was deeply conflicted over the institution of slavery. While Madison believed that "the magnitude of this evil [slavery] among us is so deeply felt, and so universally acknowledged: that no merit could be greater than that of devising a satisfactory remedy for it," he also thought the process of emancipation ought to be "gradual, equitable & satisfactory to the individual immediately concerned, and consistent with the existing & durable prejudices of the nation."[xxxii]

Emancipation raised a number of concerns for Madison. Writing to the Marquis de Lafayette in 1826, Madison said, "the two races cannot co-exist, both being free & equal. The great sine qua

non therefore is some external asylum for the colored race."[xxxiii] These feelings ultimately led Madison to become an early supporter of the American Colonization Society (ACS). The ACS was committed to freeing slaves and transporting those freed slaves back to Africa, specifically to Liberia. Madison eventually became president of the ACS in 1833 and served in that capacity until his death in 1836. While Madison did not support the institution of slavery, he was deeply conflicted about what freedom and equality might look like for freed black slaves.[xxxiv]

As the chief architect of the Federal Constitution, Madison was acutely aware of and sensitive to the division between slave states and non-slaveholding states. Indeed, it was Madison's strong feeling that the interests of both needed to be protected, which led to the drafting of the three-fifths clause.

At the same time, Madison, like most convention delegates, counseled for an immediate close of the African slave trade. In arguing against the provision prohibiting Congress from closing the African trade before 1808, Madison said: "Twenty years will produce all the mischief that can be apprehended from the liberty to import slaves. So long a term will be more dishonorable to the American character than to say nothing about it in the Constitution."[xxxv] Madison also warned against the use of the word *slavery* in the Constitution, thinking "it wrong to admit . . . the idea that there could be property in men."[xxxvi]

In the First Federal Congress, Madison proposed introducing a levy of $10 on every slave brought into America—the maximum allowed under Article I, section 9 of the Constitution. Madison supported the tax from "the dictates of humanity, the principles of the people, the national safety and happiness, and prudent policy . . . . It is hoped that by expressing a national disapprobation of this trade, we may destroy it, and save ourselves from reproaches, and our posterity the imbecility ever attendant on a country filled with slaves."[xxxvii]

Despite these great constitutional acts toward emancipation, Madison's early feelings on racial differences deepened as Madison grew older and ultimately affected his views on the abolition of slavery. Indeed in 1791, Madison refused to submit a memorial to Congress from the Virginia Abolition Society condemning slavery.[xxxviii]

Madison's refusal to take a bold moral stand against slavery was representative of the deep conflict faced by many of the Founding Fathers. Although they were willing to risk life and limb for independence and union, they refused to go to great lengths to ensure the liberty of enslaved blacks. The great champions of full emancipation would not emerge until later in the nation's history.

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[i] William Freehling, *The Founding Fathers and Slavery*, 77 Am. Hist. Rev. 81, 82 (1972)

[ii] Frederick Douglass, *What to the Slave is the Fourth of July* (July 5, 1852), *available at* http://teachingamericanhistory.org/library/index.asp?document=162
[iii] George Washington, Undated Manuscript, George Washington's Papers, Rosenbach Library.
[iv] Peter R. Henriques, *"The Only Unavoidable Subject of Regret": George Washington and Slavery*, *available at* http://chnm.gmu.edu/courses/henriques/hist615/gwslav.htm
[v] *Id.*
[vi] *Id.*
[vii] *Id.*
[viii] *Id.*
[ix] *Id.*
[x] *Id.*
[xi] John R. Howe, Jr., *John Adams's View of Slavery*, 49 J. of Negro Hist. 201, 201 (1964)
[xii] *Id. at 202*
[xiii] John Adams to Louisa Catherine Adams, 23 December 1819.
[xiv] Howe at 203 & 205.
[xv] William E. Juhnke, Benjamin Franklin's View of the Negro and Slavery, 41 Pennsylvania History 374, 376 (1974)
[xvi] *Id. at 377*

[xvii] Benjamin Franklin, Observation Concerning the Increase of Mankind (Boston, 1755).
[xviii] *Id.*
[xix] Juhnke at 378-79
[xx] *Id.* at 380-81
[xxi] Benjamin Franklin to John Waring, January 3, 1758.
[xxii] Juhnke at 382
[xxiii] *Id.* at 386-87
[xxiv] New-York Historical Society, *New York Manumission Society Records*, 6:3-4.
[xxv] *Id.*
[xxvi] Michael D. Chan, *Alexander Hamilton on Slavery*, 66 Rev. of Pol. 207, 223 (2004)
[xxvii] "Memorial to Abolish the Slave Trade," 13 March 1786.
[xxviii] Chan at 225
[xxix] Chan at 223
[xxx] Alexander Hamilton, Remarks in the N.Y. Ratifying Convention, 20 June 1788.
[xxxi] Chan at 226
[xxxii] Madison and Slavery, http://www.montpelier.org/research-and-collections/people/african-americans/madison-slavery
[xxxiii] *Id.*
[xxxiv] *Id.*
[xxxv] James Madison, Speech of August 25, 1787, *available at* http://consource.org/document/james-madisons-notes-of-the-constitutional-convention-1787-8-25/
[xxxvi] *Id.*
[xxxvii] John P. Kaminski, James Madison: Champion of Liberty and Justice 37-38 (2006)
[xxxviii] *Id.* at 39

Notes on the State of Virginia, Query XVIII: Manners by Thomas Jefferson

1784

The particular customs and manners that may happen to be received in that State?

It is difficult to determine on the standard by which the manners of a nation may be tried, whether *catholic* or *particular.* It is more difficult for a native to bring to that standard the manners of his own nation, familiarized to him by habit. There must doubtless be an unhappy influence on the manners of our people produced by the existence of slavery among us. The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other.

Our children see this, and learn to imitate it; for man is an imitative animal. This quality is the germ of all education in him. From his cradle to his grave he is learning to do what he sees others do. If a parent could find no motive either in his philanthropy or his self-love, for restraining the intemperance of passion towards his slave, it should always be a sufficient one that his child is present. But generally it is not sufficient. The parent storms, the child looks on, catches the lineaments of wrath, puts on the same airs in the circle of smaller slaves, gives a loose to the worst of passions, and thus nursed, educated, and daily exercised in tyranny, cannot but be stamped by it with odious peculiarities. The man must be a prodigy who can retain his manners and morals undepraved by such circumstances. And with what execration should the statesman be loaded, who, permitting one half the citizens thus to trample on the rights of the other, transforms those into despots, and these into enemies, destroys the morals of the one part, and the *amor patriae* of the other. For if a slave can have a country in this world, it must be any other in preference to that in which he is born to live and labor for another; in which he must lock up the faculties of his nature, contribute as far as depends on his individual endeavors to the evanishment of the human race, or entail his own miserable condition on the endless generations proceeding from him. With the morals of the people, their industry also is destroyed. For in a warm climate, no man will labor for himself who can make another labor for him. This is so true, that of the proprietors of slaves a very small proportion indeed are ever seen to labor. And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with His wrath? Indeed I tremble for my country when I reflect that God is just; that his justice cannot sleep forever; that considering numbers, nature and natural means only, a revolution of the wheel of fortune, an exchange of situation is among possible events; that it may become probable by supernatural interference! The Almighty has no attribute which can take side with us in such a contest. But it is impossible to be temperate and to pursue this subject through the various considerations of policy, of morals, of history natural and civil. We must be contented to hope they will force their way into every one’s mind. I think a change already perceptible, since the origin of the present revolution. The spirit of the master is abating, that of the slave rising from the dust, his condition mollifying, the way I hope preparing, under the auspices of heaven, for a total emancipation, and that this is disposed, in the order of events, to be with the consent of the masters, rather than by their extirpation.

1. Thomas Jefferson, "Query XVIII: Manners," from *Notes on the State of Virginia,* in A.A. Lipscomb and A.E. Bergh, eds., *The Writings of Thomas Jefferson,* Vol. 2 (Washington, D.C.: Thomas Jefferson Memorial Association, 1907), 225–28

Monday, April 15, 2013 – Essay #41 – Notes on the State of VA, Query XVIII: Manners – Thomas Jefferson – Guest Essayist: Paul Schwennesen, southern Arizona rancher and director of the Agrarian Freedom Project

Summary of Jefferson's 18th Query[1] on "Manners" (but it's really about Slavery!)

Thomas Jefferson was a famously polite gentleman. "Manners," however, has nothing to do with etiquette. You could be forgiven for giving the chapter a miss, fearing a tedious discussion of odd 18th century habits and norms ("don't pick fleas in publick," "put your best foote forward when bowing to a lady," and so on…) But don't be fooled, "Manners" contains none of that and skipping it would be a mistake.

Jefferson's foray into 'manners' was in fact a ringing condemnation of slavery. Writing under what he thought was the cloak of anonymity (his manuscripts were "discovered" and only grudgingly published later), his prose soars, clearly inspired by a deep and heartfelt sentiment. "Indeed," he says memorably, "I tremble for my country when I reflect that God is just: that his justice cannot sleep forever…" He recognized that slavery corroded the very foundations of a liberal republic, putting the liberties of *everyone* (not just slaves) in jeopardy.

Jefferson was convinced that slavery degraded not only the slave, but the master as well; that slavery was a fundamental injustice that flew directly against the Laws of Nature and of Nature's God:

The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other.

He decries the inevitable and vicious proclivity of children to imitate the behavior of their elders, replicating the 'manners' of tyrant and subservient generation after miserable generation.

Jefferson hoped for a "total emancipation" of slaves, an end to the institution that harmed not only the recipients of cruel tyranny, but also the propagators of it. It's a viewpoint that today is somewhat overlooked in an era prone to deplore slavery for its brutality *against*: Jefferson also saw the brutality *within.* "Thus nursed," Jefferson says, "…and daily exercised in tyranny," witnesses to slavery "cannot but be stamped by it with odious peculiarities."

Indeed, after reading Jefferson's anti-slavery polemic, it's a wonder that anyone gives credence to the cynical (and now somewhat fashionable) view that the Founders were nothing more than a

group of landed whites that callously excluded blacks in their newly fashioned republic. "Manners" makes it abundantly clear that Jefferson included blacks in the Declaration's self-evident truth that "all men are created equal." He says, among other things, that we ought to excoriate any statesman who would allow "half the citizens thus to trample on the rights of the other…" If Jefferson referred only to whites in his Declaration (1776), then who were the 'half' and 'other' half of citizens he refers to in "Manners" just five years later?

To be sure, perpetuation of slavery and the exclusion of blacks was the unpardonable reality that defined the next four score and seven years. Moreover, Jefferson's growing silence on the mounting issue in later life does him a severe discredit. But what he wrote in "Manners" cannot be lightly dismissed under accusations of hypocrisy. The principle he lays out remains firm. He asks:

Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?

And this is the heart of "Manners:" a free society simply cannot exist with slavery. It may attempt to live the pretext of equality for one class only. It may even imagine that the blessings of liberty apply only to a certain race. But proximity to subjugation, Jefferson warns, creates a lasting familiarity with despotism that deadens the spirit of liberty within all. Under such internal tensions, no free society can stand.

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Paul holds a Master's degree in Government from Harvard University and a dual Bachelor's degree from the Air Force Academy. He appears frequently on FOX Business News, and is a regular contributor to the Property and Environment Research Center and Huffington Post. His writing has appeared in The American Spectator, The Freeman, The New York Times, and others.

He and his wife, Sarah, are raising three kids in a decidedly centralized, top-down environment.

Letter to John Jay by Alexander Hamilton

March 14, 1779

Dear Sir:

Colonel Laurens, who will have the honor of delivering you this letter, is on his way to South Carolina, on a project, which I think, in the present situation of affairs there, is a very good one and deserves every kind of support and encouragement. This is to raise two, three, or four battalions of negroes; with the assistance of the government of that state, by contributions from the owners in proportion to the number they possess. If you should think proper to enter upon the

subject with him, he will give you a detail of his plan. He wishes to have it recommended by Congress to the state; and, as an inducement, that they would engage to take those battalions into Continental pay.

It appears to me, that an expedient of this kind, in the present state of Southern affairs, is the most rational, that can be adopted, and promises very important advantages. Indeed, I hardly see how a sufficient force can be collected in that quarter without it; and the enemy's operations there are growing infinitely serious and formidable. I have not the least doubt, that the negroes will make very excellent soldiers, with proper management; and I will venture to pronounce, that they cannot be put in better hands than those of Mr. Laurens. He has all the zeal, intelligence, enterprise, and every other qualification requisite to succeed in such an undertaking. It is a maxim with some great military judges, that with sensible officers soldiers can hardly be too stupid; and on this principle it is thought that the Russians would make the best troops in the world, if they were under other officers than their own. The King of Prussia is among the number who maintain this doctrine and has a very emphatical saying on the occasion, which I do not exactly recollect. I mention this, because I frequently hear it objected to the scheme of embodying negroes that they are too stupid to make soldiers. This is so far from appearing to me a valid objection that I think their want of cultivation (for their natural faculties are probably as good as ours) joined to that habit of subordination which they acquire from a life of servitude, will make them sooner become soldiers than our White inhabitants. Let officers be men of sense and sentiment, and the nearer the soldiers approach to machines perhaps the better. I foresee that this project will have to combat much opposition from prejudice and self-interest. The contempt we have been taught to entertain for the blacks, makes us fancy many things that are founded neither in reason nor experience; and an unwillingness to part with property of so valuable a kind will furnish a thousand arguments to show the impracticability or pernicious tendency of a scheme which requires such a sacrifice. But it should be considered, that if we do not make use of them in this way, the enemy probably will; and that the best way to counteract the temptations they will hold out will be to offer them ourselves. An essential part of the plan is to give them their freedom with their muskets. This will secure their fidelity, animate their courage, and I believe will have a good influence upon those who remain, by opening a door to their emancipation. This circumstance, I confess, has no small weight in inducing me to wish the success of the project; for the dictates of humanity and true policy equally interest me in favor of this unfortunate class of men….

1. Alexander Hamilton, "To John Jay," March 14, 1779, in Harold C. Syrett, ed., *The Papers of Alexander Hamilton,* Vol. 2 (New York: Columbia University Press, 1961–present), 17–18.

Tuesday, April 16, 2013 – Essay #42 – Alexander Hamilton's Letter to John Jay, March 14, 1779 – Guest Essayist: Nathaniel Stewart, attorney in Washington, D.C.

Before ever penning his share of The Federalist Papers, before championing the Constitution for a new nation, before laying the foundations of American fiscal policy, Alexander Hamilton was a vocal and "passionate critic" of the practice of slavery.[1]

In March 1779, in the throes of the American War for Independence, Hamilton wrote to his friend and fellow New Yorker, John Jay, to endorse an effort proposed by Colonel John Laurens of South Carolina to recruit and employ black slaves in the Continental Army. Jay was sympathetic to Hamilton's abolitionism,
and several years later the two men would work together in founding the New York Manumission Society to campaign against slavery through lectures, essays, and a registry to keep free blacks from being sent back into slavery. But in 1779, Jay was then president of the Continental Congress, and could be influential in gaining congressional and state support for Colonel Laurens' plan.

As Hamilton outlined briefly to Jay, Colonel Laurens hoped "to raise two, three, or four battalions of negroes"[2] to join the revolutionary forces in the fight against the British. In exchange for their service, black slaves would gain their emancipation. The plan no doubt was controversial and opposed, and it ultimately failed; but to Hamilton it promised several "very important advantages."[3]

First, the Crown's military operations in South Carolina were "growing infinitely serious and formidable," and Hamilton worried that the Continental Army lacked sufficient forces to address the British threat.[4] A seasoned soldier and General Washington's aide-de-camp, Hamilton knew that more battalions of men were needed and that the freed slaves would add significantly to the American ranks and bolster their beleaguered forces. Hamilton believed—and not without controversy—that under Colonel Laurens' zealous leadership "the negroes will make very excellent soldiers."[5] Here, Hamilton did not hide his abolitionist colors. He took the opportunity of Colonel Laurens' effort to dispute the common objection at the time that "negroes . . . are too stupid to make soldiers."[6] To Hamilton, such prejudicial and self-interested notions were "founded neither in reason nor experience."[7] As a recent Hamilton biographer has explained, Hamilton "had expressed an unwavering belief in the genetic equality of blacks and whites—unlike Jefferson, for instance, who regarded blacks as innately inferior—that was enlightened for his day."[8]

Second, Hamilton makes the rather obvious and practical point that if the Americans will not enlist the black slaves, "the enemy probably will." Either the blacks can fight for the colonies or they will fight against them, so, Hamilton argued, they might as well fight *for* us.

Finally, the philosophical key to Laurens' plan was the promise of emancipation. This, of course, was the most controversial element in Laurens' proposal, but Hamilton did not shy from it. "Give them their freedom with their muskets," Hamilton boldly declared, for "[t]his will secure their fidelity, animate their courage, and I believe will have a good influence upon those

who remain, by opening a door to their emancipation."[9] Here, with the fate of the colonies still very much in doubt, Hamilton is already sowing the seeds of black emancipation and looking for ways to "open a door" to their freedom.

As our own President and Congress today take up the controversial issue of firearms in our society, it is perhaps worth remembering that Hamilton, Jay, and Colonel Laurens well-understood that that the door to freedom—for blacks and whites—could be opened and defended with arms. Blacks in the South were a disarmed society—forbidden by their masters to bear arms lest they secure "their freedom with their muskets." Arming black slaves and training them in the ways of military discipline and tactics could only mean the immediate emancipation of some and the future emancipation for all blacks in the South. And it was to this hope and the "dictates of humanity" that Hamilton appealed in calling on Congress to support *arming* black slaves in order that they, too, might join in the fight for freedom.

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[1] Ron Chernow, *Alexander Hamilton*, 307.

[2] Alexander Hamilton, Letter to John Jay, March 14, 1779.

[3] *Id*.

[4] *Id*.

[5] *Id*.

[6] *Id*.

[7] *Id*.

[8] Ron Chernow, *Alexander Hamilton*, 210.

[9] Alexander Hamilton, Letter to John Jay, March 14, 1779.

Letter to the English Anti-Slavery Society by John Jay (1745-1829)

June 1788

Gentlemen:

Our society has been favored with your letter of the 1st of May last, and are happy that efforts so

honorable to the nation are making in your country to promote the cause of justice and humanity relative to the Africans. That they 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 admitted 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, and while they are more solicitous to acquire wealth than to do as they would be done by. Hence it is that India and Africa experience unmerited oppression from nations which have been long distinguished by their attachment to their civil and religious liberties, but who have expended not much less blood and treasure in violating the rights of others than in defending their own. The United States are far from being irreproachable in this respect. It undoubtedly is very inconsistent with their declarations on the subject of human rights to permit a single slave to be found within their jurisdiction, and we confess the justice of your strictures on that head.

Permit us, however, to observe, that although consequences ought not to deter us from doing what is right, yet that it is not easy to persuade men in general to act on that magnanimous and disinterested principle. It is well known that errors, either in opinion or practice, long entertained or indulged, are difficult to eradicate, and particularly so when they have become, as it were, incorporated in the civil institutions and domestic economy of a whole people.

Prior to the great revolution, the great majority or rather the great body of our people had been so long accustomed to the practice and convenience of having slaves, that very few among them even doubted the propriety and rectitude of it. Some liberal and conscientious men had, indeed, by their conduct and writings, drawn the lawfulness of slavery into question, and they made converts to that opinion; but the number of those converts compared with the people at large was then very inconsiderable. Their doctrines prevailed by almost insensible degrees, and was like the little lump of leaven which was put into three measures of meal: even at this day, the whole mass is far from being leavened, though we have good reason to hope and to believe that if the natural operations of truth are constantly watched and assisted, but not forced and precipitated, that end we all aim at will finally be attained in this country.

The Convention which formed and recommended the new Constitution had an arduous task to perform, especially as local interests, and in some measure local prejudices, were to be accommodated. Several of the States conceived that restraints on slavery might be too rapid to consist with their particular circumstances; and the importance of union rendered it necessary that their wishes on that head should, in some degree, be gratified.

It gives us pleasure to inform you, that a disposition favorable to our views and wishes prevails more and more, and that it has already had an influence on our laws. When it is considered how many of the legislators in the different States are proprietors of slaves, and what opinions and prejudices they have imbibed on the subject from their infancy, a sudden and total stop to this species of oppression is not to be expected.

We will cheerfully cooperate with you in endeavoring to procure advocates for the same cause in other countries, and perfectly approve and commend your establishing a correspondence in France. It appears to have produced the desired effect; for Mons. De Varville, the secretary of a society for the like benevolent purpose at Paris, is now here, and comes instructed to establish a

correspondence with us, and to collect such information as may promote our common views. He delivered to our society an extract from the minutes of your proceedings, dated 8th of April last, recommending him to our attention, and upon that occasion they passed the resolutions of which the enclosed are copies.

We are much obliged by the pamphlets enclosed with your letter, and shall constantly make such communications to you as may appear to us interesting.

By a report of the committee for superintending the school we have established in this city for the education of negro children, we find that proper attention is paid to it, and that scholars are now taught in it. By the laws of this State, masters may now liberate healthy slaves of a proper age without giving security that they shall not become a parish charge; and the exportation as well as importation of them is prohibited. The State has also manumitted such as became its property by confiscation; and we have reason to expect that the maxim, that every man, of whatever color, is to be presumed to be free until the contrary be shown, will prevail in our courts of justice. Manumissions daily become more common among us; and the treatment which slaves in general meet with in this State is very little different from that of other servants….

John Jay, "Jay to the English Anti-Slavery Society," June 21, 1788, in Henry Phelps Johnston, ed., *The Correspondence and Public Papers of John Jay,* Vol. 3 (New York: Da Capo Press, 1971), 340–44.

Wednesday, April 17, 2013 – Essay #43 – John Jay's Letter to the English Anti-Slavery Society – Guest Essayist: Brenda Hafera, Finance and Events Co-Ordinator at the Matthew J. Ryan Center For the Study of Free Institutions and the Public Good at Villanova University

John Jay is often lost in the long shadow cast by the legacies and genius of his *Federalist* co-authors, James Madison and Alexander Hamilton. Indeed, Jay authored only five of the eighty-five articles. This was not because his co-authors doubted his abilities or influence, but because Jay was stricken with illness and unable to contribute further. John Jay was a politician, patriot, Chief Justice, and a man of deep and seasoned principles. Being so driven by principle, one of the great causes Jay undertook was to limit the institution of slavery however possible in America. This endeavor is the subject of his "Letter to the English Anti-Slavery Society."

As president of the anti-slavery New York Manumission Society, Jay was diligently working to abolish the institution, though often without results. In this brief but substantial piece, written in June, 1788, Jay responds to criticism that anti-slavery measures in the United States are having too little an effect. He demonstrates that the existence of the institution is inconsistent with American principles and the promise of the Declaration of Independence. However, slavery is also a long established practice in which self-interest and prejudice are deeply seated. In addition, Jay specifically addresses the reason the Founders compromised on slavery at the

Constitutional Convention: to preserve that sacred union for which so many men had valiantly fought and died.

Jay begins his response to the English by acknowledging the wretched stain slavery is on the American constitution. He writes, "It undoubtedly is very inconsistent with their declarations on the subject of human rights to permit a single slave to be found within their jurisdiction, and we confess the justice of your strictures on that head." To put it another way, how can a nation, founded on the principles of natural political equality and self-government, deny such rights to an entire race within its borders?

Jay's justification for the contradiction in the American system is not one of principle, but of practicality. The institution of slavery was deeply entrenched in America. As Jay mentions, "It is well known that errors, either in opinion or practice, long entertained or indulged, are difficult to eradicate, and particularly so when they have become, as it were, incorporated in the civil institutions and domestic economy of a whole people." Slavery was part of the culture and economy of the Southern States and would not be uprooted without a struggle. Jay believed it would be possible, but it would take time and perseverance to wrest the "peculiar institution" from the South.

When Jay writes this letter, the Constitutional Convention has yet to celebrate its one year anniversary. Drafting the Constitution had been an exhausting battle. Fifty-five men in heavy wool clothing were locked in a stuffy room in the summer heat and given the task of debating the most important questions facing the young and fragile American republic.

One of the most daunting tasks ahead of them was dealing with slavery. Those delegates representing the South could not allow slavery to be abolished; their constituents would never ratify a constitution which crippled their state economy in such a fashion. Yet, how could the Founders allow slavery to exist when it was a glaring betrayal of the principle that "all men are created equal?" How could these demigods, the majority of whom, if not all, personally found slavery to be a wretched and repugnant institution, draft a compromise?

Jay gives an answer. He says, "Several of the States conceived that restraints on slavery might be too rapid to consist with their particular circumstances; and the importance of union rendered it necessary that their wishes on that head should, in some degree, be gratified." Had the northern delegates insisted on ridding the nation of slavery, the fragile union would have crumbled. America was fractured after the Revolutionary War; state and local interests were prevailing at the expense of the whole. There remained a danger that the states would splinter into smaller confederacies, rather than form a united country. If that happened, not a single slave would have been freed. The continued union of north and south, however, offered hope that slavery might be abolished in the United States in the long run. Accordingly, John Jay and the other Founders had little choice but to comply with the southern states' demand for non-interference, albeit with the understanding that slavery was a temporary and necessary evil.

After making the compromise, the Founders did not simply sit back and hope slavery would undermine itself. If any change were to occur, it was their duty to force its development. They took measures, like reaffirming the Northwest Ordinance o f 1787, which prohibited the

expansion of slavery in the Northwest Territories, and abolishing the slave trade in 1808, to encourage its extinction. Unexpected events, such as the invention of the cotton gin, which once again made slavery more economically lucrative, upset their vision and eventually led to a civil war.

Jay closes his letter with hopeful optimism. He is making progress in his city and state. Black children are being educated, slaves are able to be liberated, and exportation and importation of new slaves is prohibited. Jay was chipping away at the institution, putting it on the road to ultimate extinction. With a vision for the future, he says, "we have reason to expect that the maxim, that every man, of whatever color, is to be presumed to be free until the contrary be shown, will prevail in our courts of justice." Abraham Lincoln would later take up Jay's mantle and see that cherished maxim that "all men are created equal," fully recognized. It would take another war to preserve the sacred union, this time with brother fighting against brother, to complete the task- and the promise- of the Founding.

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Letter to Henri Gregoire by Thomas Jefferson

February 25, 1809

Sir:

I have received the favor of your letter of August 17th, and with it the volume you were so kind as to send me on the "Literature of Negroes." Be assured that no person living wishes more sincerely than I do, to see a complete refutation of the doubts I have myself entertained and expressed on the grade of understanding allotted to them by nature, and to find that in this respect they are on a par with ourselves. My doubts were the result of personal observation on the limited sphere of my own State, where the opportunities for the development of their genius were not favorable, and those of exercising it still less so. I expressed them therefore with great hesitation; but whatever be their degree of talent it is no measure of their rights. Because Sir Isaac Newton was superior to others in understanding, he was not therefore lord of the person or property of others. On this subject they are gaining daily in the opinions of nations, and hopeful advances are making towards their re-establishment on an equal footing with the other colors of the human family. I pray you therefore to accept my thanks for the many instances you have enabled me to observe of respectable intelligence in that race of men, which cannot fail to have effect in hastening the day of their relief; and to be assured of the sentiments of high and just esteem and consideration which I tender to yourself with all sincerity.

1. Thomas Jefferson, "To Henri Gregoire," February 25, 1809, in Paul Leicester Ford, ed., *The*

Works of Thomas Jefferson, Vol. 9 (New York: G. P. Putnam's Sons, 1904–5), 246–47.

Thursday, April 18, 2013 – Essay #44 – Thomas Jefferson's Letter to Henri Gregoire – Guest Essayist: Logan Beirne, Olin Scholar at Yale Law School and author of Blood of Tyrants: George Washington & the Forging of the Presidency

A complicated man of contradictions, Thomas Jefferson owned hundreds of slaves throughout his life but opposed the institution. His letter reflects this paradox: he expresses both his belief that slaves were mentally inferior as well as his desire that they be granted equal rights. Jefferson's note responds to an attempt by a French Roman Catholic priest to convince Jefferson of the African peoples' intelligence. Writing during the final days of his Presidency, Jefferson still questions their abilities. While he admits that the slaves on his estate have had little opportunity to receive an education, he explains that he has seen little firsthand evidence of the mental prowess that the priest is trying demonstrate. This is certain to make a modern audience cringe, but was typical of the rampant racism of the era. Despite his belief in slaves' inferiority, Jefferson reasons that they should be freed, regardless, since "talent it is no measure of their rights."

Jefferson urged for an end to slavery during much of his life. Describing slavery as a "hideous blot" he predicted (accurately) that it would tear the nation apart. Therefore, he sought to lead the nation away from the institution in stages. During the Revolution in 1778, he drafted a law to prohibit the importation of slaves into his home state of Virginia. Slave traders routinely captured people in Africa and sailed them over to American for sale. Jefferson wanted to end this "moral depravity." Thus, he would not be helping the slaves already in his state, but at least he would stop new people from being sold into it.

In another step after the war, Jefferson proposed an ordinance in 1784 that would ban slavery in the Northwest Territory (a sparsely populated frontier at the time that would eventually become the Midwestern states). He was trying to move the country towards a gradual emancipation so that the nation would eventually vote to end slavery across the United States. As President, he moved the country towards this end game by signing the bill prohibiting slave importation nationwide. While people would still remain enslaved within the Southern States, no new men, women, and children could legally be shipped in and sold within the country. Slaveholders instead relied on the booming domestic slave trade – so this move did not end slavery, but it was a move in that direction.

Thomas Jefferson saw slavery as contrary to the laws of nature and hoped for its complete end via the republic's democratic processes. Despite his deeply rooted racism, he longed for the African Americans' "re-establishment on an equal footing with the other colors of the human family."

Logan Beirne is an Olin Scholar at Yale Law School and author of Blood of Tyrants: George Washington & the Forging of the Presidency. His writings have appeared in USA Today, the New York Post, and numerous other publications. He served as an attorney at Sullivan & Cromwell LLP in New York City and is admitted to the New York and Connecticut Bars.

Speech on Reception of Abolition Petitions by John C. Calhoun (1782-1850)

February 6, 1837

…I do not belong, said Mr. Calhoun, to the school which holds that aggression is to be met by concession. Mine is the opposite creed, which teaches that encroachments must be met at the beginning, and that those who act on the opposite principle are prepared to become slaves. In this case, in particular, I hold concession or compromise to be fatal. If we concede an inch, concession would follow concession—compromise would follow compromise, until our ranks would be so broken that effectual resistance would be impossible. We must meet the enemy on the frontier, with a fixed determination of maintaining our position at every hazard. Consent to receive these insulting petitions, and the next demand will be that they be referred to a committee in order that they may be deliberated and acted upon. At the last session we were modestly asked to receive them, simply to lay them on the table, without any view to ulterior action…. I then said, that the next step would be to refer the petition to a committee, and I already see indications that such is now the intention. If we yield, that will be followed by another, and we will thus proceed, step by step, to the final consummation of the object of these petitions. We are now told that the most effectual mode of arresting the progress of abolition is, to reason it down; and with this view it is urged that the petitions ought to be referred to a committee. That is the very ground which was taken at the last session in the other House, but instead of arresting its progress it has since advanced more rapidly than ever. The most unquestionable right may be rendered doubtful, if once admitted to be a subject of controversy, and that would be the case in the present instance. The subject is beyond the jurisdiction of Congress—they have no right to touch it in any shape or form, or to make it the subject of deliberation or discussion…. As widely as this incendiary spirit has spread, it has not yet infected this body, or the great mass of the intelligent and business portion of the North; but unless it be speedily stopped, it will spread and work upwards till it brings the two great sections of the Union into deadly conflict. This is not a new impression with me. Several years since, in a discussion with one of the Senators from Massachusetts (Mr. Webster), before this fell spirit had showed itself, I then predicted that the doctrine of the proclamation and the Force Bill,—that this Government had a right, in the last resort, to determine the extent of its own powers, and enforce its decision at the point of the bayonet, which was so warmly maintained by that Senator, would at no distant day arouse the dormant spirit of abolitionism. I told him that the doctrine was tantamount to the assumption of unlimited power on the part of the Government, and that such would be the impression on the public mind in a large portion of the Union. The consequence would be inevitable. A large portion of the Northern States believed slavery to be a sin, and would consider it as an obligation of conscience to abolish it if they should feel themselves in any degree responsible for its continuance,—and that this doctrine would necessarily lead to the belief of such responsibility. I then predicted that it would commence as it has with this fanatical portion of society, and that

they would begin their operations on the ignorant, the weak, the young, and the thoughtless,—and gradually extend upwards till they would become strong enough to obtain political control, when he and others holding the highest stations in society, would, however reluctant, be compelled to yield to their doctrines, or be driven into obscurity. But four years have since elapsed, and all this is already in a course of regular fulfilment.

Standing at the point of time at which we have now arrived, it will not be more difficult to trace the course of future events now than it was then. They who imagine that the spirit now abroad in the North, will die away of itself without a shock or convulsion, have formed a very inadequate conception of its real character; it will continue to rise and spread, unless prompt and efficient measures to stay its progress be adopted. Already it has taken possession of the pulpit, of the schools, and, to a considerable extent, of the press; those great instruments by which the mind of the rising generation will be formed.

However sound the great body of the non-slaveholding States are at present, in the course of a few years they will be succeeded by those who will have been taught to hate the people and institutions of nearly one-half of this Union, with a hatred more deadly than one hostile nation ever entertained towards another. It is easy to see the end. By the necessary course of events, if left to themselves, we must become, finally, two people. It is impossible under the deadly hatred which must spring up between the two great sections, if the present causes are permitted to operate unchecked, that we should continue under the same political system. The conflicting elements would burst the Union asunder, powerful as are the links which hold it together. Abolition and the Union cannot co-exist. As the friend of the Union I openly proclaim it,—and the sooner it is known the better. The former may now be controlled, but in a short time it will be beyond the power of man to arrest the course of events. We of the South will not, cannot surrender our institutions. To maintain the existing relations between the two races, inhabiting that section of the Union, is indispensable to the peace and happiness of both. It cannot be subverted without drenching the country in blood, and extirpating one or the other of the races…. But let me not be understood as admitting, even by implication, that the existing relations between the two races in the slaveholding States is an evil:—far otherwise; I hold it to be a good, as it has thus far proved itself to be to both, and will continue to prove so if not disturbed by the fell spirit of abolition. I appeal to facts. Never before has the black race of Central Africa, from the dawn of history to the present day, attained a condition so civilized and so improved, not only physically, but morally and intellectually….

In the mean time, the white or European race has not degenerated. It has kept pace with its brethren in other sections of the Union where slavery does not exist. It is odious to make comparison; but I appeal to all sides whether the South is not equal in virtue, intelligence, patriotism, courage, disinterestedness, and all the high qualities which adorn our nature….

But I take higher ground. I hold that in the present state of civilization, where two races of different origin, and distinguished by color, and other physical differences, as well as intellectual, are brought together, the relation now existing in the slaveholding States between the two, is, instead of an evil, a good—a positive good. I feel myself called upon to speak freely upon the subject where the honor and interests of those I represent are involved. I hold then, that there never has yet existed a wealthy and civilized society in which one portion of the

community did not, in point of fact, live on the labor of the other. Broad and general as is this assertion, it is fully borne out by history. This is not the proper occasion, but if it were, it would not be difficult to trace the various devices by which the wealth of all civilized communities has been so unequally divided, and to show by what means so small a share has been allotted to those by whose labor it was produced, and so large a share given to the non-producing classes. The devices are almost innumerable, from the brute force and gross superstition of ancient times, to the subtle and artful fiscal contrivances of modern. I might well challenge a comparison between them and the more direct, simple, and patriarchal mode by which the labor of the African race is, among us, commanded by the European. I may say with truth, that in few countries so much is left to the share of the laborer, and so little exacted from him, or where there is more kind attention paid to him in sickness or infirmities of age. Compare his condition with the tenants of the poor houses in the more civilized portions of Europe—look at the sick, and the old and infirm slave, on one hand, in the midst of his family and friends, under the kind superintending care of his master and mistress, and compare it with the forlorn and wretched condition of the pauper in the poor house. But I will not dwell on this aspect of the question; I turn to the political; and here I fearlessly assert that the existing relation between the two races in the South, against which these blind fanatics are waging war, forms the most solid and durable foundation on which to rear free and stable political institutions. It is useless to disguise the fact. There is and always has been in an advanced stage of wealth and civilization, a conflict between labor and capital. The condition of society in the South exempts us from the disorders and dangers resulting from this conflict; and which explains why it is that the political condition of the slaveholding States has been so much more stable and quiet than that of the North…. Surrounded as the slaveholding States are with such imminent perils, I rejoice to think that our means of defense are ample, if we shall prove to have the intelligence and spirit to see and apply them before it is too late. All we want is concert, to lay aside all party differences, and unite with zeal and energy in repelling approaching dangers. Let there be concert of action, and we shall find ample means of security without resorting to secession or disunion. I speak with full knowledge and a thorough examination of the subject, and for one, see my way clearly…. I dare not hope that any thing I can say will arouse the South to a due sense of danger; I fear it is beyond the power of mortal voice to awaken it in time from the fatal security into which it has fallen.

1. John C. Calhoun, "Speech on the Reception of Abolition Petitions," February 6, 1837, in Richard Kenner Cralle, ed., *The Works of John C. Calhoun,* Vol. 2 (New York: D. Appleton & Co., 1888), 626–27, 628–33.

Friday, April 19, 2013 – Essay #45 – Sen. John C. Calhoun's February 6, 1837 Speech on Abolition Petitions – Guest Essayist: Andrew Langer, President, Institute for Liberty

In his historical play, *Henry V*, Shakespeare talks about casting our glance back through history, and compressing the events of many years "into an hourglass." In the 21st Century, it is easy to think of the debates on the abolition of slavery as having taken place with the relative-rapidity of

the passage of Obamacare, but in reality this debate happened over the course of nearly an entire century of the nation's founding years.

So we come to a speech by South Carolina Senator John C. Calhoun, delivered on February 6, 1837, nearly a quarter century before the start of the Civil War. His "Speech on the Reception of Abolition Petitions" was prescient in its predictions of animosity and bloodshed between Northern and Southern states—so prescient that one might think it had been written in the mid-1850s, not the latter half of the 1830s.

But, just as one cannot take the historic actions of any modern legislator in isolation, one must understand not only the *historic* context of the speech (what had led to it), but the *contemporary* context as well. Calhoun, who in this speech enunciates for the first time the Southern view that slavery was a positive social force, was responding not only to the social movements of the early part of the 19th Century, political pressures that were mounting over time, he was also responding to what was happening, on that same day, with his opposing counterparts in the US House of Representatives!

The First Amendment to the US Constitution guarantees a right to petition the federal government "for a redress of grievances." While the force and effect of this right is much-debated today, it had a very real manifestation in the politics of the first half of the 19th Century. Congress had been, quite literally, besieged by anti-slavery petitions, hundreds of thousands of them, and between their overwhelming nature and the level of aggravation it was producing for legislators from slaveholding states, these members of Congress passed a rule forcing all such petitions to be immediately tabled—essentially a "gag rule" on abolition petitions.

Former President John Quincy Adams, at that point a member of the US House (and one of its leading voices on abolition), had been using his mastery of political tactics to sidestep these rules—he saw the idea that one could abrogate a guaranteed right simply through House procedure as a perversion of the very idea of constitutional governance. One of these tactics was to literally read the rules so as to claim they were only meant to bar the petitioning of grievances by those who were able to vote (in other words, it would allow petitions from women, who at that time could not vote).

On February 6, 1837, Adams tried, again, to introduce a petition, this time claiming that it was from "nine abolitionist ladies from Fredericksburg, Virginia" (Virginia being a slaveholding southern state)—he was prevented from bringing it to the floor. Adams then created chaos when he attempted to open discussion on a petition from twenty-two slaves. This the House was not going to tolerate—members moved to try to punish President Adams with a formal censure, and initiated these proceedings (which ultimately ended with that motion being tabled… five years later). The resolution to censure claimed that Adams' actions would lead to an insurrection by southern slaves, and it is in *this* context that we should examine Calhoun's remarks—being delivered on the same day, just across the Capitol.

As a political analyst of the modern era, there seems something almost desperate in Calhoun's speech. Himself a former Vice-President under two different administrations (one, ironically, being John Quincy Adams' presidency), and no stranger to iconoclastic rhetoric, Calhoun

launches into a defense of the South's "curious institution and cherished way of life" that, for all its nuggets of prognostication, nevertheless goes over the top in its lauding of what all now see as an evil stain on the American story.

Calhoun not only foresaw the conflict which was to erupt between slaveholding and non-slaveholding states, he also foresaw the ultimate tossing of slavery as an American practice onto the "ash heap of history" (and rightly so). His upbringing, his steadfast commitment to this cause, doomed by its abhorrent immorality is what brings him to this act of desperation.

What he failed to see, and this is where the prism of history is colored by modern perspective, is that no society which protects individual rights can deny the wholesale rights to individuals on the other. Moreover, he cannot argue that the protection of his right to own slaves can be protected on the back of denying the First Amendment rights of his fellow citizens.

Yes, Calhoun was right in many of his predictions. But that accuracy is forever tarnished by the context in which those predictions were made.

Andrew Langer is President of the Institute for Liberty, and host of The Broadside, a weekly internet radio show, which can be found on Blogtalkradio.com.

Speech on the Oregon Bill by John C. Calhoun

June 27, 1848

…I turn now to my friends of the South, and ask: What are you prepared to do? If neither the barriers of the constitution nor the high sense of right and justice should prove sufficient to protect you, are you prepared to sink down into a state of acknowledged inferiority; to be stripped of your dignity of equals among equals, and be deprived of your equality of rights in this federal partnership of States? If so, you are woefully degenerated from your sires, and will well deserve to change condition with your slaves;—but if not, prepare to meet the issue. The time is at hand, if the question should not be speedily settled, when the South must rise up, and bravely defend herself, or sink down into base and acknowledged inferiority; and it is because I clearly perceive that this period is favorable for settling it, if it is ever to be settled, that I am in favor of pressing the question now to a decision—not because I have any desire whatever to embarrass either party in reference to the Presidential election. At no other period could the two great parties into which the country is divided be made to see and feel so clearly and intensely the embarrassment and danger caused by the question. Indeed, they must be blind not to perceive that there is a power in action that must burst asunder the ties that bind them together, strong as they are, unless it should be speedily settled. Now is the time, if ever. Cast your eyes to the North, and mark what is going on there; reflect on the tendency of events for the last three years in reference to this the most vital of all questions, and you must see that no time should be lost. I am thus brought to the question, How can the question be settled? It can, in my opinion, be finally and permanently adjusted but one way,—and that is on the high principles of justice and the constitution. Fear not to leave it to them. The less you do the better. If the North and South cannot stand together on their broad and solid foundation, there is none other on which they can.

If the obligations of the constitution and justice be too feeble to command the respect of the North, how can the South expect that she will regard the far more feeble obligations of an act of Congress? Nor should the North fear that, by leaving it where justice and the constitution leave it, she would be excluded from her full share of the territories. In my opinion, if it be left there, climate, soil, and other circumstances would fix the line between the slaveholding and non-slaveholding States in about 36° 30′. It may zigzag a little, to accommodate itself to circumstances—sometimes passing to the north, and at others passing to the south of it; but that would matter little, and would be more satisfactory to all, and tend less to alienation between the two great sections, than a rigid, straight, artificial line, prescribed by an act of Congress. And here, let me say to Senators from the North;—you make a great mistake in supposing that the portion which might fall to the south of whatever line might be drawn, if left to soil, and climate, and circumstances to determine, would be closed to the white labor of the North, because it could not mingle with slave labor without degradation. The fact is not so. There is no part of the world were agricultural, mechanical, and other descriptions of labor are more respected than in the South, with the exception of two descriptions of employment—that of menial and body servants. No Southern man—not the poorest or the lowest—will, under any circumstance, submit to perform either of them. He has too much pride for that, and I rejoice that he has. They are unsuited to the spirit of a freeman. But the man who would spurn them feels not the least degradation to work in the same field with his slave; or to be employed to work with them in the same field or in any mechanical operation; and, when so employed, they claim the right,—and are admitted, in the country portion of the South—of sitting at the table of their employers. Can as much, on the score of equality, be said of the North? With us the two great divisions of society are not the rich and poor, but white and black; and all the former, the poor as well as the rich, belong to the upper class, and are respected and treated as equals, if honest and industrious; and hence have a position and pride of character of which neither poverty nor misfortune can deprive them.

But I go further, and hold that justice and the constitution are the easiest and safest guard on which the question can be settled, regarded in reference to party. It may be settled on that ground simply by non-action—by leaving the territories free and open to the emigration of all the world, so long as they continue so,—and when they become States, to adopt whatever constitution they please, with the single restriction, to be republican, in order to their admission into the Union. If a party cannot safely take this broad and solid position and successfully maintain it, what other can it take and maintain? If it cannot maintain itself by an appeal to the great principles of justice, the constitution, and self-government, to what other, sufficiently strong to uphold them in public opinion, can they appeal? I greatly mistake the character of the people of this Union, if such an appeal would not prove successful, if either party should have the magnanimity to step forward, and boldly make it. It would, in my opinion, be received with shouts of approbation by the patriotic and intelligent in every quarter. There is a deep feeling pervading the country that the Union and our political institutions are in danger, which such a course would dispel, and spread joy over the land.

Now is the time to take the step, and bring about a result so devoutly to be wished. I have believed, from the beginning, that this was the only question sufficiently potent to dissolve the Union, and subvert our system of government; and that the sooner it was met and settled, the safer and better for all. I have never doubted but that, if permitted to progress beyond a certain

point, its settlement would become impossible, and am under deep conviction that it is now rapidly approaching it,—and that if it is ever to be averted, it must be done speedily. In uttering these opinions I look to the whole. If I speak earnestly, it is to save and protect all. As deep as is the stake of the South in the Union and our political institutions, it is not deeper than that of the North. We shall be as well prepared and as capable of meeting whatever may come, as you.

Now, let me say, Senators, if our Union and system of government are doomed to perish, and we to share the fate of so many great people who have gone before us, the historian, who, in some future day, may record the events ending in so calamitous a result, will devote his first chapter to the ordinance of 1787, lauded as it and its authors have been, as the first of that series which led to it. His next chapter will be devoted to the Missouri compromise, and the next to the present agitation. Whether there will be another beyond, I know not. It will depend on what we may do.

If he should possess a philosophical turn of mind, and be disposed to look to more remote and recondite causes, he will trace it to a proposition which originated in a hypothetical truism, but which, as now expressed and now understood, is the most false and dangerous of all political errors. The proposition to which I allude, has become an axiom in the minds of a vast many on both sides of the Atlantic, and is repeated daily from tongue to tongue, as an established and incontrovertible truth; it is,—that "all men are born free and equal." I am not afraid to attack error, however deeply it may be intrenched, or however widely extended, whenever it becomes my duty to do so, as I believe it to be on this subject and occasion.

Taking the proposition literally (it is in that sense it is understood), there is not a word of truth in it. It begins with "all men are born," which is utterly untrue. Men are not born. Infants are born. They grow to be men. And concludes with asserting that they are born "free and equal," which is not less false. They are not born free. While infants they are incapable of freedom, being destitute alike of the capacity of thinking and acting, without which there can be no freedom. Besides, they are necessarily born subject to their parents, and remain so among all people, savage and civilized, until the development of their intellect and physical capacity enables them to take care of themselves. They grow to all the freedom of which the condition in which they were born permits, by growing to be men. Nor is it less false that they are born "equal." They are not so in any sense in which it can be regarded; and thus, as I have asserted, there is not a word of truth in the whole proposition, as expressed and generally understood.

If we trace it back, we shall find the proposition differently expressed in the Declaration of Independence. That asserts that "all men are created equal." The form of expression, though less dangerous, is not less erroneous. All men are not created. According to the Bible, only two—a man and a woman—ever were—and of these one was pronounced subordinate to the other. All others have come into the world by being born, and in no sense, as I have shown, either free or equal. But this form of expression being less striking and popular, has given way to the present, and under the authority of a document put forth on so great an occasion, and leading to such important consequences, has spread far and wide, and fixed itself deeply in the public mind. It was inserted in our Declaration of Independence without any necessity. It made no necessary part of our justification in separating from the parent country, and declaring ourselves independent. Breach of our chartered privileges, and lawless encroachment on our acknowledged and well-established rights by the parent country, were the real causes,—and of themselves

sufficient, without resorting to any other, to justify the step. Nor had it any weight in constructing the governments which were substituted in the place of the colonial. They were formed of the old materials and on practical and well-established principles, borrowed for the most part from our own experience and that of the country from which we sprang.

If the proposition be traced still further back, it will be found to have been adopted from certain writers on government who had attained much celebrity in the early settlement of these States, and with those writings all the prominent actors in our revolution were familiar. Among these, Locke and Sydney were prominent. But they expressed it very differently. According to their expression, "all men in the state of nature were free and equal." From this the others were derived; and it was this to which I referred when I called it a hypothetical truism;—to understand why, will require some explanation. Man, for the purpose of reasoning, may be regarded in three different states: in a state of individuality; that is, living by himself apart from the rest of his species. In the social; that is, living in society, associated with others of his species. And in the political; that is, living under government. We may reason as to what would be his rights and duties in either, without taking into consideration whether he could exist in it or not. It is certain, that in the first, the very supposition that he lived apart and separated from all others would make him free and equal. No one in such a state could have the right to command or control another. Every man would be his own master, and might do just as he pleased. But it is equally clear, that man cannot exist in such a state; that he is by nature social, and that society is necessary, not only to the proper development of all his faculties, moral and intellectual, but to the very existence of his race. Such being the case, the state is a purely hypothetical one; and when we say all men are free and equal in it, we announce a mere hypothetical truism; that is, a truism resting on a mere supposed state that cannot exist, and of course one of little or no practical value.

But to call it a state of nature was a great misnomer, and has led to dangerous errors; for that cannot justly be called a state of nature which is so opposed to the constitution of man as to be inconsistent with the existence of his race and the development of the high faculties, mental and moral, with which he is endowed by his Creator.

Nor is the social state of itself his natural state; for society can no more exist without government, in one form or another, than man without society. It is the political, then, which includes the social, that is his natural state. It is the one for which his Creator formed him,—into which he is impelled irresistibly,—and in which only his race can exist and all its faculties be fully developed.

Such being the case, it follows that any, the worst form of government, is better than anarchy; and that individual liberty, or freedom, must be subordinate to whatever power may be necessary to protect society against anarchy within or destruction without; for the safety and well-being of society is as paramount to individual liberty, as the safety and well-being of the race is to that of individuals; and in the same proportion the power necessary for the safety of society is paramount to individual liberty. On the contrary, government has no right to control individual liberty beyond what is necessary to the safety and well-being of society. Such is the boundary which separates the power of government and the liberty of the citizen or subject in the political state, which, as I have shown, is the natural state of man—the only one in which his race can

exist, and the one in which he is born, lives, and dies.

It follows from all this that the quantum of power on the part of the government, and of liberty on that of individuals, instead of being equal in all cases, must necessarily be very unequal among different people, according to their different conditions. For just in proportion as a people are ignorant, stupid, debased, corrupt, exposed to violence within, and danger from without, the power necessary for government to possess, in order to preserve society against anarchy and destruction, becomes greater and greater, and individual liberty less and less, until the lowest condition is reached,—when absolute and despotic power becomes necessary on the part of the government, and individual liberty extinct. So, on the contrary, just as a people rise in the scale of intelligence, virtue, and patriotism, and the more perfectly they become acquainted with the nature of government, the ends for which it was ordered, and how it ought to be administered, and the less the tendency to violence and disorder within, and danger from abroad,—the power necessary for government becomes less and less, and individual liberty greater and greater. Instead, then, of all men having the same right to liberty and equality, as is claimed by those who hold that they are all born free and equal, liberty is the noble and highest reward bestowed on mental and moral development, combined with favorable circumstances. Instead, then, of liberty and equality being born with men,—instead of all men and all classes and descriptions being equally entitled to them, they are high prizes to be won, and are in their most perfect state, not only the highest reward that can be bestowed on our race, but the most difficult to be won,—and when won, the most difficult to be preserved. They have been made vastly more so by the dangerous error I have attempted to expose,—that all men are born free and equal,—as if those high qualities belonged to man without effort to acquire them, and to all equally alike, regardless of their intellectual and moral condition. The attempt to carry into practice this, the most dangerous of all political errors, and to bestow on all,—without regard to their fitness either to acquire or maintain liberty,—that unbounded and individual liberty supposed to belong to man in the hypothetical and misnamed state of nature, has done more to retard the cause of liberty and civilization, and is doing more at present, than all other causes combined. While it is powerful to pull down governments, it is still more powerful to prevent their construction on proper principles. It is the leading cause among those which have placed Europe in its present anarchical condition, and which mainly stands in the way of reconstructing good governments in the place of those which have been overthrown,—threatening thereby the quarter of the globe most advanced in progress and civilization with hopeless anarchy,—to be followed by military despotism. Nor are we exempt from its disorganizing effects. We now begin to experience the danger of admitting so great an error to have a place in the declaration of our independence. For a long time it lay dormant; but in the process of time it began to germinate, and produce its poisonous fruits. It had strong hold on the mind of Mr. Jefferson, the author of that document, which caused him to take an utterly false view of the subordinate relation of the black to the white race in the South; and to hold, in consequence, that the latter, though utterly unqualified to possess liberty, were as fully entitled to both liberty and equality as the former; and that to deprive them of it was unjust and immoral. To this error, his proposition to exclude slavery from the territory northwest of the Ohio may be traced,—and to that the ordinance of 1787,—and through it the deep and dangerous agitation which now threatens to engulf, and will certainly engulf, if not speedily settled, our political institutions, and involve the country in countless woes.

1. John C. Calhoun, "On the Oregon Bill," June 27, 1848, in Richard Kenner Cralle, ed., *The Works of John C. Calhoun,* Vol. 4 (New York: D. Appleton & Co., 1888), 503–12.

Monday, April 22, 2013 – Essay #46 – Sen. John C. Calhoun's Speech On the Oregon Bill, June 27, 1848 – Guest Essayist: Andrew Langer, President of the Institute for Liberty

Politics, a process of using rhetoric to maneuver and influence in order to either induce policy change or maintain the status quo, has been compared to many things—war, football, chess. And like these comparatives, one side or another can outmaneuver the other (or, in turn, be outmaneuvered).

So it is with today's subject, again former Vice-President John C. Calhoun, on the issue of slavery and Oregon's acceptance as a newly-created territory. Calhoun, now back in the US Senate, was Secretary of State when the treaty underlying Oregon's possibility as a US Territory was negotiated with the British, (avoiding a third war with Great Britain), is laying out, once again, his case for the maintenance of the South's peculiar institution, this time on the nation's most-western frontier.

In this speech, which contextually sits a decade after his speech preaching that slavery was a "moral good," but a decade before the start of the Civil War, Calhoun—who, by all regards, was an intellectual giant for his day, shows that even those most brilliant of politicians can be outmaneuvered by his own rhetoric. Unwittingly, Calhoun, one of the fiercest defenders of constitutional principles, opens the door for the elitist and anti-individualist rhetoric and philosophies underlying today's most-liberal progressive statists—and in defending the rights of southern states, he unwittingly endorses the very centralized powers that led to the Civil War, and which America grapples with to this very day.

After a great deal of rhetorical flourish through his commentary on the varying stations of life of men (rhetoric eerily similar to the off-hand statements we hear today with regards to the immigration debate), Calhoun launches into one of most-distressing and intellectually-disappointing arguments from one of the most notable figures in the history of the United States: an attack on the opening statements of the Declaration of Independence—specifically, Jefferson's pronouncement of the self-evident truth that "all men are created equal".

Calhoun disagrees—he had started with the corollary that "all men are born free and equal", claiming that this was false because "men are not born. Infants are born." And since infants are dependent upon their parents, they are not free, etc.

For a man of a keen intellect, the only word that could be applied to this narrow interpretation is, "childish". It is an interpretation of our founding documents that is unworthy of a man of

Calhoun's stature—and were it to be offered by any politician today, it would be considered laughable.

Calhoun attempts to further justify his narrow interpretation of the phrases in the Declaration by taking issue with Locke's posit that all men are, in a state of nature, free and equal. Locke subscribed to what some scholars call the "single, solitary man" view of the bundle of rights: that a hypothetical man, existing alone in a state of nature, retains all measure of the rights to which the creator endowed, and he is free to exercise those rights in any manner.

It is when that single, solitary man interacts with another man that the exercise of those rights comes into conflict… and it is the intersection of those exercises of rights out of which all just law is born.

But rather than focus on just law, and the necessity of government to facilitate the protection of individual rights, Calhoun takes us down a ***very*** dangerous path: that man is required to be ***governed***. That the degree of that governance required is directly related to the heightened state of that man. In other words, the more civilized, rich, and educated the man, the less governance is needed. Conversely, the less educated, crude, and poor the man, the more governance is needed. He says, quite plainly, that "individual liberty, or freedom, ***must be subordinate to whatever power may be necessary to protect society against anarchy within or destruction without***; for the safety and well-being of society is as paramount to individual liberty." (emphasis added).

Though Calhoun died a decade before the Civil War, one can only imagine how horrified he might have been had Abraham Lincoln recited these phrasings back to Calhoun as the justification for a greater centralization in federal power as a response to the decision by southern states to rebel. Certainly, if individual liberties must be subordinate to these powers, the rights of those states must be subordinate as well.

This watering down of the concept of individual liberty, the subornation of the individual to the state, this belief that intellectual elites can better govern those without economic or academic advantages… these are the hallmarks of the modern left. And just as the use of these arguments to perpetuate literal enslavement in the 19th Century were wholly without merit, their use to justify economic, entitlement, or regulatory enslavement in the 21st Century are without merit as well.

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Letter to John Holmes by Thomas Jefferson

April 22, 1820

I thank you, dear Sir, for the copy you have been so kind as to send me of the letter to your constituents on the Missouri question. It is a perfect justification to them. I had for a long time

ceased to read newspapers, or pay any attention to public affairs, confident they were in good hands, and content to be a passenger in our bark to the shore from which I am not distant. But this momentous question, like a fire bell in the night, awakened and filled me with terror. I considered it at once as the knell of the Union. It is hushed, indeed, for the moment. But this is a reprieve only, not a final sentence. A geographical line, coinciding with a marked principle, moral and political, once conceived and held up to the angry passions of men, will never be obliterated; and every new irritation will mark it deeper and deeper. I can say, with conscious truth, that there is not a man on earth who would sacrifice more than I would to relieve us from this heavy reproach, in any *practicable* way. The cession of that kind of property, for so it is misnamed, is a bagatelle which would not cost me a second thought, if, in that way, a general emancipation and *expatriation* could be effected; and gradually, and with due sacrifices, I think it might be. But as it is, we have the wolf by the ears, and we can neither hold him, nor safely let him go. Justice is in one scale, and self-preservation in the other. Of one thing I am certain, that as the passage of slaves from one State to another, would not make a slave of a single human being who would not be so without it, so their diffusion over a greater surface would make them individually happier, and proportionally facilitate the accomplishment of their emancipation, by dividing the burden on a greater number of coadjutors. An abstinence too, from this act of power, would remove the jealousy excited by the undertaking of Congress to regulate the condition of the different descriptions of men composing a State. This certainly is the exclusive right of every State, which nothing in the constitution has taken from them and given to the General Government. Could Congress, for example, say, that the non-freemen of Connecticut shall be freemen, or that they shall not emigrate into any other State? I regret that I am now to die in the belief, that the useless sacrifice of themselves by the generation of 1776, to acquire self-government and happiness to their country, is to be thrown away by the unwise and unworthy passions of their sons, and that my only consolation is to be, that I live not to weep over it. If they would but dispassionately weigh the blessings they will throw away, against an abstract principle more likely to be effected by union than by scission, they would pause before they would perpetrate this act of suicide on themselves, and of treason against the hopes of the world. To yourself, as the faithful advocate of the Union, I tender the offering of my high esteem and respect.

1. Thomas Jefferson, "To John Holmes," April 22, 1820, in Paul Leicester Ford, ed., *The Works of Thomas Jefferson,* Vol. 10 (New York: G. P. Putnam's Sons, 1904-5), 157-58.

Tuesday, April 23, 2013 – Essay #47 – Thomas Jefferson's Letter to John Holmes – Guest Essayist: James Legee, Graduate Fellow at the Matthew J. Ryan Center for the study of Free Institutions and the Public Good, Villanova University

Thomas Jefferson's April, 1820 Letter to John Holmes came as the nation expanded westward into the Louisiana Purchase, and with the homesteaders and settlers came the question of slavery. In an attempt to address slavery and its role in the new territories, it was agreed by

Congress that slavery would be allowed in Missouri but no other state North of the 36°30′ line; additionally, Maine would enter the Union as a Free State. John Holmes, who served as a Representative from Massachusetts until March 1820 and then a Senator from the newly formed state of Maine as of June 1820, was an architect of the Missouri Compromise. The letter from Jefferson to Holmes began with praise for Holmes' pamphlet to the citizens of Maine. Quickly though, Jefferson began to excoriate the Compromise as an existential threat to the Union. Jefferson continued on to articulate his own belief, that movement of slaves should not be restricted, and that the practice and laws governing slavery were not the purview of the congress, but rather, a matter to be handled within each individual state.

Despite their obvious philosophical differences, Jefferson understood just as well as Madison or Washington the fragility of a republican government. The news of the compromise came "like a fire bell in the night…considered it at once as the knell of the Union." The legislation drew a very literal line through the Union, dividing it with the majority of free states on one side, and the majority of slave states on the other. Jefferson understands that this is not merely a political dividing line, but a line "coinciding with a marked principle, moral and political, once conceived and held up to the angry passions of men, will never be obliterated." When the Kansas-Nebraska Act later attempted to obliterate that line, the result was bloodshed and unrest in those territories. Despite our political dialogue today, moral and political questions are often inseparable. Such a dividing line, a line that put the sacred beliefs and deepest convictions of men in even more stark opposition, could spell disaster for the Union. As is a theme in many of the Founders' writings, this is a danger not solely to the Union, but to the fate of self-government in all the world, a world which was controlled by divine right monarchies and oligarchies. He laments in the close of the letter, "If they would but dispassionately weigh the blessing they will throw away, against an abstract principle more likely to be effected by union than by scission, they would pause before they would perpetrate this act of suicide on themselves, and of treason against the hopes of the world." Now that lines had been draw, Jefferson realized the young republic "held the wolf by the ears" and the fight over slavery, though delayed, could not be contained. His opposition to the compromise, though, did not extend out of moral repugnance to slavery, nor did it come from a desire to limit the spread of the institution.

Jefferson continues on to argue that slavery should not be restricted in the new territories or states. He contends "of one thing I am certain, that as the passage of slaves from one State to another, would not make a slave of a single human being who would not be so without it…" Jefferson believed that allowing slavery in the new territories would make the slaves "individually happier" and facilitate emancipation. There is no further explanation as to why spreading slavery would lead to its destruction. In fact, the opposite seems true, as it is reasonable to conclude that slaves could perform any task that would have otherwise been open to free labor in Missouri or any other part of the Louisiana Purchase. Indeed, the population of slaves in America had continued to grow from 1790 to 1820 despite the restriction of the importation of new slaves. This is due to a natural growth as those enslaved had children and families, but there was also a reduction in emancipations as the profitability of slave labor grew.

Jefferson continued the argument against the Missouri Compromise in examining which part of government held the power to address slavery. He contended that the states should vote on the issue of slavery, not Congress. The states were Jefferson's fourth branch of government and

without explicit Constitutional authority for the national government he felt slavery was a state– not federal– issue. He wrote, "This certainly is the exclusive right of every State, which nothing in the constitution has taken from them and given to the General Government." Arguably, the state government is the most direct expression of the will of the citizens of a region, and the point of a federal system with the powers of the states protected by the 10th Amendment. So, perhaps Jefferson was right and the people of each state should have decided the issue of slavery. However, all the people that comprised the states were not granted a say; the obvious and most glaring exemption were the slaves themselves. Jefferson speaks of the sacrifice of the "generation of 1776, to acquire self-government and happiness to their country…" But is it republican self-government if it is not extended to all souls? Is there self-government in America at all, if an entire race of people is not given a say in their destiny and lack even self-ownership? The expressed powers of the Constitution and 10th Amendment reserving powers to the states were not included to protect slavery, but to protect liberty.

While Jefferson is right to fear the future of the Union and to fear the dividing line that the Missouri compromise would cut across the nation, it is difficult to support his view of the termination of slavery through its spread or popular sovereignty as the right of the states in voting slavery up or down. Should we then cast down Jefferson as a bigot and hypocrite? No; no more than we should abandon Washington for having owned slaves. It is Abraham Lincoln who perhaps best understands the centrality of Jefferson to the existence of America. Lincoln writes "All honor to Jefferson–to the man who, in the concrete pressure of a struggle for national independence by a single people, had the coolness, forecast, and capacity to introduce into a merely revolutionary document, an abstract truth, applicable to all men and all times, and so to embalm it there, that to-day, and in all coming days, it shall be a rebuke and a stumbling-block to the very harbingers of re-appearing tyranny and oppression."

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Letter to Edward Everett by James Madison

August 28, 1830

I have duly received your letter in which you refer to the "nullifying doctrine," advocated as a constitutional right by some of our distinguished fellow citizens; and to the proceedings of the Virginia Legislature in 98 and 99, as appealed to in behalf of that doctrine; and you express a wish for my ideas on those subjects.

I am aware of the delicacy of the task in some respects; and the difficulty in every respect of doing full justice to it. But having in more than one instance complied with a like request from other friendly quarters, I do not decline a sketch of the views which I have been led to take of the doctrine in question, as well as some others connected with them; and of the grounds from which it appears that the proceedings of Virginia have been misconceived by those who have appealed

to them. In order to understand the true character of the Constitution of the United States the error, not uncommon, must be avoided of viewing it through the medium either of a consolidated Government or of a confederated Government whilst it is neither the one nor the other, but a mixture of both. And having in no model the similitudes and analogies applicable to other systems of Government it must more than any other be its own interpreter, according to its text and *the facts of the case.*

From these it will be seen that the characteristic peculiarities of the Constitution are 1. The mode of its formation, 2. The division of the supreme powers of Government between the States in their united capacity and the States in their individual capacities.

1. It was formed, not by the Governments of the component States, as the Federal Government for which it was substituted was formed; nor was it formed by a majority of the people of the United States as a single community in the manner of a consolidated Government.

It was formed by the States—that is by the people in each of the States, acting in their highest sovereign capacity; and formed, consequently by the same authority which formed the State Constitutions.

Being thus derived from the same source as the Constitutions of the States, it has within each State, the same authority as the Constitution of the State; and is as much a Constitution, in the strict sense of the term, within its prescribed sphere, as the Constitutions of the States are within their respective spheres; but with this obvious and essential difference, that being a compact among the States in their highest sovereign capacity, and constituting the people thereof one people for certain purposes, it cannot be altered or annulled at the will of the States individually, as the Constitution of a State may be at its individual will.

2. And that it divides the supreme powers of Government between the Government of the United States, and the Governments of the individual States, is stamped on the face of the instrument; the powers of war and of taxation, of commerce and of treaties, and other enumerated powers vested in the Government of the United States being of as high and sovereign a character as any of the powers reserved to the State Governments

Nor is the Government of the United States created by the Constitution, less a Government in the strict sense of the term, within the sphere of its powers, than the Governments created by the constitutions of the States are within their several spheres. It is like them organized into Legislative, Executive, and Judiciary Departments. It operates like them, directly on persons and things. And, like them, it has at command a physical force for executing the powers committed to it. The concurrent operation in certain cases is one of the features marking the peculiarity of the system.

Between these different constitutional Governments—the one operating in all the States, the others operating separately in each, with the aggregate powers of Government divided between them, it could not escape attention that controversies would arise concerning the boundaries of jurisdiction; and that some provision ought to be made for such occurrences. A political system that does not provide for a peaceable and authoritative termination of occurring controversies,

would not be more than the shadow of a Government; the object and end of a real Government being the substitution of law and order for uncertainty confusion, and violence.

That to have left a final decision in such cases to each of the States, then thirteen and already twenty-four, could not fail to make the Constitution and laws of the United States different in different States was obvious; and not less obvious, that this diversity of independent decisions, must altogether distract the Government of the Union and speedily put an end to the Union itself. A uniform authority of the laws, is in itself a vital principle. Some of the most important laws could not be partially executed. They must be executed in all the States or they could be duly executed in none. An impost or an excise, for example, if not in force in some States, would be defeated in others. It is well known that this was among the lessons of experience which had a primary influence in bringing about the existing Constitution. A loss of its general authority would moreover revive the exasperating questions between the States holding ports for foreign commerce and the adjoining States without them, to which are now added all the inland States necessarily carrying on their foreign commerce through other States.

To have made the decisions under the authority of the individual States, coordinate in all cases with decisions under the authority of the United States would unavoidably produce collisions incompatible with the peace of society, and with that regular and efficient administration which is the essence of free Governments. Scenes could not be avoided in which a ministerial officer of the United States and the correspondent officer of an individual State, would have rencounters in executing conflicting decrees, the result of which would depend on the comparative force of the local posse attending them, and that a casualty depending on the political opinions and party feelings in different States.

To have referred every clashing decision under the two authorities for a final decision to the States as parties to the Constitution, would be attended with delays, with inconveniences, and with expenses amounting to a prohibition of the expedient, not to mention its tendency to impair the salutary veneration for a system requiring such frequent interpositions, nor the delicate questions which might present themselves as to the form of stating the appeal, and as to the Quorum for deciding it.

To have trusted to negotiation, for adjusting disputes between the Government of the United States and the State Governments as between independent and separate sovereignties, would have lost sight altogether of a Constitution and Government for the Union; and opened a direct road from a failure of that resort, to the ultima ratio between nations wholly independent of and alien to each other. If the idea had its origin in the process of adjustment between separate branches of the same Government the analogy entirely fails. In the case of disputes between independent parts of the same Government neither part being able to consummate its will, nor the Governor to proceed without a concurrence of the parts, necessity brings about an accommodation. In disputes between a State Government and the Government of the United States the case is practically as well as theoretically different; each party possessing all the Departments of an organized Government, Legislative, Executive, and Judiciary; and having each a physical force to support its pretensions. Although the issue of negotiation might sometimes avoid this extremity, how often would it happen among so many States, that an unaccommodating spirit in some would render that resource unavailing? A contrary supposition

would not accord with a knowledge of human nature or the evidence of our own political history.

The Constitution, not relying on any of the preceding modifications for its safe and successful operation, has expressly declared on the one hand; 1. "That the Constitution, and the laws made in pursuance thereof, and all Treaties made under the authority of the United States shall be the supreme law of the land; 2. That the judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding; 3. That the judicial power of the United States shall extend to all cases in law and equity arising under the Constitution, the laws of the United States and Treaties made under their authority etc."

On the other hand, as a security of the rights and powers of the States in their individual capacities, against an undue preponderance of the powers granted to the Government over them in their united capacity, the Constitution has relied on, 1. The responsibility of the Senators and Representatives in the Legislature of the United States to the Legislatures and people of the States. 2. The responsibility of the President to the people of the United States; and 3. The liability of the Executive and Judiciary functionaries of the United States to impeachment by the Representatives of the people of the States, in one branch of the Legislature of the United States and trial by the Representatives of the States, in the other branch; the State functionaries, Legislative, Executive, and Judiciary, being at the same time in their appointment and responsibility, altogether independent of the agency or authority of the United States.

How far this structure of the Government of the United States be adequate and safe for its objects, time alone can absolutely determine. Experience seems to have shown that whatever may grow out of future stages of our national career, there is as yet a sufficient control in the popular will over the Executive and Legislative Departments of the Government. When the Alien and Sedition laws were passed in contravention to the opinions and feelings of the community, the first elections that ensued put an end to them. And whatever may have been the character of other acts in the judgment of many of us, it is but true that they have generally accorded with the views of a majority of the States and of the people. At the present day it seems well understood that the laws which have created most dissatisfaction have had a like sanction without doors; and that whether continued varied or repealed, a like proof will be given of the sympathy and responsibility of the Representative Body to the Constituent Body. Indeed, the great complaint now is, not against the want of this sympathy and responsibility, but against the results of them in the legislative policy of the nation.

With respect to the Judicial power of the United States and the authority of the Supreme Court in relation to the boundary of jurisdiction between the Federal and the State Governments. I may be permitted to refer to the number of the "Federalist" for the light in which the subject was regarded by its writer, at the period when the Constitution was depending; and it is believed that the same was the prevailing view then taken of it, that the same view has continued to prevail, and that it does so at this time notwithstanding the eminent exceptions to it.

But it is perfectly consistent with the concession of this power to the Supreme Court, in cases falling within the course of its functions, to maintain that the power has not always been rightly exercised. To say nothing of the period, happily a short one, when judges in their seats did not abstain from intemperate and party harangues, equally at variance with their duty and their

dignity, there have been occasional decisions from the Bench which have incurred serious and extensive disapprobation. Still it would seem that, with but few exceptions, the course of the judiciary has been hitherto sustained by the predominant sense of the nation. Those who have denied or doubted the supremacy of the judicial power of the United States and denounce at the same time nullifying power in a State, seem not to have sufficiently adverted to the utter inefficiency of a supremacy in a law of the land, without a supremacy in the exposition and execution of the law; nor to the destruction of all equipoise between the Federal Government and the State governments, if, whilst the functionaries of the Federal Government are directly or indirectly elected by and responsible to the States and the functionaries of the States are in their appointments and responsibility wholly independent of the United States no constitutional control of any sort belonged to the United States over the States. Under such an organization it is evident that it would be in the power of the States individually, to pass unauthorized laws, and to carry them into complete effect, anything in the Constitution and laws of the United States to the contrary notwithstanding. This would be a nullifying power in its plenary character; and whether it had its final effect, through the Legislative, Executive, or Judiciary organ of the State, would be equally fatal to the constitutional relation between the two Governments.

Should the provisions of the Constitution as here reviewed be found not to secure the Government and rights of the States against usurpations and abuses on the part of the United States the final resort within the purview of the Constitution lies in an amendment of the Constitution according to a process applicable by the States.

And in the event of a failure of every constitutional resort, and an accumulation of usurpations and abuses, rendering passive obedience and non-resistance a greater evil, than resistance and revolution, there can remain but one resort, the last of all, an appeal from the cancelled obligations of the constitutional compact, to original rights and the law of self-preservation. This is the ultima ratio under all Government whether consolidated, confederated, or a compound of both; and it cannot be doubted that a single member of the Union, in the extremity supposed, but in that only would have a right, as an extra and ultra constitutional right, to make the appeal.

This brings us to the expedient lately advanced, which claims for a single State a right to appeal against an exercise of power by the Government of the United States decided by the State to be unconstitutional, to the parties of the Constitution, compact; the decision of the State to have the effect of nullifying the act of the Government of the United States unless the decision of the State be reversed by three-fourths of the parties.

The distinguished names and high authorities which appear to have asserted and given a practical scope to this doctrine, entitle it to a respect which it might be difficult otherwise to feel for it.

If the doctrine were to be understood as requiring the three-fourths of the States to sustain, instead of that proportion to reverse, the decision of the appealing State, the decision to be without effect during the appeal, it would be sufficient to remark, that this extra constitutional course might well give way to that marked out by the Constitution which authorizes two-thirds of the States to institute and three-fourths to effectuate, an amendment of the Constitution establishing a permanent rule of the highest authority in place of an irregular precedent of construction only.

But it is understood that the nullifying doctrine imports that the decision of the State is to be presumed valid, and that it overrules the law of the United States unless overruled by three-fourths of the States.

Can more be necessary to demonstrate the inadmissibility of such a doctrine than that it puts it in the power of the smallest fraction over one-fourth of the United States—that is, of seven States out of twenty-four—to give the law and even the Constitution to seventeen States, each of the seventeen having as parties to the Constitution an equal right with each of the seven to expound it and to insist on the exposition. That the seven might, in particular instances be right and the seventeen wrong, is more than possible. But to establish a positive and permanent rule giving such a power to such a minority over such a majority, would overturn the first principle of free Government and in practice necessarily overturn the Government itself.

It is to be recollected that the Constitution was proposed to the people of the States as a *whole,* and unanimously adopted by the States as a *whole,* it being a part of the Constitution that not less than three-fourths of the States should be competent to make any alteration in what had been unanimously agreed to. So great is the caution on this point, that in two cases when peculiar interests were at stake, a proportion even of three-fourths is distrusted, and unanimity required to make an alteration.

When the Constitution was adopted as a whole, it is certain that there were many parts which if separately proposed, would have been promptly rejected. It is far from impossible, that every part of the Constitution might be rejected by a majority, and yet, taken together as a whole be unanimously accepted. Free constitutions will rarely if ever be formed without reciprocal concessions; without articles conditioned on and balancing each other. Is there a constitution of a single State out of the twenty-four that would bear the experiment of having its component parts submitted to the people and separately decided on?

What the fate of the Constitution of the United States would be if a small proportion of States could expunge parts of it particularly valued by a large majority, can have but one answer.

The difficulty is not removed by limiting the doctrine to cases of construction. How many cases of that sort, involving cardinal provisions of the Constitution, have occurred? How many now exist? How many may hereafter spring up? How many might be ingeniously created, if entitled to the privilege of a decision in the mode proposed?

Is it certain that the principle of that mode would not reach farther than is contemplated. If a single State can of right require three-fourths of its co-States to overrule its exposition of the Constitution, because that proportion is authorized to amend it, would the plea be less plausible that, as the Constitution was unanimously established, it ought to be unanimously expounded?

The reply to all such suggestions seems to be unavoidable and irresistible, that the Constitution is a compact; that its text is to be expounded according to the provision for expounding it, making a part of the compact; and that none of the parties can rightfully renounce the expounding provision more than any other part. When such a right accrues, as it may accrue, it must grow out of abuses of the compact releasing the sufferers from their fealty to it.

In favor of the nullifying claim for the States individually, it appears, as you observe, that the proceedings of the Legislature of Virginia in 98 and 99 against the Alien and Sedition Acts are much dwelt upon.

It may often happen, as experience proves, that erroneous constructions, not anticipated, may not be sufficiently guarded against in the language used; and it is due to the distinguished individuals who have misconceived the intention of those proceedings to suppose that the meaning of the Legislature, though well comprehended at the time, may not now be obvious to those unacquainted with the contemporary indications and impressions.

But it is believed that by keeping in view the distinction between the Government of the States and the States in the sense in which they were parties to the Constitution; between the rights of the parties, in their concurrent and in their individual capacities; between the several modes and objects of interposition against the abuses of power, and especially between interpositions within the purview of the Constitution and interpositions appealing from the Constitution to the rights of nature paramount to all Constitutions; with these distinctions kept in view, and an attention, always of explanatory use, to the views and arguments which were combated, a confidence is felt, that the Resolutions of Virginia, as vindicated in the Report on them, will be found entitled to an exposition, showing a consistency in their parts and an inconsistency of the whole with the doctrine under consideration.

That the Legislature could not have intended to sanction such a doctrine is to be inferred from the debates in the House of Delegates, and from the address of the two Houses to their constituents on the subject of the resolutions. The tenor of the debates which were ably conducted and are understood to have been revised for the press by most, if not all, of the speakers, discloses no reference whatever to a constitutional right in an individual State to arrest by force the operation of a law of the United States concert among the States for redress against the alien and sedition laws, as acts of usurped power, was a leading sentiment, and the attainment of a concert the immediate object of the course adopted by the Legislature, which was that of inviting the other States "to *concur* in declaring the acts to be unconstitutional, and to *cooperate* by the necessary and proper measures in maintaining unimpaired the authorities rights and liberties reserved to the States respectively and to the people." That by the necessary and proper measures to be *concurrently*and cooperatively taken, were meant measures known to the Constitution, particularly the ordinary control of the people and Legislatures of the States over the Government of the United States cannot be doubted; and the interposition of this control as the event showed was equal to the occasion. It is worthy of remark, and explanatory of the intentions of the Legislature, that the words "not law, but utterly null, void, and of no force or effect," which had followed, in one of the Resolutions, the word "unconstitutional," were struck out by common consent. Though the words were in fact but synonymous with "unconstitutional," yet to guard against a misunderstanding of this phrase as more than declaratory of opinion, the word unconstitutional alone was retained, as not liable to that danger.

The published address of the Legislature to the people their constituents affords another conclusive evidence of its views. The address warns them against the encroaching spirit of the General Government, argues the unconstitutionality of the alien and sedition acts, points to other instances in which the constitutional limits had been overleaped; dwells upon the dangerous

mode of deriving power by implications; and in general presses the necessity of watching over the consolidating tendency of the Federal policy. But nothing is said that can be understood to look to means of maintaining the rights of the States beyond the regular ones within the forms of the Constitution.

If any farther lights on the subject could be needed, a very strong one is reflected in the answers to the Resolutions by the States which protested against them. The main objection to these, beyond a few general complaints against the inflammatory tendency of the resolutions was directed against the assumed authority of a State Legislature to declare a law of the United States unconstitutional, which they pronounced an unwarrantable interference with the exclusive jurisdiction of the Supreme Court of the United States. Had the resolutions been regarded as avowing and maintaining a right in an individual State, to arrest by force the execution of a law of the United States it must be presumed that it would have been a conspicuous object of their denunciation.

1. James Madison, "Letter to Edward Everett," August 28, 1830, in Ralph Ketcham, ed., *Selected Writings of James Madison*(Indianapolis, IN: Hackett, 2006), 340-48.

Wednesday, April 24, 2013 – Essay #48 – James Madison's Letter To Edward Everett – Guest Essayist: Charles K. Rowley, Duncan Black Professor Emeritus of Economics at George Mason University and General Director of The Locke Institute in Fairfax, Virginia

In this 1830 response to Edward Everett of Massachusetts James Madison maintains that a state does not possess the authority to strike down as unconstitutional an act of the federal government. If you find the essay long-winded, you are correct in this assessment. It is long-winded because James Madison was a hypocrite on the issue of nullification, supporting the notion when it suited him, and rejecting it when it did not. You may learn from this episode an important lesson about human nature. The greatest of founding fathers does not always make a great secretary of state, a great president, or a great elder-statesman. James Madison (and Thomas Jefferson) were no exceptions to this insight.

Nullification, in United States constitutional history, is a legal theory that a state has the right to nullify, or invalidate, any law which that state has deemed to be unconstitutional. The concept of nullification appears nowhere in the United States Constitution, though its relevance may just conceivably be deduced from the wording of the Tenth Amendment. The theory of nullification has never been legally upheld, but rather has been rejected by the Supreme Court of the United States. Nevertheless, until the War of Northern Aggression ended in the defeat of the South, nullification was the most important theoretical alternative to the idea that the U.S. Supreme Court is the final arbiter of constitutional controversies. So James Madison, in 1830, was not responding to a trivial question.

Supporters of nullification argued that the states' power of nullification is inherent in the nature of the federal system. Prior to ratifying the Constitution, the states essentially were sovereign nations. The Constitution is a contract or compact among the states whereby the states delegated certain powers to the federal government, while reserving all other powers to themselves. As parties to the compact, the states retained the inherent right to judge compliance with the compact. According to this theory, if a state determines that the federal government has exceeded its delegated powers, that state may declare the federal law in question to be unconstitutional. This sovereign power, it was argued, was one of the powers reserved to the states by the Tenth Amendment.

The federal courts – predictably of course – have systematically rejected this view. The courts have rejected the compact theory, finding that the Constitution was established directly by the people, as stated in the preamble: 'We the people of the United States….' Under the Supremacy Clause of Article VI, the Constitution and federal laws adopted in pursuance thereof are the 'supreme law of the land…any thing in the constitution of laws of any state to the contrary nothwithstanding.' Federal laws are valid and are supreme, as long as those laws are consistent with the Constitution. The federal courts and not the states are empowered to determine whether federal laws are constitutional, with the Supreme Court having the final authority.

The concept of nullification of federal law by the states was not discussed at the Constitutional Convention, so the records of that Convention provide no support for the theory of nullification. With the single exception of Virginia, the records of the state ratifying conventions do not include any assertion that the states would have the power to nullify federal laws. During the Virginia Convention, Edmund Randolph and George Nicholas stated that ratification by Virginia would constitute its agreement to a contract and that Virginia would have a right to judge the constitutional limits of federal power. But these remarks do not appear to have been central to the ratification decision.

The Federalist Papers nowhere assert that the states have the power to nullify federal law. On the contrary, Federalist Nos. 33, 39, 44, and 78 explicitly state that federal laws are supreme over state laws and that only the federal courts have the power to pronounce federal legislation void as contrary to the Constitution.

So by strict construction and by inferred intent, nullification should play no role in the United States. Yet, as early as 1798, the two leading Founding Fathers of the United States, Thomas Jefferson and James Madison – seemingly paranoid about the presumed over-reach by the Federalists under the presidency of John Adams – were writing out resolutions that asserted the theory of nullification in the most unambiguous and forthright terms.

The issue that incited nullification attempts was the *Alien and Sedition Acts* passed in 1798 by the Federalists in the 5th United States Congress in the aftermath of the French Revolution and during the undeclared naval war with France later known as the Quasi-War. The bills were signed into law by President John Adams. The unrest in France was sweeping into the United States, encouraged in some instances by Republicans, some of whom were calling for secession. The unrest was viewed by Federalists as emanating from French and French-sympathizing immigrants. Was Thomas Jefferson sympathetic to the unrest? Well Jefferson certainly hated

John Adams as though he were Satan himself!

The legislation was meant to guard against a real threat of anarchy. The Republicans denounced them, though hypocritically, Thomas Jefferson as President and James Madison as Secretary of State deployed the Acts against the Federalists after winning the 1800 elections. Opposition to the laws became focused in the highly controversial 1798 Virginia and Kentucky Resolutions authored respectively by James Madison and Thomas Jefferson.

As would so often occur during periods of war, U.S. presidents and their Congressional allies undoubtedly over-reached in their attempt to suppress subversion and dissent. Again, as so often would occur in the future, the federal courts conspired to judge unconstitutional laws constitutional. Unquestionably, a number of U.S. citizens were unconstitutionally deprived of their rights under the Constitution. Twenty-five people were arrested, eleven were tried, and ten were convicted. The Alien and Sedition Acts were never appealed to the Supreme Court, whose judicial review was not established until *Marbury v. Madison* in 1803.

In any event, Jefferson and Madison secretly drafted the 1798 Kentucky and Virginia Resolutions denouncing the federal legislation and calling for nullification, though the state legislatures of both states rejected these resolutions. Jefferson went one step further in the case of Kentucky and drafted a threat for Kentucky to secede from the Union. Had this action become public knowledge at the time, Jefferson may well have been impeached for treason. After all, he was calling for outright rebellion, if needed, against a federal government of which he was serving as Vice-President. George Washington was so appalled by the Virginia and Kentucky Resolutions that he advised Patrick Henry that 'if systematically and pertinaciously pursued' they would 'dissolve the union or produce coercion'.

The influence of Jefferson's doctrine of states rights reverberated right up to the Civil War and beyond. A future president, James Garfield, at the close of the Civil War, stated that Jefferson's Kentucky Resolution 'contained the germ of nullification and secession, and we are today reaping the fruits'.

So now you will understand why the older, more mature, James Madison, by then unchained from the doctrines of Thomas Jefferson, wrote that reversionary letter to Edward Everett in 1830. After, all, no one was more responsible than he for the Constitution of the United States.

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The Missouri Compromise

March 6, 1820

An Act to authorize the people of the Missouri territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states, and to prohibit slavery in certain territories.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the inhabitants of that portion of the Missouri Territory included within the boundaries hereinafter designated, be, and they are hereby, authorized to form for themselves a constitution and state government, and to assume such name as they shall deem proper; and the said state, when formed, shall be admitted into the Union, upon an equal footing with the original states, in all respects whatsoever.

Section 2. *And be it further enacted,* That the said state shall consist of all the territory included within the following boundaries, to wit: Beginning in the middle of the Mississippi river, on the parallel of thirty-six degrees of north latitude; thence west, along that parallel of latitude, to the St. Francois river; thence up, and following the course of that river, in the middle of the main channel thereof, to the parallel of latitude of thirty-six degrees and thirty minutes; thence west, along the same, to a point where the said parallel is intersected by a meridian line passing through the middle of the mouth of the Kansas river, where the same empties into the Missouri river, thence, from the point aforesaid north, along the said meridian line, to the intersection of the parallel of latitude which passes through the rapids of the river Des Moines, making the said line to correspond with the Indian boundary line; thence east, from the point of intersection last aforesaid, along the said parallel of latitude, to the middle of the channel of the main fork of the said river Des Moines; thence down and along the middle of the main channel of the said river Des Moines, to the mouth of the same, where it empties into the Mississippi river; thence, due east, to the middle of the main channel of the Mississippi river; thence down, and following the course of the Mississippi river, in the middle of the main channel thereof, to the place of beginning: *Provided,* The said state shall ratify the boundaries aforesaid; *And provided also,*That the said state shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said state, so far as the said rivers shall form a common boundary to the said state; and any other state or states, now or hereafter to be formed and bounded by the same, such rivers to be common to both; and that the river Mississippi, and the navigable rivers and waters leading into the same, shall be common highways, and for ever free, as well to the inhabitants of the said state as to other citizens of the United States, without any tax, duty, impost, or toll, therefor, imposed by the said state.

Section 3. *And be it further enacted,* That all free white male citizens of the United States, who shall have arrived at the age of twenty-one years, and have resided in said territory three months previous to the day of election, and all other persons qualified to vote for representatives to the general assembly of the said territory, shall be qualified to be elected, and they are hereby qualified and authorized to vote, and choose representatives to form a convention, who shall be apportioned amongst the several counties as follows:

From the county of Howard, five representatives. From the county of Cooper, three

representatives. From the county of Montgomery, two representatives. From the county of Pike, one representative. From the county of Lincoln, one representative. From the county of St. Charles, three representatives. From the county of Franklin, one representative. From the county of St. Louis, eight representatives. From the county of Jefferson, one representative. From the county of Washington, three representatives. From the county of St. Genevieve, four representatives. From the county of Madison, one representative. From the county of Cape Girardeau, five representatives. From the county of New Madrid, two representatives. From the county of Wayne, and that portion of the county of Lawrence which falls within the boundaries herein designated, one representative.

And the election for the representatives aforesaid shall be holden on the first Monday, and two succeeding days of May next, throughout the several counties aforesaid in the said territory, and shall be, in every respect, held and conducted in the same manner, and under the same regulations as is prescribed by the laws of the said territory regulating elections therein for members of the general assembly, except that the returns of the election in that portion of Lawrence county included in the boundaries aforesaid, shall be made to the county of Wayne, as is provided in other cases under the laws of said territory.

Section 4. *And be it further enacted,* That the members of the convention thus duly elected, shall be, and they are hereby authorized to meet at the seat of government of said territory on the second Monday of the month of June next; and the said convention, when so assembled, shall have power and authority to adjourn to any other place in the said territory, which to them shall seem best for the convenient transaction of their business; and which convention, when so met, shall first determine by a majority of the whole number elected, whether it be, or be not, expedient at that time to form a constitution and state government for the people within the said territory, as included within the boundaries above designated; and if it be deemed expedient, the convention shall be, and hereby is, authorized to form a constitution and state government; or, if it be deemed more expedient, the said convention shall provide by ordinance for electing representatives to form a constitution or frame of government; which said representatives shall be chosen in such manner, and in such proportion as they shall designate; and shall meet at such time and place as shall be prescribed by the said ordinance; and shall then form for the people of said territory, within the boundaries aforesaid, a constitution and state government: *Provided,* That the same, whenever formed, shall be republican, and not repugnant to the constitution of the United States; and that the legislature of said state shall never interfere with the primary disposal of the soil by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers; and that no tax shall be imposed on lands the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. Section 5. *And be it further enacted,*That until the next general census shall be taken, the said state shall be entitled to one representative in the House of Representatives of the United States.

Section 6. *And be it further enacted,* That the following propositions be, and the same are hereby, offered to the convention of the said territory of Missouri, when formed, for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory upon the United States:

First. That section numbered sixteen in every township, and when such section has been sold, or

otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the state for the use of the inhabitants of such township, for the use of schools.

Second. That all salt springs, not exceeding twelve in number, with six sections of land adjoining to each, shall be granted to the said state for the use of said state, the same to be selected by the legislature of the said state, on or before the first day of January, in the year one thousand eight hundred and twenty-five; and the same, when so selected, to be used under such terms, conditions, and regulations, as the legislature of said state shall direct: *Provided,* That no salt spring, the right whereof now is, or hereafter shall be, confirmed or adjudged to any individual or individuals, shall, by this section, be granted to the said state: *And provided also,* That the legislature shall never sell or lease the same, at any one time, for a longer period than ten years, without the consent of Congress.

Third. That five per cent. of the net proceeds of the sale of lands lying within the said territory or state, and which shall be sold by Congress, from and after the first day of January next, after deducting all expenses incident to the same, shall be reserved for making public roads and canals, of which three fifths shall be applied to those objects within the state, under the direction of the legislature thereof; and the other two fifths in defraying, under the direction of Congress, the expenses to be incurred in making of a road or roads, canal or canals, leading to the said state.

Fourth. That four entire sections of land be, and the same are hereby, granted to the said state, for the purpose of fixing their seat of government thereon; which said sections shall, under the direction of the legislature of said state, be located, as near as may be, in one body, at any time, in such townships and ranges as the legislature aforesaid may select, on any of the public lands of the United States: *Provided,* That such locations shall be made prior to the public sale of the lands of the United States surrounding such location.

Fifth. That thirty-six sections, or one entire township, which shall be designated by the President of the United States, together with the other lands heretofore reserved for that purpose, shall be reserved for the use of a seminary of learning, and vested in the legislature of said state, to be appropriated solely to the use of such seminary by the said legislature: *Provided,* That the five foregoing propositions herein offered, are on the condition that the convention of the said state shall provide, by an ordinance, irrevocable without the consent of the United States, that every and each tract of land sold by the United States, from and after the first day of January next, shall remain exempt from any tax laid by order or under the authority of the state, whether for state, county, or township, or any other purpose whatever, for the term of five years from and after the day of sale; *And further,* That the bounty lands granted, or hereafter to be granted, for military services during the late war, shall, while they continue to be held by the patentees, or their heirs, remain exempt as aforesaid from taxation for the term of three years from and after the date of the patents respectively.

Section 7. *And be it further enacted,* That in case a constitution and state government shall be formed for the people of the said territory of Missouri, the said convention or representatives, as soon thereafter as may be, shall cause a true and attested copy of such constitution, or frame of state government, as shall be formed or provided, to be transmitted to Congress.

Section 8. *And be it further enacted.* That in all that territory ceded by France to the United States, under the name of Louisiana, which lies north of thirty-six degrees and thirty minutes north latitude, not included within the limits of the state, contemplated by this act, slavery and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be, and is hereby, forever prohibited: *Provided always,* That any person escaping into the same, from whom labor or service is lawfully claimed, in any state or territory of the United States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.

1. Act of March 6, 1820, ch. 22, 22 *Stat.*545-58.

Thursday, April 25, 2013 – Essay #49 – The Missouri Compromise – Guest Essayist: William C. Duncan, Director of the Marriage Law Foundation

The Missouri Compromise

William C. Duncan, Director of the Marriage Law Foundation

In our day, it is common, indeed expected, for the United States Supreme Court to strike down laws passed by Congress as unconstitutional. In the first decades of the United States, however, this was an exceedingly rare practice. In fact, in 70 years, the Court struck down only two federal laws as unconstitutional. The second of these was the Missouri Compromise.

The Compromise was legislation that arose out of a controversy about extending slavery into the northern parts of the territory acquired during the Louisiana Purchase. The legislation "admitted Missouri as slave state but otherwise prohibited slavery in the Louisiana Purchase territory north of 36°30'." Forrest McDonald, *States Rights and the Union* 133 (2000). This was a "compromise" in that it prevented (1) the spread of slavery into the northern part of the territory, (2) ensured the possibility of slave states south of the line, and (3) prevented harsh and divisive debates over slavery in any states that would be part of the new territory. Its abolitionist critics noted that it was a compromise that allowed for an evil practice to spread.

The Compromise created a difficult balance not only because it tolerated slave-owning but because it inserted the national government into issues that had traditionally been only of state concern. As a result, as Forrest McDonald notes writing about how the Compromise was viewed decades later, some Southerners "had long felt, vaguely, that the Missouri Compromise line was unconstitutional" (p. 167).

This is where the Supreme Court comes in. The constitutionality of the Missouri Compromise became a central issue in the Supreme Court's infamous decision in *Dred Scott v. Sandford* (1857). This case involved a petition by a slave for his freedom and for that of his wife and children. In deciding the case, the court engaged in an early instance of judicial activism, holding

that black persons could not be citizens of the United States and that residence in a free state did not result in a slave's being freed.

Additionally, the court went beyond the issues it was asked to address in the case by holding the Missouri Compromise unconstitutional. The Court invoked the Fifth Amendment's due process clause (later to be used by Twentieth Century courts as the source for other unwritten rights). It said: "an act of Congress which deprives a citizen of the United States of his liberty or property merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law."

The *Dred Scott* decision contributed to a financial panic and to the victory of Republican Party in the 1858 Congressional elections. With other factors, it contributed and, with other factors to Abraham Lincoln's success in the 1860 presidential election, to secession and eventually to the Civil War. Ultimately the effort to buy temporary respite from controversy by acquiescing in existence of a serious wrong was doomed to fail.

The history of the Compromise can be a cautionary tale for us today. It teaches us that the Supreme Court is just another branch of government and has no particular monopoly on wisdom (which suggests that the practice of seeking to find new constitutional "rights" through Supreme Court decisions is bad policy). More importantly, it shows that moral compromises are always tenuous and can't hold over the long term.

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The Wilmot Proviso

August 8, 1846

Provided, That, as an express and fundamental condition to the acquisition of any territory from the Republic of Mexico by the United States, by virtue of any treaty which may be negotiated between them, and to the use by the Executive of the moneys herein appropriated, neither slavery nor involuntary servitude shall ever exist in any part of said territory, except for crime, whereof the party shall first be duly convicted.

David Wilmot, "The Wilmot Proviso," August 8, 1846, in Thomas Hart Benton, ed., *Abridgment of the Debates of Congress, from 1789 to 1856,* Vol. 15 (New York: D. Appleton & Co., 1861), 646.

Friday, April 26, 2013 – Essay #50 – The Wilmot Proviso – Guest Essayist: Andrew Langer, President of the Institute for Liberty

Sometimes the smallest, most seemingly inconsequential events can have tremendous historical significance—a minor Central European Arch Duke's assassination igniting World War I, for instance. So it is with *The Wilmot Proviso,* a 71-word, one paragraph bill in the US House of Representatives.

Introduced by Pennsylvania Congressman David Wilmot in 1846 as part of the debate on appropriations for the cessation of the Mexican-American War (and treaty negotiations), the Proviso would have banned slavery in any territories acquired from Mexico as a result of America's victory in that war. In less than two years, with the ratification of the Treaty of Guadalupe Hidalgo, America's territorial holdings would now stretch from the Atlantic to the Pacific, and from Canada to the present-day Mexican border—vast territories that could set the balance of power (political and economic) between slave-holding and non-slave holding states.

Though introduced by Wilmot, the text was actually written by Rep. Jacob Brinkerhoff, a congressman from Ohio, and along with Wimot one of Congress' Free Soil Party members, a group of former Democrats who left their party over moral and economic objections to slavery (the Free Soilers were one of several factions to start the Republican Party in the years immediately preceding the Civil War). It was agreed among Congress' Free Soilers that whoever had the best chance of successfully introducing the bill should do so—and when the opportunity presented itself, Wilmot (who was, at the time, a rising star in Congress) did.

The Bill passed the House, narrowly, only to languish in the Senate. As I discussed in Essays 45 and 46 of this 90-day study, Sen. John C. Calhoun (back in the Senate for only a year at this point), was both intimately familiar with the terms being negotiated in the Treaty of Guadalupe Hidalgo, and had been a key defender of slavery's persistence throughout his political career.

Like Calhoun's *Speech on the Oregon Bill*, *the Wilmot Proviso* sits squarely in the middle of the two decades of serious maneuvering and outmaneuvering of pro and anti-slavery forces in the US Congress. Nearly a decade earlier, Calhoun had strenuously argued against former President John Quincy Adams attempts to merely hear petitions from the American people to Congress on the issue of slavery. ***But now, for the very first time in American history, Congress was actually going to take a vote on whether or not slavery ought to be permitted somewhere on United States' soil!***

It was, at the point in time, the capstone of a tremendous amount of hard work, sacrifice, and political maneuvering by America's growing an strengthening abolitionist movement.

That it never passed the Senate, in any forms, is actually immaterial to the Proviso's historic significance. The bill itself, and the ideas it embodied, then became the subject of intense push-back and examination by pro-slavery forces. What would the impact be on the political and economic balance between slave states and non-slave states? Was the concept advanced by Adams, Brinkerhoff, Wilmot and others even constitutional? Did the federal government have the power to restrict private property ownership, assuming that slaves ***were*** private property?

Those questions would be answered a decade later in the Supreme Court's *Dred Scott Decision*. Scott, a slave bought by an officer in the US Army, was brought into the free territory of Illinois—and by virtue of this, Scott asked that the federal government declare him to be free. In one of the bleakest moments in Supreme Court jurisprudence, however, the High Court declared that Scott was was not a citizen of the United States, and therefore had no standing to sue in federal court.

But the court also focused squarely on the issues raised by *The Wilmot Proviso*—namely, whether the federal government had the power to regulate slavery in territory that it had acquired subsequent to the nation's creation (the heart of the proviso itself). The court ruled that such a pronouncement was flatly unconstitutional.

But despite the High Court's miscarriage of justice (it may have been the first, but it certainly wasn't the last), the questions raised by *The Wilmot Proviso* would ultimately be settled by the two sides of that political conflict—in the bloodiest manner possible.

Andrew Langer is President of the Institute for Liberty, and host of The Broadside, a weekly internet radio show, which can be found on Blogtalkradio.com.

The Constitution and the Union by Daniel Webster (1782-1852)

March 7, 1850

Mr. President:

I wish to speak today, not as a Massachusetts man, nor as a Northern man, but as an American, and a member of the Senate of the United States. It is fortunate that there is a Senate of the United States; a body not yet moved from its propriety, not lost to a just sense of its own dignity and its own high responsibilities, and a body to which the country looks, with confidence, for wise, moderate, patriotic, and healing counsels. It is not to be denied that we live in the midst of strong agitations, and are surrounded by very considerable dangers to our institutions and government. The imprisoned winds are let loose. The East, the North, and the stormy South combine to throw the whole sea into commotion, to toss its billows to the skies, and disclose its profoundest depths. I do not affect to regard myself, Mr. President, as holding, or as fit to hold, the helm in this combat with the political elements; but I have a duty to perform, and I mean to perform it with fidelity,—not without a sense of existing dangers, but not without hope. I have a part to act, not for my own security or safety, for I am looking out for no fragment upon which to float away from the wreck, if wreck there must be, but for the good of the whole, and the preservation of all; and there is that which will keep me to my duty during this struggle, whether the sun and the stars shall appear, or shall not appear for many days. I speak today for the preservation of the Union. "Hear me for my cause." I speak today, out of a solicitous and anxious heart, for the restoration to the country of that quiet and that harmony which make the blessings of this Union so rich, and so dear to us all. These are the topics that I propose to myself to discuss; these are the motives, and the sole motives, that influence me in the wish to

communicate my opinions to the Senate and the country; and if I can do any thing, however little, for the promotion of these ends, I shall have accomplished all that I expect….

Now, Sir, upon the general nature and influence of slavery there exists a wide difference of opinion between the northern portion of this country and the southern. It is said on the one side, that, although not the subject of any injunction or direct prohibition in the New Testament, slavery is a wrong; that it is founded merely in the right of the strongest; and that it is an oppression, like unjust wars, like all those conflicts by which a powerful nation subjects a weaker to its will; and that, in its nature, whatever may be said of it in the modifications which have taken place, it is not according to the meek spirit of the Gospel. It is not "kindly affectioned"; it does not "seek another's, and not its own"; it does not "let the oppressed go free." These are sentiments that are cherished, and of late with greatly augmented force, among the people of the Northern States. They have taken hold of the religious sentiment of that part of the country, as they have, more or less, taken hold of the religious feeling of a considerable portion of mankind. The South, upon the other side, having been accustomed to this relation between two races all their lives, from their birth, having been taught, in general, to treat the subjects of this bondage with care and kindness, and I believe, in general, feeling great kindness for them, have not taken the view of the subject which I have mentioned. There are thousands of religious men, with consciences as tender as any of their brethren at the North, who do not see the unlawfulness of slavery; and there are more thousands, perhaps, that, whatsoever they may think of it in its origin, and as a matter depending upon natural right, yet take things as they are, and, finding slavery to be an established relation of the society in which they live, can see no way in which, let their opinions on the abstract question be what they may, it is in the power of the present generation to relieve themselves from this relation. And candor obliges me to say, that I believe they are just as conscientious, many of them, and the religious people, all of them, as they are at the North who hold different opinions.

The honorable Senator from South Carolina the other day alluded to the separation of that great religious community, the Methodist Episcopal Church. That separation was brought about by differences of opinion upon this particular subject of slavery. I felt great concern, as that dispute went on, about the result. I was in hopes that the difference of opinion might be adjusted, because I looked upon that religious denomination as one of the great props of religion and morals throughout the whole country, from Maine to Georgia, and westward to our utmost western boundary. The result was against my wishes and against my hopes. I have read all their proceedings and all their arguments; but I have never yet been able to come to the conclusion that there was any real ground for that separation; in other words, that any good could be produced by that separation. I must say I think there was some want of candor or charity. Sir, when a question of this kind seizes on the religious sentiments of mankind, and comes to be discussed in religious assemblies of the clergy and laity, there is always to be expected, or always to be feared, a great degree of excitement. It is in the nature of man, manifested by his whole history, that religious disputes are apt to become warm in proportion to the strength of the convictions which men entertain of the magnitude of the questions at issue. In all such disputes, there will sometimes be found men with whom everything is absolute; absolutely wrong, or absolutely right. They see the right clearly; they think others ought so to see it, and they are disposed to establish a broad line of distinction between what is right and what is wrong. They are not seldom willing to establish that line upon their own convictions of truth and justice; and

are ready to mark and guard it by placing along it a series of dogmas, as lines of boundary on the earth's surface are marked by posts and stones. There are men who, with clear perceptions, as they think, of their own duty, do not see how too eager a pursuit of one duty may involve them in the violation of others, or how too warm an embracement of one truth may lead to a disregard of other truths equally important. As I heard it stated strongly, not many days ago, these persons are disposed to mount upon some particular duty, as upon a war-horse, and to drive furiously on and upon and over all other duties that may stand in the way. There are men who, in reference to disputes of that sort, are of the opinion that human duties may be ascertained with the exactness of mathematics. They deal with morals as with mathematics; and they think what is right may be distinguished from what is wrong with the precision of an algebraic equation. They have, therefore, none too much charity towards others who differ from them. They are apt, too, to think that nothing is good but what is perfect, and that there are no compromises or modifications to be made in consideration of difference of opinion or in deference to other men's judgment. If their perspicacious vision enables them to detect a spot on the face of the sun, they think that a good reason why the sun should be struck down from heaven. They prefer the chance of running into utter darkness to living in heavenly light, if that heavenly light be not absolutely without any imperfection. There are impatient men; too impatient always to give heed to the admonition of St. Paul, that we are not to "do evil that good may come"; too impatient to wait for the slow progress of moral causes in the improvement of mankind….

Mr. President, in the excited times in which we live, there is found to exist a state of crimination and recrimination between the North and South. There are lists of grievances produced by each; and those grievances, real or supposed, alienate the minds of one portion of the country from the other, exasperate the feelings, and subdue the sense of fraternal affection, patriotic love, and mutual regard. I shall bestow a little attention, Sir, upon these various grievances existing on the one side and on the other. I begin with complaints of the South. I will not answer, further than I have, the general statements of the honorable Senator from South Carolina, that the North has prospered at the expense of the South in consequence of the manner of administering this government, in the collecting of its revenues, and so forth. These are disputed topics, and I have no inclination to enter into them. But I will allude to the other complaints of the South, and especially to one which has in my opinion just foundation; and that is, that there has been found at the North, among individuals and among legislators, a disinclination to perform fully their constitutional duties in regard to the return of persons bound to service who have escaped into the free States. In that respect, the South, in my judgment, is right, and the North is wrong. Every member of every Northern legislature is bound by oath, like every other officer in the country, to support the Constitution of the United States; and the article of the Constitution which says to these States that they shall deliver up fugitives from service is as binding in honor and conscience as any other article. No man fulfils his duty in any legislature who sets himself to find excuses, evasions, escapes from this constitutional obligation. I have always thought that the Constitution addressed itself to the legislatures of the States or to the States themselves. It says that those persons escaping to other States "shall be delivered up," and I confess I have always been of the opinion that it was an injunction upon the States themselves. When it is said that a person escaping into another State, and coming therefore within the jurisdiction of that State, shall be delivered up, it seems to me the import of the clause is, that the State itself, in obedience to the Constitution, shall cause him to be delivered up. That is my judgment. I have always entertained that opinion, and I entertain it now. But when the subject, some years ago, was before

the Supreme Court of the United States, the majority of the judges held that the power to cause fugitives from service to be delivered up was a power to be exercised under the authority of this government. I do not know, on the whole, that it may not have been a fortunate decision. My habit is to respect the result of judicial deliberations and the solemnity of judicial decisions. As it now stands, the business of seeing that these fugitives are delivered up resides in the power of Congress and the national judicature, and my friend at the head of the Judiciary Committee has a bill on the subject now before the Senate, which, with some amendments to it, I propose to support, with all its provisions, to the fullest extent. And I desire to call the attention of all sober-minded men at the North, of all conscientious men, of all men who are not carried away by some fanatical idea or some false impression, to their constitutional obligations. I put it to all the sober and sound minds at the North as a question of morals and a question of conscience. What right have they, in their legislative capacity or any other capacity, to endeavor to get round this Constitution, to embarrass the free exercise of the rights secured by the Constitution; to the persons whose slaves escape from them? None at all; none at all. Neither in the forum of conscience, nor before the face of the Constitution, are they, in my opinion justified in such an attempt. Of course it is a matter for their consideration. They probably, in the excitement of the times, have not stopped to consider of this. They have followed what seemed to be the current of thought and of motives, as the occasion arose, and they have neglected to investigate fully the real question, and to consider their constitutional obligations; which, as I am sure, if they did consider, they would fulfil with alacrity. I repeat, therefore, Sir, that here is a well-founded ground of complaint against the North, which ought to be removed, which it is now in the power of the different departments of this government to remove; which calls for the enactment of proper laws authorizing the judicature of this government, in the several States, to do all that is necessary for the recapture of fugitive slaves and for their restoration to those who claim them. Wherever I go, and whenever I speak on the subject, and when I speak here I desire to speak to the whole North, I say that the South has been injured in this respect, and has a right to complain; and the North has been too careless of what I think the Constitution peremptorily and emphatically enjoins upon her as a duty….

Then, Sir, there are the Abolition societies, of which I am unwilling to speak, but in regard to which I have very clear notions and opinions. I do not think them useful. I think their operations for the last twenty years have produced nothing good or valuable. At the same time, I believe thousands of their members to be honest and good men, perfectly well-meaning men. They have excited feelings; they think they must do something for the cause of liberty; and, in their sphere of action, they do not see what else they can do than to contribute to an Abolition press, or an Abolition society, or to pay an Abolition lecturer. I do not mean to impute gross motives even to the leaders of these societies; but I am not blind to the consequences of their proceedings. I cannot but see what mischiefs their interference with the South has produced. And is it not plain to every man? Let any gentleman who entertains doubts on this point recur to the debates in the Virginia House of Delegates in 1832, and he will see with what freedom a proposition made by Mr. Jefferson Randolph for the gradual abolition of slavery was discussed in that body. Every one spoke of slavery as he thought; very ignominious and disparaging names and epithets were applied to it. The debates in the House of Delegates on that occasion, I believe, were all published. They were read by every colored man who could read; and to those who could not read, those debates were read by others. At that time Virginia was not unwilling or afraid to discuss this question, and to let that part of her population know as much of the discussion as

they could learn. That was in 1832. As has been said by the honorable member from South Carolina, these Abolition societies commenced their course of action in 1835. It is said, I do not know how true it may be, that they sent incendiary publications into the slave States; at any rate, they attempted to arouse, and did arouse, a very strong feeling; in other words, they created great agitation in the North against Southern slavery. Well, what was the result? The bonds of the slaves were bound more firmly than before, their rivets were more strongly fastened. Public opinion, which in Virginia had begun to be exhibited against slavery, and was opening out for the discussion of the question, drew back and shut itself up in its castle. I wish to know whether anybody in Virginia can now talk openly as Mr. Randolph, Governor McDowell, and others talked in 1832 and sent their remarks to the press? We all know the fact, and we all know the cause; and every thing that these agitating people have done has been, not to enlarge, but to restrain, not to set free, but to bind faster, the slave population of the South….

Mr. President, I should much prefer to have heard from every member on this floor declarations of opinion that this Union could never be dissolved, than the declaration of opinion by anybody that, in any case, under the pressure of any circumstances, such a dissolution was possible. I hear with distress and anguish the word "secession," especially when it falls from the lips of those who are patriotic, and known to the country, and known all over the world, for their political services. Secession! Peaceable secession! Sir, your eyes and mine are never destined to see that miracle. The dismemberment of this vast country without convulsion! The breaking up of the fountains of the great deep without ruffling the surface! Who is so foolish, I beg everybody's pardon, as to expect to see any such thing? Sir, he who sees these States, now revolving in harmony around a common center, and expects to see them quit their places and fly off without convulsion, may look the next hour to see the heavenly bodies rush from their spheres, and jostle against each other in the realms of space, without causing the wreck of the universe. There can be no such thing as peaceable secession. Peaceable secession is an utter impossibility. Is the great Constitution under which we live, covering this whole country, is it to be thawed and melted away by secession, as the snows on the mountain melt under the influence of a vernal sun, disappear almost unobserved, and run off? No, Sir! No, Sir! I will not state what might produce the disruption of the Union; but, Sir, I see as plainly as I see the sun in heaven what that disruption itself must produce; I see that it must produce war, and such a war as I will not describe, *in its twofold character.*

Peaceable secession! Peaceable secession! The concurrent agreement of all the members of this great republic to separate! A voluntary separation, with alimony on one side and on the other. Why, what would be the result? Where is the line to be drawn? What States are to secede? What is to remain American? What am I to be? An American no longer? Am I to become a sectional man, a local man, a separatist, with no country in common with the gentlemen who sit around me here, or who fill the other house of Congress? Heaven forbid! Where is the flag of the republic to remain? Where is the eagle still to tower? or is he to cower, and shrink, and fall to the ground? Why, Sir, our ancestors, our fathers and our grandfathers, those of them that are yet living amongst us with prolonged lives, would rebuke and reproach us; and our children and our grandchildren would cry out shame upon us, if we of this generation should dishonor these ensigns of the power of the government and the harmony of that Union which is every day felt among us with so much joy and gratitude. What is to become of the army? What is to become of the navy? What is to become of the public lands? How is each of the thirty States to defend

itself? I know, although the idea has not been stated distinctly, there is to be, or it is supposed possible that there will be, a Southern Confederacy. I do not mean, when I allude to this statement, that any one seriously contemplates such a state of things. I do not mean to say that it is true, but I have heard it suggested elsewhere, that the idea has been entertained, that, after the dissolution of this Union, a Southern Confederacy might be formed. I am sorry, Sir, that it has ever been thought of, talked of, or dreamed of, in the wildest flights of human imagination. But the idea, so far as it exists, must be of a separation, assigning the slave States to one side and the free States to the other. Sir, I may express myself too strongly, perhaps, but there are impossibilities in the natural as well as in the physical world, and I hold the idea of a separation of these States, those that are free to form one government, and those that are slave-holding to form another, as such an impossibility. We could not separate the States by any such line, if we were to draw it. We could not sit down here today and draw a line of separation that would satisfy any five men in the country. There are natural causes that would keep and tie us together, and there are social and domestic relations which we could not break if we would, and which we should not if we could.

Sir, nobody can look over the face of this country at the present moment, nobody can see where its population is the most dense and growing, without being ready to admit, and compelled to admit, that ere long the strength of America will be in the Valley of the Mississippi. Well, now, Sir, I beg to inquire what the wildest enthusiast has to say on the possibility of cutting that river in two, and leaving free States at its source and on its branches, and slave States down near its mouth, each forming a separate government? Pray, Sir, let me say to the people of this country, that these things are worthy of their pondering and of their consideration. Here, Sir, are five millions of freemen in the free States north of the river of Ohio. Can any body suppose that this population can be severed, by a line that divides them from the territory of a foreign and an alien government, down somewhere, the Lord knows where, upon the lower banks of the Mississippi? What would become of Missouri? Will she join the *arrondissement* of the slave States? Shall the man from the Yellow Stone and the Platte be connected, in the new republic, with the man who lives on the southern extremity of the Cape of Florida? Sir, I am ashamed to pursue this line of remark. I dislike it, I have an utter disgust for it. I would rather hear of natural blasts and mildews, war, pestilence, and famine, than to hear gentlemen talk of secession. To break up this great government! to dismember this glorious country! to astonish Europe with an act of folly such as Europe for two centuries has never beheld in any government or any people! No, Sir! no, Sir! There will be no secession! Gentlemen are not serious when they talk of secession….

And now, Mr. President, I draw these observations to a close. I have spoken freely, and I meant to do so. I have sought to make no display. I have sought to enliven the occasion by no animated discussion, nor have I attempted any train of elaborate argument. I have wished only to speak my sentiments, fully and at length, being desirous, once and for all, to let the Senate know, and to let the country know, the opinions and sentiments which I entertain on all these subjects. These opinions are not likely to be suddenly changed. If there be any future service that I can render to the country, consistently with these sentiments and opinions, I shall cheerfully render it. If there be not, I shall still be glad to have had an opportunity to disburden myself from the bottom of my heart, and to make known every political sentiment that therein exists. And now, Mr. President, instead of speaking of the possibility or utility of secession, instead of dwelling in those caverns of darkness, instead of groping with those ideas so full of all that is horrid and horrible, let us

come out into the light of day; let us enjoy the fresh air of Liberty and Union; let us cherish those hopes which belong to us; let us devote ourselves to those great objects that are fit for our consideration and our action; let us raise our conceptions to the magnitude and the importance of the duties that devolve upon us; let our comprehension be as broad as the country for which we act, our aspirations as high as its certain destiny; let us not be pigmies in a case that calls for men. Never did there devolve on any generation of men higher trusts than now devolve upon us, for the preservation of this Constitution and the harmony and peace of all who are destined to live under it. Let us make our generation one of the strongest and brightest links in that golden chain which is destined, I fondly believe, to grapple the people of all the States to this Constitution for ages to come. We have a great, popular constitutional government, guarded by law and by judicature, and defended by the affections of the whole people. No monarchical throne presses these States together, no iron chain of military power encircles them; they live and stand under a government popular in its form, representative in its character, founded upon principles of equality, and so constructed, we hope, as to last for ever. In all its history it has been beneficent; it has trodden down no man's liberty; it has crushed no State. Its daily respiration is liberty and patriotism; its yet youthful veins are full of enterprise, courage, and honorable love of glory and renown. Large before, the country has now, by recent events, become vastly larger. This republic now extends, with a vast breadth, across the whole continent. The two great seas of the world wash the one and the other shore. We realize, on a mighty scale, the beautiful description of the ornamental border of the buckler of Achilles:—

"Now, the broad shield complete, the artist crowned

With his last hand, and poured the ocean round;

In living silver seemed the waves to roll,

And beat the buckler's verge, and bound the whole."

1. Daniel Webster, "The Constitution and the Union," March 7, 1850, in Charles M. Wiltse et al., eds., *The Papers of Daniel Webster,* Vol. 2 (Hanover, NH: Dartmouth College, 1975-1989), 515-16, 520-22, 540-41, 543-44, 546-48, 550-51.

Monday, April 29, 2013 – Essay #51 – Daniel Webster's "The Constitution and the Union" – Guest Essayist: Logan Beirne, Olin Scholar at Yale Law School and author of Blood of Tyrants: George Washington & the Forging of the Presidency

In this speech, U.S. Senator Daniel Webster strives to unify a deeply divided nation. Speaking "not as a Massachusetts man, nor as a Northern man, but as an American," he pleads "for the preservation of the Union."

He begins with a conciliatory tone in which he tries to view the issue of slavery from both perspectives. Careful not to scold the South for the practice, he argues that the fight stems from a "difference of opinion" among equally religious men. His concern is that neither side is convincing the other and the people are merely diverging in their views. Because this is a religious debate, he believes, people are apt to "think that nothing is good but what is perfect, and that there are no compromises or modifications to be made in consideration of difference of opinion."

Webster then outlines the complaints that the South and North have lodged against one another. He supported the Fugitive Slave Law of 1850 requiring federal officials to recapture and return runaway slaves, and therefore takes time in his speech to castigate the North for violating their duty to return Southern "property." He expounds, "What right have they, in their legislative capacity or any other capacity, to endeavor to get round this Constitution, to embarrass the free exercise of the rights secured by the Constitution; to the persons whose slaves escape from them? None at all."

Webster likewise finds fault with the Abolitionists. He believes that, although their efforts may be well intentioned, they are inciting discord. They rouse the North versus the South and slaves against their owners. Webster argues that the backlash against the Abolitionists even moved Virginia, which had begun to discuss ending the institution, to become even more pro-slavery. He believes that "every thing that these agitating people have done has been, not to enlarge, but to restrain, not to set free, but to bind faster, the slave population of the South."

He finally turns the crux of his argument: the Union must remained together. He warns that "Peaceable secession is an utter impossibility" and any attempt to divide the country would lead to war. From their history to the Constitution, the states are too deeply intertwined be separated, he argues, as he points to the preposterousness of attempts to carve up the nation.

Webster's goal is compromise. He endeavors to show that the arguments on both sides of the North-South debates have certain merits rather than inflame the divisive sentiment of the era. Webster concludes by calling upon the North and South to rise above their differences and work together to preserve the unity of the United States. He seeks to stir their combined patriotism and pride for America's "great, popular constitutional government, guarded by law and by judicature, and defended by the affections of the whole people." He was utterly unsuccessful. Despite Webster's attempts to mend the deepening chasm between the people, the nation continued its slide towards civil war.

Logan Beirne is an Olin Scholar at Yale Law School and author of Blood of Tyrants: George Washington & the Forging of the Presidency. His writings have appeared in USA Today, the New York Post, and numerous other publications. He served as an attorney at Sullivan & Cromwell LLP in New York City and is admitted to the New York and Connecticut Bars.

Alabama Slave Code of 1852

1852

Chapter III. Patrols.

§983. All white male owners of slaves, below the age of sixty years, and all other free white persons, between the ages of eighteen and forty-five years, who are not disabled by sickness or bodily infirmity, except commissioned officers in the militia, and persons exempt by law from the performance of militia duty, are subject to perform patrol duty….

§990. Each detachment must patrol such parts of the precinct as in their judgment is necessary, at least once a week at night, during their term of service, and oftener, when required so to do by a justice of the peace; or when informed, by a credible person, of evidences of insubordination, or threatened outbreak, or insurrection of the slaves; or of any contemplated unlawful assembly of slaves or free negroes….

§992. The patrol has power to enter, in a peaceable manner, upon any plantation; to enter by force, if necessary, all negro cabins or quarters, kitchens and out houses, and to apprehend all slaves who may there be found, not belonging to the plantation or household, without a pass from their owner or overseer; or strolling from place to place, without authority.

§993. The patrol has power to punish slaves found under the circumstances recited in the preceding section, by stripes, not exceeding thirty-nine.

§994. It is the duty of the patrol, on receiving information that any person is harboring a runaway slave, to make search for such slave, and if found, to apprehend and take him before a justice of the peace, who, if the owner is unknown, must commit him to jail.

§995. If the patrol find any slave from home without a pass, and under circumstances creating the belief that he is a runaway, they must detain him in custody, and give information thereof to the owner, if known; and if unknown, or without their precinct, deliver him up to a justice, who must commit him to jail for safe keeping….

§998. The leader of each patrol must, at the expiration of each term of service, make report in writing, and upon oath, to the justice, of the number of times his detachment has patrolled, and of the absence, without sufficient excuse, of any member of the detachment at the times designated for patrolling, and failure to perform patrol duty; and thereupon it is the duty of the justice to cite such delinquents to appear at a time and place designated by him, and show cause why a fine should not be imposed against him; and upon their failure to appear, or to render a sufficient excuse, they must each be fined ten dollars for each omission, for which execution may issue….

§1004. The patrol, if sued for any act done in the performance of patrol duty, may give this law in evidence under the general issue; but are liable in damages, to any person aggrieved, for any unnecessary violence committed under color of performing patrol duty, either by unnecessarily breaking or entering houses, or for excessive punishment inflicted on any slave.

Chapter IV. Slaves and Free Negroes.

Article I. Slaves.

§1005. No master, overseer, or other person having the charge of a slave must permit such slave to hire himself to another person, or to hire his own time, or to go at large, unless in a corporate town, by consent of the authorities thereof, evidenced by an ordinance of the corporation; and every such offense is a misdemeanor, punishable by fine not less than twenty nor more than one hundred dollars.

§1006. No master, overseer, or head of a family must permit any slave to be or remain at his house, out house, or kitchen, without leave of the owner or overseer, above four hours at any one time; and for every such offense he forfeits ten dollars, to be recovered before any justice of the peace, by any person who may sue for the same.

§1007. Any owner or overseer of a plantation, or householder, who knowingly permits more than five negroes, other than his own, to be and remain at his house, plantation, or quarter, at any one time, forfeits ten dollars for each and every one over that number, to the use of any one who may sue for the same, before any justice of the peace; unless such assemblage is for the worship of almighty God, or for burial service, and with the consent of the owner or overseer of such slaves.

§1008. No slave must go beyond the limits of the plantation on which he resides, without a pass, or some letter or token from his master or overseer, giving him authority to go and return from a certain place; and if found violating this law, may be apprehended and punished, not exceeding twenty stripes, at the discretion of any justice before whom he may be taken.

§1009. If any slave go upon the plantation, or enter the house or out house of any person, without permission in writing from his master or overseer, or in the prosecution of his lawful business, the owner or overseer of such plantation or householder may give, or order such slave to be given, ten lashes on his bare back.

§1010. Any railroad company in whose car or vehicle, and the master or owner of any steamboat, or vessel, in which a slave is transported or carried, without the written authority of the owner or person in charge of such slave, forfeits to the owner the sum of fifty dollars; and if such slave is lost, is liable for his value, and all reasonable expenses attending the prosecution of the suit….

§1012. No slave can keep or carry a gun, powder, shot, club, or other weapon, except the tools given him to work with, unless ordered by his master or overseer to carry such weapon from one place to another. Any slave found offending against the provisions of this section, may be seized, with such weapon, by any one, and carried before any justice, who, upon proof of the offense, must condemn the weapon to the use of such person, and direct that the slave receive thirty-nine lashes on his bare back.

§1013. Any justice of the peace may, within his own county, grant permission in writing to any slave, on the application of his master or overseer, to carry and use a gun and ammunition within

his master's plantation….

§1015. Riots, routs, unlawful assemblies, trespasses, and seditious speeches by a slave, are punished, by the direction of any justice before whom he may be carried, with stripes not exceeding one hundred.

§1016. Any person having knowledge of the commission of any offense by a slave against the law, may apprehend him, and take him before a justice of the peace for trial….

§1018. No slave can own property, and any property purchased or held by a slave, not claimed by the master or owner, must be sold by order of any justice of the peace; one half the proceeds of the sale, after the payment of costs and necessary expenses, to be paid to the informer, and the residue to the county treasury.

§1019. Any slave who writes for, or furnishes any other slave with any pass or free paper, on conviction before any justice of the peace, must receive one hundred lashes on his bare back.

§1020. Not more than five male slaves shall assemble together at any place off the plantation, or place to which they belong, with or without passes or permits to be there, unless attended by the master or overseer of such slaves, or unless such slaves are attending the public worship of God, held by white persons.

§1021. It is the duty of all patrols, and all officers, civil and military, to disperse all such unlawful assemblies; and each of the slaves constituting such unlawful assembly, must be punished by stripes, not exceeding ten; and for the second offense, may be punished with thirty-nine stripes, at the discretion of any justice of the peace before whom he may be brought.

§1022. Any slave who preaches, exhorts, or harangues any assembly of slaves, or of slaves and free persons of color, without a license to preach or exhort from some religious society of the neighborhood, and in the presence of five slaveholders, must, for the first offense, be punished with thirty-nine lashes, and for the second, with fifty lashes; which punishment may be inflicted by any officer of a patrol company, or by the order of any justice of the peace.

§1023. Runaway slaves may be apprehended by any person, and carried before any justice of the peace, who must either commit them to the county jail, or send them to the owner, if known; who must, for every slave so apprehended, pay the person apprehending him six dollars, and all reasonable charges.

§1024. Any justice of the peace receiving information that three or more runaway slaves are lurking and hid in swamps, or other obscure places, may, by warrant, reciting the names of the slaves, and their owners, if known, direct a leader of the patrol of the district, and if there be none, then any other suitable person, to summon, and take with him such power as may be necessary to apprehend such runaway; and if taken, to deliver them to the owner or commit them to the jail of his proper county.

§1025. For such apprehension and delivery to the owner, or committal to jail, the parties so

apprehending shall be entitled to twenty dollars for each slave, to be paid by the owner….

§1027. On the reception of a runaway slave, the sheriff must, without delay, cause advertisement to be made in a newspaper, published in the county, if there be one, if not, in the one published nearest to the court house of such county, giving an accurate description of the person of the slave, his supposed age, the information contained in the warrant in relation to the slave, and his owner, and such other facts important to the identification of the slave, as the sheriff may be able to obtain from the slave, or from any other source, which must be continued for six months, once a week, if the slave is not sooner reclaimed by the owner….

Article II. Free Negroes.

§1033. Every free colored person who has come to this state since the first day of February, one thousand eight hundred and thirty-two, and has been admonished by any sheriff, justice of the peace, or other judicial officer, that he cannot, by law, remain in this state; and does not, within thirty days, depart therefrom, must, on conviction, be punished by imprisonment in the penitentiary for two years; and shall have thirty days after his discharge from the penitentiary to leave the state; and on failing to do so, must be imprisoned in the penitentiary for five years….

§1035. If any free person of color is at any time found at an unlawful assembly of slaves, he forfeits twenty dollars, to any person who will sue for the same, before any justice of the peace; and for the second offense, must, in addition thereto, be punished with ten stripes. All justices of the peace, sheriffs, and constables, are charged with the execution of this law….

§1038. Any free person of color who writes for, or furnishes a slave with a pass, is guilty of a misdemeanor, and, on conviction, must be fined not less than fifty dollars, and be imprisoned not less than six months.

§1039. Any free person of color who writes for, or furnishes any slave a pass, with the intent to enable such slave to escape from his master, is guilty of a felony, and, on conviction, must be imprisoned in the penitentiary not less than three, nor more than seven years….

§1041. Any free person of color, who buys of, or sells to, any slave, any article, or commodity whatever, without a written permission from the master, or overseer of such slave, designating the article so to be bought, or sold, is guilty of a misdemeanor, and must, upon conviction, before any justice of the peace of the county where such offense is committed, be punished with thirty-nine stripes.

§1042. Any free person of color, found in company with any slave, in any kitchen, out house, or negro quarter, without a written permission from the owner, or overseer of such slave, must, for every such offense, receive fifteen lashes; and for every subsequent offense, thirty-nine lashes; which may be inflicted by the owner or overseer of the slave, or by any officer or member of any patrol company.

§1043. If any free person of color permits a slave to be, or remain in his house, or out house, or about his premises, without permission, in writing, from the owner, or overseer of the slave, he

shall be punished as provided in the preceding section.

§1044. Any free person of color, who preaches, exhorts, or harangues any assembly of slaves, or of slaves and free persons of color, unless in the presence of five slaveholders, and licensed to preach or exhort by some religious society of the neighborhood, must, for the first offense, receive thirty-nine lashes, and for the second offense, fifty lashes, by the order of any justice of the county, before whom the offender may be carried.

"Title 13, Chapters 3, 4," in Arthur P. Bagby, et al., eds., *The Code of Alabama* (Montgomery, AL: Brittain and De Wold, 1852), 234-42

Tuesday, April 30, 2013 – Essay #52 – The Alabama Slave Code of 1852 – Guest Essayist: William C. Duncan, Director of the Marriage Law Foundation

Chattel slavery in the United States, because of its manifest injustice, was always morally tenuous. As opposition to slavery grew in the United States in the early Nineteenth Century, the states in which slavery was allowed adopted more and more draconian policies to prop up the institution. An example is the Alabama Slave Code of 1852.

Such codes help us understand the meaning and intent of the Fourteenth Amendment enacted after the Civil War to guarantee full citizenship to freed slaves and to end the practice of extending (or, more properly, denying) constitutional protection by race.

The 1852 slave code is virtually an anti-Bill of Rights. The code prohibits religious practice and preaching by slaves unless "in the presence of five slaveholders." (§1022) It Public assembly is forbidden. (§1020) Gun ownership and even possession is denied to slaves. (§1012) It allows "slave patrols" to enter private residences "by force" and summary punishment for merely being away from the "plantation or household" of the owner "without a pass from their owner or overseer." (§992) Property ownership is forbidden. (§1018) Of course, no procedural protections for those accused of crimes is afforded. The code even provides for the barbaric punishment of "one hundred lashes on [a slave's] bare back." (§1019)

Reflecting the linkage of slavery with racial classifications which made the American experience with slavery so peculiarly noxious, the Code is explicitly racist, treating even "free colored persons" differently from other citizens. A recent doctoral dissertation explains "the Penal Code of 1841, carried forward to the Code of 1852, indicates the development of a greater disparity in charging and sentencing between slave and free defendants, accomplished primarily by improving the condition of white convicts, while leaving unchanged existing law applicable to slaves." Daniel Reese Farnell, Jr., "Alabama Courts and the Administration of Slavery" at http://etd.auburn.edu/etd/bitstream/handle/10415/1393/FARNELL_DANIEL_58.pdf?sequence=1.

Reading the Code one does not wonder why Thomas Jefferson, referring to the acceptance of slavery, said, "I tremble when I think that God is just."

Understanding the way states allowing slavery propped up the system by denying even the most basic rights to slaves and often all black persons and by egregious discrepancies in legal treatment, tied directly to the race of the person affected help explain the provisions in the Fourteenth Amendment prohibiting any state law "which shall abridge the privileges or immunities of citizens of the United States" and extending the "equal protection of the laws" to anyone within the jurisdiction of a state.

The amendment thus restored to former slaves basic constitutional protection and prohibited the treatment of individuals by racial category, ending (at least on paper, since substantial progress had to be made over time) the slave codes forever.

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Speech on the Kansas-Nebraska Act by Abraham Lincoln

October 16, 1854

…The repeal of the Missouri Compromise, and the propriety of its restoration, constitute the subject of what I am about to say….

I think, and shall try to show, that it is wrong; wrong in its direct effect, letting slavery into Kansas and Nebraska—and wrong in its prospective principle, allowing it to spread to every other part of the wide world, where men can be found inclined to take it.

This *declared* indifference, but as I must think, covert *real* zeal for the spread of slavery, I can not but hate. I hate it because of the monstrous injustice of slavery itself. I hate it because it deprives our republican example of its just influence in the world—enables the enemies of free institutions, with plausibility, to taunt us as hypocrites—causes the real friends of freedom to doubt our sincerity, and especially because it forces so many really good men amongst ourselves into an open war with the very fundamental principles of civil liberty—criticising the Declaration of Independence, and insisting that there is no right principle of action but *self-interest.*

Before proceeding, let me say I think I have no prejudice against the Southern people. They are just what we would be in their situation. If slavery did not now exist amongst them, they would not introduce it. If it did now exist amongst us, we should not instantly give it up. This I believe of the masses north and south. Doubtless there are individuals, on both sides, who would not

hold slaves under any circumstances; and others who would gladly introduce slavery anew, if it were out of existence. We know that some southern men do free their slaves, go north, and become tip-top abolitionists; while some northern ones go south, and become most cruel slave-masters. When southern people tell us they are no more responsible for the origin of slavery, than we; I acknowledge the fact. When it is said that the institution exists; and that it is very difficult to get rid of it, in any satisfactory way, I can understand and appreciate the saying. I surely will not blame them for not doing what I should not know how to do myself. If all earthly power were given me, I should not know what to do, as to the existing institution. My first impulse would be to free all the slaves, and send them to Liberia,—to their own native land. But a moment's reflection would convince me, that whatever of high hope, (as I think there is) there may be in this, in the long run, its sudden execution is impossible. If they were all landed there in a day, they would all perish in the next ten days; and there are not surplus shipping and surplus money enough in the world to carry them there in many times ten days. What then? Free them all, and keep them among us as underlings? Is it quite certain that this betters their condition? I think I would not hold one in slavery, at any rate; yet the point is not clear enough for me to denounce people upon. What next? Free them, and make them politically and socially, our equals? My own feelings will not admit of this; and if mine would, we well know that those of the great mass of white people will not. Whether this feeling accords with justice and sound judgment, is not the sole question, if indeed, it is any part of it. A universal feeling, whether well or ill-founded, can not be safely disregarded. We can not, then, make them equals. It does seem to me that systems of gradual emancipation might be adopted; but for their tardiness in this, I will not undertake to judge our brethren of the south.

When they remind us of their constitutional rights, I acknowledge them, not grudgingly, but fully, and fairly; and I would give them any legislation for the reclaiming of their fugitives, which should not, in its stringency, be more likely to carry a free man into slavery, than our ordinary criminal laws are to hang an innocent one.

But all this; to my judgment, furnishes no more excuse for permitting slavery to go into our own free territory, than it would for reviving the African slave trade by law. The law which forbids the bringing of slaves *from* Africa; and that which has so long forbid the taking them *to* Nebraska, can hardly be distinguished on any moral principle; and the repeal of the former could find quite as plausible excuses as that of the latter.

The arguments by which the repeal of the Missouri Compromise is sought to be justified, are these:

First, that the Nebraska country needed a territorial government.

Second, that in various ways, the public had repudiated it, and demanded the repeal; and therefore should not now complain of it.

And lastly, that the repeal establishes a principle, which is intrinsically right.

I will attempt an answer to each of them in its turn….

But one great argument in the support of the repeal of the Missouri Compromise, is still to come. That argument is "the sacred right of self-government." It seems our distinguished Senator has found great difficulty in getting his antagonists, even in the Senate to meet him fairly on this argument—some poet has said

"Fools rush in where angels fear to tread."

At the hazard of being thought one of the fools of this quotation, I meet that argument—I rush in, I take that bull by the horns.

I trust I understand, and truly estimate the right of self-government. My faith in the proposition that each man should do precisely as he pleases with all which is exclusively his own, lies at the foundation of the sense of justice there is in me. I extend the principles to communities of men, as well as to individuals. I so extend it, because it is politically wise, as well as naturally just; politically wise, in saving us from broils about matters which do not concern us. Here, or at Washington, I would not trouble myself with the oyster laws of Virginia, or the cranberry laws of Indiana.

The doctrine of self-government is right—absolutely and eternally right—but it has no just application, as here attempted. Or perhaps I should rather say that whether it has such just application depends upon whether a negro is *not* or *is* a man. If he is *not* a man, why in that case, he who *is* a man may, as a matter of self-government, do just as he pleases with him. But if the negro *is* a man, is it not to that extent, a total destruction of self-government, to say that he too shall not govern *himself?* When the white man governs himself that is self-government; but when he governs himself, and also governs *another* man, that is *more*than self-government—that is despotism. If the negro is a man, why then my ancient faith teaches me that "all men are created equal;" and that there can be no moral right in connection with one man's making a slave of another.

Judge Douglas frequently, with bitter irony and sarcasm, paraphrases our argument by saying "The white people of Nebraska are good enough to govern themselves, *but they are not good enough to govern a few miserable negroes!!"*

Well I doubt not that the people of Nebraska are, and will continue to be as good as the average of people elsewhere. I do not say the contrary. What I do say is, that no man is good enough to govern another man, *without that other's consent.*I say this is the leading principle—the sheet anchor of American republicanism. Our Declaration of Independence says:

"We hold these truths to be self evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

I have quoted so much at this time merely to show that according to our ancient faith, the just powers of governments are derived from the consent of the governed. Now the relation of masters and slaves is, pro tanto, a total violation of this principle. The master not only governs

the slave without his consent; but he governs him by a set of rules altogether different from those which he prescribes for himself. Allow all the governed an equal voice in the government, and that, and that only is self-government.

Let it not be said I am contending for the establishment of political and social equality between the whites and blacks. I have already said the contrary. I am not now combating the argument of necessity, arising from the fact that the blacks are already amongst us; but I am combating what is set up as moral argument for allowing them to be taken where they have never yet been—arguing against the extension of a bad thing, which where it already exists, we must of necessity, manage as we best can.

In support of his application of the doctrine of self-government, Senator Douglas has sought to bring to his aid the opinions and examples of our revolutionary fathers. I am glad he has done this. I love the sentiments of those old-time men; and shall be most happy to abide by their opinions. He shows us that when it was in contemplation for the colonies to break off from Great Britain, and set up a new government for themselves, several of the states instructed their delegates to go for the measure provided each state should be allowed to regulate its domestic concerns in its own way. I do not quote; but this in substance. This was right. I see nothing objectionable in it. I also think it probable that it had some reference to the existence of slavery amongst them. I will not deny that it had. But had it, in any reference to the carrying of slavery into new countries? That is the question; and we will let the fathers themselves answer it.

This same generation of men, and mostly the same individuals of the generation, who declared this principle—who declared independence—who fought the war of the revolution through—who afterwards made the constitution under which we still live—these same men passed the ordinance of ’87, declaring that slavery should never go to the north-west territory. I have no doubt Judge Douglas thinks they were very inconsistent in this. It is a question of discrimination between them and him. But there is not an inch of ground left for his claiming that their opinions—their example—their authority—are on his side in this controversy.

Again, is not Nebraska, while a territory, a part of us? Do we not own the country? And if we surrender the control of it, do we not surrender the right of self-government? It is part of ourselves. If you say we shall not control it because it is only part, the same is true of every other part; and when all the parts are gone, what has become of the whole? What is then left of us? What use for the general government, when there is nothing left for it [to] govern?

But you say this question should be left to the people of Nebraska, because they are more particularly interested. If this be the rule, you must leave it to each individual to say for himself whether he will have slaves. What better moral right have thirty-one citizens of Nebraska to say, that the thirty-second shall not hold slaves, than the people of the thirty-one States have to say that slavery shall not go into the thirty-second State at all?

But if it is a sacred right for the people of Nebraska to take and hold slaves there, it is equally their sacred right to buy them where they can buy them cheapest; and that undoubtedly will be on the coast of Africa; provided you will consent to not hang them for going there to buy them. You must remove this restriction too, from the sacred right of self-government. I am aware you

say that taking slaves from the States to Nebraska, does not make slaves of freemen; but the African slave-trader can say just as much. He does not catch free negroes and bring them here. He finds them already slaves in the hands of their black captors, and he honestly buys them at the rate of about a red cotton handkerchief a head. This is very cheap, and it is a great abridgement of the sacred right of self-government to hang men for engaging in this profitable trade!

Another important objection to this application of the right of self-government, is that it enables the first few, to deprive the succeeding many, of a free exercise of the right of self-government. The first few may get slavery in, and the subsequent many cannot easily get it out. How common is the remark now in the slave States—"If we were only clear of our slaves, how much better it would be for us." They are actually deprived of the privilege of governing themselves as they would, by the action of a very few, in the beginning. The same thing was true of the whole nation at the time our constitution was formed.

Whether slavery shall go into Nebraska, or other new territories, is not a matter of exclusive concern to the people who may go there. The whole nation is interested that the best use shall be made of these territories. We want them for the homes of free white people. This they cannot be, to any considerable extent, if slavery shall be planted within them. Slave States are places for poor white people to remove from; not to remove to. New free States are the places for poor people to go to and better their condition. For this use, the nation needs these territories.

Still further; there are constitutional relations between the slave and free States, which are degrading to the latter. We are under legal obligations to catch and return their runaway slaves to them—a sort of dirty, disagreeable job, which I believe, as a general rule the slave-holders will not perform for one another. Then again, in the control of the government—the management of the partnership affairs—they have greatly the advantage of us. By the constitution, each State has two Senators—each has a number of Representatives; in proportion to the number of its people—and each has a number of presidential electors, equal to the whole number of its Senators and Representatives together. But in ascertaining the number of the people, for this purpose, five slaves are counted as being equal to three whites. The slaves do not vote; they are only counted and so used, as to swell the influence of the white people's votes. The practical effect of this is more aptly shown by a comparison of the States of South Carolina and Maine. South Carolina has six representatives, and so has Maine; South Carolina has eight presidential electors, and so has Maine. This is precise equality so far; and, of course they are equal in Senators, each having two. Thus in the control of the government, the two States are equals precisely. But how are they in the number of their white people? Maine has 581,813—while South Carolina has 274,567. Maine has twice as many as South Carolina, and 32,679 over. Thus each white man in South Carolina is more than the double of any man in Maine. This is all because South Carolina, besides her free people, has 384,984 slaves. The South Carolinian has precisely the same advantage over the white man in every other free State, as well as in Maine. He is more than the double of any one of us in this crowd. The same advantage, but not to the same extent, is held by all the citizens of the slave States, over those of the free; and it is an absolute truth, without an exception, that there is no voter in any slave State, but who has more legal power in the government, than any voter in any free State. There is no instance of exact equality; and the disadvantage is against us the whole chapter through. This principle, in the aggregate, gives the slave States, in the present Congress, twenty additional representatives—

being seven more than the whole majority by which they passed the Nebraska bill.

Now all this is manifestly unfair; yet I do not mention it to complain of it, in so far as it is already settled. It is in the constitution; and I do not, for that cause, or any other cause, propose to destroy, or alter, or disregard the constitution. I stand to it, fairly, fully, and firmly.

But when I am told I must leave it altogether to other people to say whether new partners are to be bred up and brought into the firm, on the same degrading terms against me, I respectfully demur. I insist, that whether I shall be a whole man, or only, the half of one, in comparison with others, is a question in which I am somewhat concerned; and one which no other man can have a sacred right of deciding for me. If I am wrong in this—if it really be a sacred right of self-government, in the man who shall go to Nebraska, to decide whether he will be the equal of me or the double of me, then after he shall have exercised that right, and thereby shall have reduced me to a still smaller fraction of a man than I already am, I should like for some gentleman deeply skilled in the mysteries of sacred rights, to provide himself with a microscope, and peep about, and find out, if he can, what has become of my sacred rights! They will surely be too small for detection with the naked eye.

Finally, I insist, that if there is any thing which it is the duty of the whole people to never entrust to any hands but their own, that thing is the preservation and perpetuity, of their own liberties, and institutions. And if they shall think, as I do, that the extension of slavery endangers them, more than any, or all other causes, how recreant to themselves, if they submit the question, and with it, the fate of their country, to a mere hand-full of men, bent only on temporary self-interest. If this question of slavery extension were an insignificant one—one having no power to do harm—it might be shuffled aside in this way. But being, as it is, the great Behemoth of danger, shall the strong gripe of the nation be loosened upon him, to entrust him to the hands of such feeble keepers?

I have done with this mighty argument, of self-government. Go, sacred thing! Go in peace.

But Nebraska is urged as a great Union-saving measure. Well I too, go for saving the Union. Much as I hate slavery, I would consent to the extension of it rather than see the Union dissolved, just as I would consent to any great evil, to avoid a greater one. But when I go to Union saving, I must believe, at least, that the means I employ has some adaptation to the end. To my mind, Nebraska has no such adaptation.

“It hath no relish of salvation in it.”

It is an aggravation, rather, of the only one thing which ever endangers the Union. When it came upon us, all was peace and quiet. The nation was looking to the forming of new bonds of Union; and a long course of peace and prosperity seemed to lie before us. In the whole range of possibility, there scarcely appears to me to have been any thing, out of which the slavery agitation could have been revived, except the very project of repealing the Missouri compromise. Every inch of territory we owned, already had a definite settlement of the slavery question, and by which, all parties were pledged to abide. Indeed, there was no uninhabited country on the continent, which we could acquire; if we except some extreme northern regions, which are

wholly out of the question. In this state of case, the genius of Discord himself, could scarcely have invented a way of again getting us by the ears, but by turning back and destroying the peace measures of the past. The councils of that genius seem to have prevailed, the Missouri compromise was repealed; and here we are, in the midst of a new slavery agitation, such, I think, as we have never seen before. Who is responsible for this? Is it those who resist the measure; or those who, causelessly, brought it forward, and pressed it through, having reason to know, and, in fact, knowing it must and would be so resisted? It could not but be expected by its author, that it would be looked upon as a measure for the extension of slavery, aggravated by a gross breach of faith. Argue as you will, and long as you will, this is the naked front and aspect, of the measure. And in this aspect, it could not but produce agitation. Slavery is founded in the selfishness of man's nature—opposition to it, is his love of justice. These principles are an eternal antagonism; and when brought into collision so fiercely, as slavery extension brings them, shocks, and throes, and convulsions must ceaselessly follow. Repeal the Missouri compromise—repeal all compromises—repeal the declaration of independence—repeal all past history, you still can not repeal human nature. It still will be the abundance of man's heart, that slavery extension is wrong; and out of the abundance of his heart, his mouth will continue to speak. The structure, too, of the Nebraska bill is very peculiar. The people are to decide the question of slavery for themselves; but when they are to decide; or how they are to decide; or whether, when the question is once decided, it is to remain so, or is it to be subject to an indefinite succession of new trials, the law does not say, Is it to be decided by the first dozen settlers who arrive there? or is it to await the arrival of a hundred? Is it to be decided by a vote of the people? or a vote of the legislature? or, indeed by a vote of any sort? To these questions, the law gives no answer. There is a mystery about this; for when a member proposed to give the legislature express authority to exclude slavery, it was hooted down by the friends of the bill. This fact is worth remembering. Some yankees, in the east, are sending emigrants to Nebraska, to exclude slavery from it; and, so far as I can judge, they expect the question to be decided by voting, in some way or other. But the Missourians are awake too. They are within a stone's throw of the contested ground. They hold meetings, and pass resolutions, in which not the slightest allusion to voting is made. They resolve that slavery already exists in the territory; that more shall go there; that they, remaining in Missouri will protect it; and that abolitionists shall be hung, or driven away. Through all this, bowie-knives and six-shooters are seen plainly enough; but never a glimpse of the ballot-box. And, really, what is to be the result of this? Each party within, having numerous and determined backers without, is it not probable that the contest will come to blows, and bloodshed? Could there be a more apt invention to bring about collision and violence, on the slavery question, than this Nebraska project is? I do not charge, or believe, that such was intended by Congress; but if they had literally formed a ring, and placed champions within it to fight out the controversy, the fight could be no more likely to come off, than it is. And if this fight should begin, is it likely to take a very peaceful, Union-saving turn? Will not the first drop of blood so shed, be the real knell of the Union? The Missouri Compromise ought to be restored. For the sake of the Union, it ought to be restored. We ought to elect a House of Representatives which will vote its restoration. If by any means, we omit to do this, what follows? Slavery may or may not be established in Nebraska. But whether it be or not, we shall have repudiated—discarded from the councils of the Nation—the spirit of compromise; for who after this will ever trust in a national compromise? The spirit of mutual concession—that spirit which first gave us the constitution, and which has thrice saved the Union—we shall have strangled and cast from us forever. And what shall we have in lieu of it? The South flushed with

triumph and tempted to excesses; the North, betrayed, as they believe, brooding on wrong and burning for revenge. One side will provoke; the other resent. The one will taunt, the other defy; one agrees, the other retaliates. Already a few in the North, defy all constitutional restraints, resist the execution of the fugitive slave law, and even menace the institution of slavery in the States where it exists.

Already a few in the South, claim the constitutional right to take to and hold slaves in the free states—demand the revival of the slave trade; and demand a treaty with Great Britain by which fugitive slaves may be reclaimed from Canada. As yet they are but few on either side. It is a grave question for the lovers of the Union, whether the final destruction of the Missouri Compromise, and with it the spirit of all compromise will or will not embolden and embitter each of these, and fatally increase the numbers of both.

But restore the compromise, and what then? We thereby restore the national faith, the national confidence, the national feeling of brotherhood. We thereby reinstate the spirit of concession and compromise—that spirit which has never failed us in past perils, and which may be safely trusted for all the future. The south ought to join in doing this. The peace of the nation is as dear to them as to us. In memories of the past and hopes of the future, they share as largely as we. It would be on their part, a great act—great in its spirit, and great in its effect. It would be worth to the nation a hundred years' purchase of peace and prosperity. And what of sacrifice would they make? They only surrender to us, what they gave us for a consideration long, long ago; what they have not now, asked for, struggled or cared for; what has been thrust upon them, not less to their own astonishment than to ours.

But it is said we cannot restore it; that though we elect every member of the lower house, the Senate is still against us. It is quite true, that of the Senators who passed the Nebraska bill, a majority of the whole Senate will retain their seats in spite of the elections of this and the next year. But if at these elections, their several constituencies shall clearly express their will against Nebraska, will these senators disregard their will? Will they neither obey, nor make room for those who will?

But even if we fail to technically restore the compromise, it is still a great point to carry a popular vote in favor of the restoration. The moral weight of such a vote can not be estimated too highly. The authors of Nebraska are not at all satisfied with the destruction of the compromise—an endorsement of this principle, they proclaim to be the great object. With them, Nebraska alone is a small matter—to establish a principle, for future use, is what they particularly desire.

That future use is to be the planting of slavery wherever in the wide world, local and unorganized opposition can not prevent it. Now if you wish to give them this endorsement—if you wish to establish this principle—do so. I shall regret it; but it is your right. On the contrary if you are opposed to the principle— intend to give it no such endorsement—let no wheedling, no sophistry, divert you from throwing a direct vote against it. Some men, mostly whigs, who condemn the repeal of the Missouri Compromise, nevertheless hesitate to go for its restoration, lest they be thrown in company with the abolitionist. Will they allow me as an old whig to tell them good humoredly, that I think this is very silly? Stand with anybody that stands right. Stand with him while he is right and part with him when he goes wrong. Stand with the abolitionist in

restoring the Missouri Compromise; and stand against him when he attempts to repeal the fugitive slave law. In the latter case you stand with the southern disunionist. What of that? you are still right. In both cases you are right. In both cases you oppose the dangerous extremes. In both you stand on middle ground and hold the ship level and steady. In both you are national and nothing less than national. This is good old whig ground. To desert such ground, because of any company, is to be less than a whig—less than a man—less than an American. I particularly object to the new position which the avowed principle of this Nebraska law gives to slavery in the body politic. I object to it because it assumes that there can be moral right in the enslaving of one man by another. I object to it as a dangerous dalliance for a few people—a sad evidence that, feeling prosperity we forget right—that liberty, as a principle, we have ceased to revere. I object to it because the fathers of the republic eschewed, and rejected it. The argument of "Necessity" was the only argument they ever admitted in favor of slavery; and so far, and so far only as it carried them, did they ever go. They found the institution existing among us, which they could not help; and they cast blame upon the British King for having permitted its introduction. Before the constitution, they prohibited its introduction into the north-western Territory—the only country we owned, then free from it. At the framing and adoption of the constitution, they forbore to so much as mention the word "slave" or "slavery" in the whole instrument. In the provision for the recovery of fugitives, the slave is spoken of as a "person held to service or labor." In that prohibiting the abolition of the African slave trade for twenty years, that trade is spoken of as "The migration or importation of such persons as any of the States now existing, shall think proper to admit," etc. These are the only provisions alluding to slavery. Thus, the thing is hid away, in the constitution, just as an afflicted man hides away a wen or a cancer, which he dares not cut out at once, lest he bleed to death; with the promise, nevertheless, that the cutting may begin at the end of a given time. Less than this our fathers could not do; and now they would not do. Necessity drove them so far, and farther, they would not go. But this is not all. The earliest Congress, under the constitution, took the same view of slavery. They hedged and hemmed it in to the narrowest limits of necessity.

In 1794, they prohibited an out-going slave-trade—that is, the taking of slaves from the United States to sell.

In 1798, they prohibited the bringing of slaves from Africa, into the Mississippi Territory—this territory then comprising what are now the States of Mississippi and Alabama. This was ten years before they had the authority to do the same thing as to the States existing at the adoption of the constitution.

In 1800 they prohibited American citizens from trading in slaves between foreign countries—as, for instance, from Africa to Brazil.

In 1803 they passed a law in aid of one or two State laws, in restraint of the internal slave trade.

In 1807, in apparent hot haste, they passed the law, nearly a year in advance, to take effect the first day of 1808—the very first day the constitution would permit—prohibiting the African slave trade by heavy pecuniary and corporal penalties.

In 1820, finding these provisions ineffectual, they declared the trade piracy, and annexed to it,

the extreme penalty of death. While all this was passing in the general government, five or six of the original slave States had adopted systems of gradual emancipation; and by which the institution was rapidly becoming extinct within these limits.

Thus we see, the plain unmistakable spirit of that age, towards slavery, was hostility to the principle, and toleration, only by necessity.

But now it is to be transformed into a "sacred right." Nebraska brings it forth, places it on the high road to extension and perpetuity; and, with a pat on its back, says to it, "Go, and God speed you." Henceforth it is to be the chief jewel of the nation—the very figure-head of the ship of State. Little by little, but steadily as man's march to the grave, we have been giving up the old for the new faith. Near eighty years ago we began by declaring that all men are created equal; but now from that beginning we have run down to the other declaration, that for some men to enslave others is a "sacred right of self-government." These principles can not stand together. They are as opposite as God and mammon; and whoever holds to the one, must despise the other. When Pettit, in connection with his support of the Nebraska bill, called the Declaration of Independence "a self-evident lie" he only did what consistency and candor require all other Nebraska men to do. Of the forty odd Nebraska Senators who sat present and heard him, no one rebuked him. Nor am I apprised that any Nebraska newspaper, or any Nebraska orator, in the whole nation, has ever yet rebuked him. If this had been said among Marion's men, Southerners though they were, what would have become of the man who said it? If this had been said to the men who captured André, the man who said it, would probably have been hung sooner than André was. If it had been said in old Independence Hall, seventy-eight years ago, the very door-keeper would have throttled the man, and thrust him into the street.

Let no one be deceived. The spirit of seventy-six and the spirit of Nebraska, are utter antagonisms; and the former is being rapidly displaced by the latter.

Fellow countrymen—Americans south, as well as north, shall we make no effort to arrest this? Already the liberal party throughout the world, express the apprehension "that the one retrograde institution in America, is undermining the principles of progress, and fatally violating the noblest political system the world ever saw." This is not the taunt of enemies, but the warning of friends. Is it quite safe to disregard it—to despise it? Is there no danger to liberty itself, in discarding the earliest practice, and first precept of our ancient faith? In our greedy chase to make profit of the negro, let us beware, lest we "cancel and tear to pieces" even the white man's charter of freedom.

Our republican robe is soiled, and trailed in the dust. Let us repurify it. Let us turn and wash it white, in the spirit, if not the blood, of the Revolution. Let us turn slavery from its claims of "moral right," back upon its existing legal rights, and its arguments of "necessity." Let us return it to the position our fathers gave it; and there let it rest in peace. Let us re-adopt the Declaration of Independence, and with it, the practices, and policy, which harmonize with it. Let north and south—let all Americans—let all lovers of liberty everywhere—join in the great and good work. If we do this, we shall not only have saved the Union; but we shall have so saved it, as to make, and to keep it, forever worthy of the saving. We shall have so saved it, that the succeeding millions of free happy people, the world over, shall rise up, and call us blessed, to the latest generations….

Abraham Lincoln, "Speech at Peoria, Illinois," October 16, 1854, in Roy P. Basler, ed., *The Collected Works of Abraham Lincoln,* Vol. 2 (New Brunswick, NJ: Rutgers University Press, 1953), 248, 255-56, 265-76. Reprinted with the permission of the Abraham Lincoln Association, Springfield, IL.

Wednesday, May 1, 2013 – Essay #53 – Abraham Lincoln's Speech on the Kansas-Nebraska Act – Guest Essayist: Frank M. Reilly, Partner at the law firm of Potts & Reilly, L.L.P., Horseshoe Bay, Texas

In 1820, the U.S. Congress passed the Missouri Compromise in an effort to settle disagreements between pro and anti-slavery factions regarding the admission of new states to the union. The Missouri Compromise prohibited slavery in new states north of the 36°30□ north parallel, with the exception of Missouri. In 1854, Senator Stephen A. Douglas of Illinois proposed, and succeeded in passing, the Kansas-Nebraska Act, which unraveled the Missouri Compromise. The Kansas-Nebraska Act, signed into law by President Franklin Pierce on May 30, 1854, allowed citizens within the Kansas and Nebraska territories to decide by what they called "Popular Sovereignty" (a popular vote) as to whether they would allow slavery.

Abraham Lincoln, having been out of political office since retiring from his one term in the U.S. Congress in 1849, re-engaged into the political world by giving several speeches in opposition to the Kansas-Nebraska Act. Like his well-researched speech he would give some years later at Cooper Union in New York that kicked off his presidential campaign, Lincoln studied the subject intensely, and he modified each speech after hearing Stephen Douglas' discourses on the subject. Lincoln gave his most inspired and comprehensive speech in Peoria, Illinois on October 16, 1854, or at least since this was the only one of the three talks that he personally transcribed, it appears to be his best. In the following paragraphs, any emphasis shown in the quotations from Lincoln's transcription are as written by Lincoln himself.

The Peoria speech sparked Lincoln's political resurrection, and he was elected as a member of the Illinois House of Representatives a few weeks later. This momentum, though slowed at times, propelled him to the presidency in 1860. Stephen Douglas, with whom Lincoln would more famously debate in their 1858 U.S. Senate contest, was in attendance.

Lincoln spoke for three hours, walking the difficult path of boldly speaking against the institution of slavery and any expansion of it, while, in order to maintain the union, supporting the continuation of the institution in the states where it currently existed. From the outset and throughout, Lincoln's speech resounded with support for individual freedom and equality, frequently invoking the themes and words of the Declaration of Independence. On the other hand, Lincoln expressed support for the rule of law and settled compromises and respect for the Constitution's provisions pertaining to apportionment of representation.

There was no question that Lincoln's main point was in opposition to slavery, and just a few sentences into his speech, Lincoln quickly express his opposition to the practice. He referred to the "monstrous injustice of slavery," and argued that permitting it in these new territories deprived the young nation of its just righteousness as a free state. He explained that enemies of freedom could call the nation hypocrites, and supporters of freedom could question the nation's sincerity.

Lincoln also discussed "the right of self-government" which he described as a state in which "each man should do precisely as he pleases with all which is exclusively his own… ." While supportive of self-government, Lincoln noted that the concept could not be applied to the question of whether slavery should be permitted in Kansas or Nebraska, as slaves were also men. Lincoln reasoned that self-government was totally inconsistent with slavery, as slavery would prevent slaves from governing themselves. He further argued that "that no man is good enough to govern another man, *without that other's consent*." This he tied into the Declaration of Independence's affirmation of the rights of life, liberty and the pursuit of happiness, and the fact that those rights should be secured by governments, "DERIVING THEIR JUST POWERS FROM THE CONSENT OF THE GOVERNED."

Lincoln also mentioned that the Kansas-Nebraska Act, by repealing the Missouri Compromise, threatened to undermine the public's trust of a national compromise, noting that in fact, the Constitution itself was created in the spirit of compromise. Lincoln warned that the effect of the repeal of the compromise would be that "[o]ne side will provoke; the other resent. The one will taunt, the other defy; one agrees, the other retaliates."

As he began concluding his speech, Lincoln again referred to the Declaration of Independence: "Near eighty years ago we began by declaring that all men are created equal; but now from that beginning we have run down to the other declaration, that for some men to enslave others is a 'sacred right of self-government.' These principles can not stand together. They are as opposite as God and mammon; and whoever holds to the one, must despise the other."

Lincoln's love of freedom, equality, morality, and representative governance with the consent of the governed was clear in this speech. He echoed Thomas Jefferson's words from the Declaration of Independence to make the point that slavery was wholly inconsistent with those loves.

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Republican Party Platform of 1856

June 17, 1856

This convention of delegates, assembled in pursuance of a call addressed to the people of the United States, without regard to past political differences or divisions, who are opposed to the

repeal of the Missouri Compromise, to the policy of the present Administration, to the extension of slavery into free territory; in favor of the admission of Kansas as a free state, of restoring the action of the Federal government to the principles of Washington and Jefferson; and who purpose to unite in presenting candidates for the offices of President and Vice-President, do resolve as follows:

Resolved, That the maintenance of the principles promulgated in the Declaration of Independence, and embodied in the federal constitution, is essential to the preservation of our Republican institutions, and that the federal constitution, the rights of the states, and the union of the states, shall be preserved.

Resolved, That with our republican fathers we hold it to be a self-evident truth that all men are endowed with the inalienable rights to life, liberty, and the pursuit of happiness, and that the primary object and ulterior design of our Federal government were, to secure these rights to all persons within its exclusive jurisdiction; that as our republican fathers, when they had abolished slavery in all our national territory, ordained that no person should be deprived of life, liberty, or property, without due process of law, it becomes our duty to maintain this provision of the constitution against all attempts to violate it for the purpose of establishing slavery in any territory of the United States, by positive legislation, prohibiting its existence or extension therein. That we deny the authority of Congress, of a territorial legislature, of any individual or association of individuals, to give legal existence to slavery in any territory of the United States, while the present constitution shall be maintained.

Resolved, That the constitution confers upon Congress sovereign power over the territories of the United States for their government, and that in the exercise of this power it is both the right and the imperative duty of Congress to prohibit in the territories those twin relics of barbarism—polygamy and slavery.

Resolved, That while the constitution of the United States was ordained and established, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty, and contains ample provision for the protection of the life, liberty, and property of every citizen, the dearest constitutional rights of the people of Kansas have been fraudulently and violently taken from them; their territory has been invaded by an armed force; spurious and pretended legislative, judicial, and executive officers have been set over them, by whose usurped authority, sustained by the military power of the government, tyrannical and unconstitutional laws have been enacted and enforced; the rights of the people to keep and bear arms have been infringed; test oaths of an extraordinary and entangling nature have been imposed as a condition of exercising the right of suffrage and holding office; the right of an accused person to a speedy and public trial by an impartial jury has been denied; the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, has been violated; they have been deprived of life, liberty, and property without due process of law; that the freedom of speech and of the press has been abridged; the right to choose their representatives has been made of no effect; murders, robberies, and arsons have been instigated and encouraged, and the offenders have been allowed to go unpunished; that all these things have been done with the knowledge, sanction, and procurement of the present national administration; and that for this

high crime against the constitution, the Union, and humanity, we arraign the administration, the President, his advisers, agents, supporters, apologists, and accessories, either before or after the facts, before the country and before the world; and that it is our fixed purpose to bring the actual perpetrators of these atrocious outrages, and their accomplices, to a sure and condign punishment hereafter.

Resolved, That Kansas should be immediately admitted as a state of this Union, with her present free constitution, as at once the most effectual way of securing to her citizens the enjoyment of the rights and privileges to which they are entitled, and of ending the civil strife now raging in her territory.

Resolved, That the highwayman's plea, that "might makes right," embodied in the Ostend circular, was in every respect unworthy of American diplomacy, and would bring shame and dishonor upon any government or people that gave it their sanction.

Resolved, That a railroad to the Pacific ocean, by the most central and practicable route, is imperatively demanded by the interests of the whole country, and that the Federal government ought to render immediate and efficient aid in its construction, and, as an auxiliary thereto, the immediate construction of an emigrant route on the line of the railroad.

Resolved, That appropriations of Congress for the improvement of rivers and harbors of a national character, required for the accommodation and security of our existing commerce, are authorized by the constitution, and justified by the obligation of government to protect the lives and property of its citizens.

Resolved, That we invite the affiliation and cooperation of the men of all parties, however differing from us in other respects, in support of the principles herein declared; and believing that the spirit of our institutions, as well as the constitution of our country, guarantees liberty of conscience and equality of rights among citizens, we oppose all proscriptive legislation affecting their security.

1. "1856.—Republican Platform," June 17, 1856, in Thomas Valentine Cooper and Hector Tyndale Fenton, eds., *American Politics (Non-Partisan) from the Beginning to Date,* Vol. 2 (Philadelphia: Fireside Publishing Company, 1892), 39-40.

Thursday, May 2, 2013 – Essay #54 – Republican Party Platform of 1856 – Guest Essayist: Scot Faulkner, Former Chief Administrative Officer of the U.S. House of Representatives

The Republican Party Platform of 1856 is the most important political platform in American history. It coalesced diverse factions into a new political movement that would dominate American politics for the next 76 years, winning 14 of the next 19 Presidential elections. It also

signaled the end of 36 years of political obfuscation on the issue of slavery in America, ultimately leading to the Civil War. The Republican Party Platform of 1856, more than any other platform in American history, was designed to codify a new political philosophy and to solidify a coalition of highly fractious political forces into a cogent and compelling movement.

This new political party, with its history changing manifesto, arose out of a long and complex sequence of events. The **RESOLVED** provisions of the 1856 Republican Platform reflect the pathways that brought diverse political leaders and factions together for their first national political convention on July 6, 1854 in Jackson, Michigan.

In the 1850s, America's civic culture was crumbling. Decades of political compromise and avoidance on the issue of slavery had maintained an uneasy peace. The Mexican-American War (1846-47) added over 500,000 square miles to the U.S. and rekindled sectional competition. Ralph Waldo Emerson prophesied, "The United States will conquer Mexico, but it will be as the man swallows the arsenic, which brings him down in turn. Mexico will poison us." [1]

The carefully orchestrated balance between Northern/Free states and Southern/Slave states in the U.S. Senate had only been maintained by tightly controlling the admission of new states to the Union. In 1820, Missouri was ready to be admitted as a "slave" state. Their Senate votes were to be off-set by separating the northern part of Massachusetts into the new "free" state of Maine. A key part of this Missouri Compromise of 1820 was to limit expansion of "slave states" to below a line, parallel 36°30′ north. However, after the Mexican War, Texas, California, and many other potential states, clamored for admission into the Union, reawakening the slumbering sectional strife and the "free" versus "slave" state controversy.

In 1850, a new Compromise was approved. This was a package of five separate bills that maintained the North/South balance in the Senate by allowing California to join the Union as a free state, even though its southern border dipped below the 1820 slave demarcation line. This was balanced by admitting Texas as a slave state. Other provisions balanced ending the slave trade in Washington, DC with strengthening the Fugitive Slave Act.

The Compromise of 1850 was the last great moment for the Whig Party. This party rose as a counter to the Jacksonian Democrats in the late 1830s. It thrived by broadly promoting westward expansion without a conflict with Mexico, supporting transportation infrastructure projects, and protecting fledgling American businesses with tariffs. The Whigs also benefited from having stellar leaders in the U.S. Senate, like Henry Clay and Daniel Webster, and attracting popular war heroes to run as their presidential candidates. The reawakening of sectional competition ended their brief moment of political ascendancy.

In 1848, the Whig Party split on slavery with pro-freedom/anti-Mexican War "Conscience Whigs" and pro-slavery "Cotton Whigs" ("lords of the lash" allied with "lords of the loom"). [2] They still stumbled across the 1848 Presidential finish line with Mexican War hero Zachery Taylor. Unfortunately, food poisoning led to Taylor's death on July 9, 1850 ushering in the Presidency of anti-immigrant Millard Filmore and his "No-nothing" nativist movement. In 1852, the highly divided Whig Party needed 53 roll call votes to nominate another war hero, Winfield Scott, only to lose in a landslide to Pro-slavery Democrat Franklin Pierce. Rep. Alexander

Stephens, a "Cotton Whig" pronounced, "the Whig Party is dead." [3]

The implosion of the Whigs, and the new sectional rivalry, launched new parties, and factions within parties. These reflected the wide range of opinions on slavery from zealous support of slavery every where possible to immediate abolition every where possible. In the middle were factions that wanted to maintain the Union through various forms of compromise, allowing slavery some places, but not others.

This cauldron of factionalism came to a boil in 1854.

It began with the proposed trans-continental railroad to California. Southerners wanted the rail line to take a southern route. James Gadsden, Pierce's Ambassador to Mexico, negotiated the purchase of Mexican lands in what is now the southern border of Arizona and New Mexico on December 30, 1853 to assure sufficient rights-of-way through less mountainous terrain.

The north wanted a northern route that began at St. Louis, Missouri and linked to Chicago, Baltimore, Philadelphia, and New York City. Most northern business leaders favored the northern route and felt that organization of the Nebraska Territory would facilitate this decision. However, rival factions within Missouri wanted control of the route and the potential fortunes to be made from land speculation. Pro-slave forces threatened to block any efforts to organize Nebraska because Missouri would then be surrounded on its west, east, and north by free states. Illinois Senator Stephen Douglas, a key architect of the Compromise of 1850 and Chairman of the Senate Committee on Territories, wanted to help his business supporters and avoid a confrontation with southerners. [4] The **seventh RESOLVED** of the Republican's 1856 platform reaffirms building of this transcontinental railroad

On January 4, 1854, Douglas introduced the Kansas-Nebraska Act. This act repealed the Missouri Compromise of 1820 and opened the entire territory to popular or "squatter" sovereignty for determining whether the territories would be free or slave. At this time the Nebraska Territory encompassed the entire Louisiana Purchase from the Missouri Compromise line to the Canadian Border. Indiana Representative George Washington Julian, who would serve as the Chairman of the Committee on Organization for the 1856 Republican Convention, commented, "The whole question of slavery was thus re-opened." [5]

The debate on the Kansas-Nebraska Act was tumultuous. Ohio Senator, Salmon Chase, published, "The Appeal of the Independent Democrats in Congress to the People of the United States", in the *New York Times* on January 24, 1854. He declared the abandonment of the Missouri Compromise a, "gross violation of a sacred pledge" and an "atrocious plot" to convert free territory into a "dreary region of despotism, inhabited by masters and slaves." [6] These sentiments are echoed in the **second and third RESOLVES** of the Republican's 1856 platform.

Anti-slavery "Free Soil" party activists along with anti-slavery "Conscience Whigs" and "Barn Burner" Democrats held anti-Nebraska meetings and rallies across the north. These meetings in the winter and spring of 1854 were the earliest stirrings of the Republican Party. The anti-Nebraska meeting held in a Congregational church in Ripon, Wisconsin on February 28, 1854, is considered the formal beginning of the Republican Party. This meeting led to the Republican

state convention in Madison, Wisconsin on July 13, which nominated the first slate of Republicans for that fall's election. [7].

The Kansas-Nebraska Act passed the Senate in March and the House of Representatives in early May. President Pierce signed the bill into law on May 30, 1854. New York Senator William H. Seward responded to victorious southern Senators by stating, "Since there is no escaping your challenge, I accept it in behalf of the cause of freedom. We will engage in a competition for the virgin soil of Kansas, and God give the victory to the side which is stronger in numbers as it is in right." [8] Both pro and anti slave forces moved into the Kansas territory engaging in brutal guerilla warfare over the next five years. The sporadic civil war in what became known as "Bleeding Kansas" even spilled into the U.S. Senate chamber. On May 22, 1856, South Carolina Representative, Preston Brooks assaulted Massachusetts Senator Charles Sumner in the Senate Chamber, bludgeoning him into unconsciousness. [9] The **fourth and fifth RESOLVES** of the Republican's 1856 platform recommend a swift resolution of the Kansas dispute in favor of it being a free state and assails the Pierce Administration for its role in causing so much harm.

On October 9-11, 1854, President Pierce's Secretary of State, William L. Marcy, met with the Administration's European ambassadors in Ostend, Belgium to discuss the possibility of the United States purchasing or invading Cuba and bringing it into America as a slave state. The resulting dispatch was the infamous Ostend Manifesto or Circular. This gave official sanction to years of free lance efforts by Southern slave zealots (known as filibusters) to bring slave holding parts of Central and South America into the Union and further inflamed northern opposition. This is the basis of the **sixth RESOLVED** of the Republican's 1856 platform.

The 1856 Presidential campaign was waged in a chaotic environment. The fragmented Democratic Party competed with the fragments of the Whig Party over slavery. The newly formed "Free Soil", "Opposition", and "North American" parties competed with the fledgling Republican Party. Lurking in the wings was the "No Nothing" Party that focused on stopping immigration into the U.S. and restricting citizenship for recently arrived immigrants.

There was much behind the scenes negotiations and deals to consolidate factions into the new Republican Party. Abraham Lincoln spent most of 1855-1856 building a new coalition among the factions and even among politicized newspapers in Illinois. [10] As George Washington Julian later explained, "The dispersion of the old parties was one thing, but the organization of their fragments into a new one on a just basis was quite a different thing." [11] The **ninth RESOLVED** in the Republican's 1856 platform reflects this matrix of deals and arrangements that created a true coalition movement.

The first Republican Presidential Nominating Convention was held in the Musical Fund Hall in Philadelphia, Pennsylvania, on June 17-19, 1856. Pro-slavery assaults in Kansas and the U.S. Senate during May emboldened the delegates to be more explicit in their anti-slavery position. [12] The delegates also felt the Republicans had a good chance of winning the Presidential election of 1856. They almost did. Pennsylvania Representative Thaddeus Stevens called the surprisingly close loss a "victorious defeat" and Indiana Representative Schuyler Colfax compared it to the Battle of Bunker Hill. [13]

Republican delegates sensed they had a historic opportunity and expanded their platform beyond planks focused on anti-slavery and infrastructure to articulate their philosophy on the role of government. These sentiments are outlined in the **preamble and the first RESOLVED** and woven in as themes in the **second, fourth, eighth and ninth RESOLVES**. This approach to limited government, grounded in our nation's founding principles, allowed an embryonic coalition of renegades to become the dominant political movement for the next seventy-six years. These core beliefs guide the Republican Party to this day.

Scot Faulkner served as the first Chief Administrative Officer of the U.S. House of Representatives and was Director of Personnel for Reagan-Bush 1980. You may read his columns at http://citizenoversight.blogspot.com

NOTES

[1] McPherson, James, *Battle Cry of Freedom* (Oxford University Press, New York, 1988) page 51.

[2] Ibid., page 60.

[3] Ibid., page 118.

[4] Mayer, George H., *The Republican Party 1854-1966 Second Edition* (Oxford University Press, New York, 1966) page 25.

[5] Julian, George Washington, *Political Recollections; Anthology – America; Great Crises in Our History Told by its Makers; Vol. VII* (Veterans of Foreign Wars, Chicago, 1925) page 212.

[6] Op. Cit., McPherson, page 124.

[7] Op. Cit., Mayer, page 26.

[8] Op. Cit. McPherson, page 145.

[9] Op. Cit. McPherson, page 150.

[10] Op. Cit., Mayer, pages 38-39.

[11] Gould, Lewis L, *Grand Old Party; A History of the Republicans* (Random House, New York, 2003) page 5.

[12] Ibid., page 18.

[13] Op. Cit. Mayer, page 47.

Dred Scott v. Sandford by Roger Taney (1777-1864)

1857

Mr. Chief Justice Taney delivered the opinion of the court:…

…The question is simply this: can a negro, whose ancestors were imported into this country and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen. One of these rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a state, in the sense in which the word "citizen" is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only; that is, of those persons who are the descendants of Africans who were imported into this country and sold as slaves….

We proceed to examine the case as presented by the pleadings.

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty. We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can, therefore, claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

In discussing this question, we must not confound the rights of citizenship which a state may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of a citizen, and to endow him with all its rights. But this character, of course, was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the

comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a State under the federal government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character.

It is very clear, therefore, that no State can, by any Act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a state should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endue him with the full rights of citizenship in every other State without their consent. Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guaranteed to citizens of this new sovereignty were intended to embrace those only who were then members of the several state communities, or who should afterwards, by birthright or otherwise, become members, according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State which he did not before possess, and placed him in every other State upon a perfect equality with

its own citizens as to rights of person and rights of property; it made him a citizen of the United States.

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the governments and institutions of the thirteen Colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognized as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it, in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English government and English people. They not only seized them on the coast of Africa, and sold them or held them in slavery for their own use; but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen Colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different Colonies, as slave labor was found more or less profitable. But no one seems to have

doubted the correctness of the prevailing opinion of the time.

The legislation of the different Colonies furnishes positive and indisputable proof of this fact….

The language of the Declaration of Independence is equally conclusive.

It begins by declaring that, "when in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and nature's God entitle them, a decent respect for the opinions of mankind requires that they should declare the causes which impel them to the separation."

It then proceeds to say: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among them is life, liberty, and pursuit of happiness; that to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day, would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this Declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this Declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not, in any part of the civilized world, be supposed to embrace the negro race, which, by common consent, had been excluded from civilized governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.

This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language.

The brief preamble sets forth by whom it was formed, for what purposes, and for whose benefit and protection. It declares that it is formed by the people of the United States; that is to say, by those who were members of the different political communities in the several States; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the people of the United States, and of citizens of the several States,

when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the people. It uses them as terms so well understood that no further description or definition was necessary.

But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808, if it thinks proper. And the importation which it thus sanctions was unquestionably of persons of the race of which we are speaking, as the traffic in slaves in the United States had always been confined to them. And by the other provision the States pledge themselves to each other to maintain the right of property of the master, by delivering up to him any slave who may have escaped from his service, and be found within their respective territories. By the first above-mentioned clause, therefore, the right to purchase and hold this property is directly sanctioned and authorized for twenty years by the people who framed the Constitution. And by the second, they pledge themselves to maintain and uphold the right of the master in the manner specified, as long as the government they then formed should endure. And these two provisions show, conclusively, that neither the description of persons therein referred to, nor their descendants, were embraced in any of the other provisions of the Constitution; for certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen….

We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom.

The case, as he himself states it, on the record, brought here by his writ of error, is this:

The plaintiff was a negro slave, belonging to Dr. Emerson, who was a surgeon in the Army of the United States. In the year 1834, he took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situated on the west bank of the Mississippi River, in the Territory known as Upper Louisiana, acquired by the United States of France, and situated north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling, from said last mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was a negro slave of Major Taliaferro, who belonged to the Army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post, situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave, at said Fort Snelling, unto the said Dr. Emerson hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling, until the year 1838.

In the year 1836, the plaintiff and Harriet intermarried, at Fort Snelling, with the consent of Dr. Emerson, who then claimed to be their master and owner. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat Gipsey, north of the north line of the State of Missouri, and upon the River Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet, and their said daughter Eliza, from said Fort Snelling, to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, and Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them, and each of them, as slaves.

In considering this part of the controversy, two questions arise: 1st. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States hereinbefore mentioned? And 2nd. If they were not, is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, as stated in the above admissions?

We proceed to examine the first question.

The Act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of that territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the difficulty which meets us at the threshold of this part of the inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon one who is held as a slave under the laws of any one of the States.

The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers on Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" but, in the judgment of the court, that provision has no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States, and was within their boundaries as settled by the Treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign government. It was a special provision for a known and particular Territory, and to meet a present emergency, and nothing more.

A brief summary of the history of the times, as well as the careful and measured terms in which the article is framed, will show the correctness of this proposition…. This was the state of things when the Constitution of the United States was formed. The territory ceded by Virginia belonged to the several confederated States as common property, and they had united in establishing in it a system of government and jurisprudence, in order to prepare it for admission as States, according

to the terms of the cession. They were about to dissolve this federative Union, and to surrender a portion of their independent sovereignty to a new government, which, for certain purposes, would make the people of the several States one people, and which was to be supreme and controlling within its sphere of action throughout the United States; but this government was to be carefully limited in its powers, and to exercise no authority beyond those expressly granted by the Constitution, or necessarily to be implied from the language of the instrument, and the objects it was intended to accomplish; and as this league of States would, upon the adoption of the new government, cease to have any power over the territory, and the Ordinance they had agreed upon be incapable of execution, and a mere nullity, it was obvious that some provision was necessary to give the new government sufficient power to enable it to carry into effect the objects for which it was ceded, and the compacts and agreements which the States had made each other in the exercise of their powers of sovereignty. It was necessary that the lands should be sold to pay the war debt; that a government and system of jurisprudence should be maintained in it, to protect the citizens of the United States, who should migrate to the Territory, in their rights of person and of property. It was also necessary that the new government, about to be adopted, should be authorized to maintain the claim of the United States to the unappropriated lands in North Carolina and Georgia, which had not then been ceded, but the cession of which was confidently anticipated upon some terms that would be arranged between the general government and these two States. And, moreover, there were many articles of value besides this property in land, such as arms, military stores, munitions, and ships of war, which were the common property of the States, when acting in their independent characters as confederates, which neither the new government nor any one else would have a right to take possession of, or control, without authority from them; and it was to place these things under the guardianship and protection of the new government, and to clothe it with the necessary powers, that the clause was inserted in the Constitution which give Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." It was intended for a specific purpose, to provide for the things we have mentioned. It was to transfer to the new government the property then held in common by the States, and to give to that government power to apply it to the objects for which it had been destined by mutual agreement among the States before their league was dissolved. It applied only to the property which the States held in common at that time, and has no reference whatever to any territory or other property which the new sovereignty might afterwards itself acquire….

The Constitution has always been remarkable for the felicity of its arrangement of different subjects, and the perspicuity and appropriateness of the language it uses. But if this clause is construed to extend to territory acquired by the present government from a foreign nation, outside of the limits of any charter from the British Government to a Colony, it would be difficult to say, why it was deemed necessary to give the government the power to sell any vacant lands belonging to the sovereignty which might be found within it; and if this was necessary, why the grant of this power should precede the power to legislate over it and establish a government there; and still more difficult to say, why it was deemed necessary so specially and particularly to grant the power to make needful rules and regulations in relation to any personal or movable property it might acquire there. For the words, "other property", necessarily, by every known rule of interpretation, must mean property of a different description from territory or land. And the difficulty would perhaps be insurmountable in endeavoring to account for the last member of the sentence, which provides that "nothing in this Constitution shall be so

construed as to prejudice any claims of the United States or any particular State," or to say how any particular State could have claims in or to a Territory ceded by a foreign government, or to account for associating this provision with the preceding provisions of the clause, with which it would appear to have no connection….

Whether, therefore, we take the particular clause in question, by itself, or in connection with the other provisions of the Constitution, we think it clear, that it applies only to the particular territory of which we have spoken, and cannot, by any just rule of interpretation, be extended to a territory which the new government might afterwards obtain from a foreign nation. Consequently, the power which Congress may have lawfully exercised in this territory, while it remained under a territorial government, and which may have been sanctioned by judicial decision, can furnish no justification and no argument to support a similar exercise of power over territory afterwards acquired by the Federal Government. We put aside, therefore, any argument, drawn from precedents, showing the extent of the power which the general government exercised over slavery in this territory, as altogether inapplicable to the case before us…. No one, we presume, will question the correctness of that opinion; nor is there anything in conflict with it in the opinion now given. The point decided in the case cited has no relation to the question now before the court. That depended on the construction of the 3rd article of the Constitution, in relation to the judiciary of the United States, and the power which Congress might exercise in a territory in organizing the Judicial Department of the government. The case before us depends upon other and different provisions of the Constitution, altogether separate and apart from the one above mentioned. The question as to what courts Congress may ordain or establish in a territory to administer laws which the Constitution authorizes it to pass, and what laws it is or is not authorized by the Constitution to pass, are widely different—are regulated by different and separate articles of the Constitution, and stand upon different principles. And we are satisfied that no one who reads attentively the page in Peters' Reports to which we have referred, can suppose that the attention of the court was drawn for a moment to the question now before this court, or that it meant in that case to say that Congress had a right to prohibit a citizen of the United States from taking any property which he lawfully held, into a Territory of the United States.

This brings us to examine by what provision of the Constitution the present federal government under its delegated and restricted powers, is authorized to acquire territory outside of the original limits of the United States, and what powers it may exercise therein over the person or property of a citizen of the United States, while it remains a territory, and until it shall be admitted as one of the States of the Union.

There is certainly no power given by the Constitution to the Federal Government to establish or maintain Colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. That power is plainly given; and if a new State is admitted it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the State, and the citizens of the State, and the Federal Government. But no power is given to acquire a Territory to be held and governed permanently in that character.

And indeed the power exercised by Congress to acquire territory and establish a government

there, according to its own unlimited discretion, was viewed with great jealousy by the leading statesmen of the day. And in the Federalist, No. 38, written by *Mr. Madison,* he speaks of the acquisition of the Northwestern Territory by the confederated States, by the cession from Virginia and the establishment of a government there, as an exercise of power not warranted by the Articles of Confederation, and dangerous to the liberties of the people. And he urges the adoption of the Constitution as a security and safeguard against such an exercise of power.

We do not mean, however, to question the power of Congress in this respect. The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority; and as the propriety of admitting a new State is committed to sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a state upon an equal footing with the other States, must rest upon the same discretion. It is a question for the Political Department of the government, and not the judicial; and whatever the Political Department of the government shall recognize as within the limits of the United States, the Judicial Department is also bound to recognize, and to administer in it the laws of the United States, so far as they apply, and to maintain in the territory the authority and rights of the government, and also the personal rights and rights of property of individual citizens, as secured by the Constitution. All we mean to say on this point is, that, as there is no express regulation in the Constitution defining the power which the general government may exercise over the person or property of a citizen in a territory thus acquired, the court must necessarily look to the provisions and principles of the Constitution, and its distribution of powers, for the rules and principles by which its decision must be governed. Taking this rule to guide us, it may be safely assumed that citizens of the United States who migrate to a territory belonging to the people of the United States, cannot be ruled as mere colonists, dependent upon the will of the general government, and to be governed by any laws it may think proper to impose. The principle upon which our governments rest, and upon which alone they continue to exist, is the union of States, sovereign and independent within their own limits in their internal and domestic concerns, and bound together as one people by a general government, possessing certain enumerated and restricted powers, delegated to it by the people of the several States, and exercising supreme authority within the scope of the powers granted to it, throughout the dominion of the United States. A power, therefore, in the general government to obtain and hold Colonies and dependent Territories, over which they might legislate without restriction, would be inconsistent with its own existence in its present form. Whatever it acquires, it acquires for the benefit of the people of the several States who created it. It is their trustee acting for them, and charged with the duty of promoting the interests of the whole people of the Union in the exercise of the powers specifically granted. At the time when the Territory in question was obtained by cession from France, it contained no population fit to be associated together and admitted as a State; and it therefore was absolutely necessary to hold possession of it as a Territory belonging to the United States until it was settled and inhabited by a civilized community capable of self-government, and in a condition to be admitted on equal terms with the other States as a member of the Union. But, as we have before said, it was acquired by the general government as the representative and trustee of the people of the United States, and it must, therefore, be held in that character for their

common and equal benefit; for it was the people of the several States, acting through the agent and representative, the Federal Government, who in fact acquired the territory in question, and the government holds it for their common use until it shall be associated with the other States as a member of the Union. But until that time arrives, it is undoubtedly necessary that some government should be established, in order to organize society, and to protect the inhabitants in their persons and property; and as the people of the United States could act in this matter only through the government which represented them, and through which they spoke and acted when the territory was obtained, it was not only within the scope of its powers, but it was its duty to pass such laws and establish such a government as would enable those by whose authority they acted to reap the advantages anticipated from its acquisition, and to gather there a population which would enable it to assume the position to which it was destined among the States of the Union. The power to acquire, necessarily carries with it the power to preserve and apply to the purposes for which it was acquired. The form of government to be established necessarily rested in the discretion of Congress. It was their duty to establish the one that would be best suited for the protection and security of the citizens of the United States and other inhabitants who might be authorized to take up their abode there, and that must always depend upon the existing condition of the Territory, as to the number and character of its inhabitants, and the situation in the Territory. In some cases a government, consisting of persons appointed by the Federal Government, would best subserve the interests of the Territory, when the inhabitants were few and scattered, and new to one another. In other instances, it would be more advisable to commit the powers of self-government to the people who had settled in the territory, as being the most competent to determine what was best for their own interests. But some form of civil authority would be absolutely necessary to organize and preserve civilized society, and prepare it to become a state; and what is the best form must always depend on the condition of the territory at the time, and the choice of the mode must depend upon the exercise of a discretionary power by Congress acting within the scope of its constitutional authority, and not infringing upon the rights of person or rights of property of the citizen who might go there to reside or for any other lawful purpose. It was acquired by the exercise of this discretion and it must be held and governed in like manner, until it is fitted to be a state. But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of government. The powers of the government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a territory of the United States, put off its character, and assume discretionary or despotic powers which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States, and the duties it owes them under the provisions of the Constitution. The territory being a part of the United States, the government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved.

A reference to a few of the provisions of the Constitution will illustrate this proposition.

For example, no one, we presume, will contend that Congress can make any law in a territory respecting the establishment of religion or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the territory peaceably to assemble and to petition the government for the redress of grievances.

Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel anyone to be a witness against himself in a criminal proceeding.

These powers, and others in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the general government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty and property, without due process of law. And an Act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law.

So, too, it will hardly be contended that Congress could by law quarter a soldier in a house in a territory without the consent of the owner, in time of peace; nor in time of war, but in a manner prescribed by law. Nor could they by law forfeit the property of a citizen in a territory who was convicted of treason, for a longer period than the life of the person convicted; nor take private property for public use without just compensation.

The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under territorial government, as well as that covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the general government might attempt, under the plea of implied or incidental powers. And if Congress itself cannot do this—if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a territorial government to exercise them. It could confer no power on any local government, established by its authority, to violate the provisions of the Constitution.

It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writings of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which governments may exercise over it, have been dwelt upon in the argument.

But in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their government and interfering with their relation to each other. The powers of the government, and the rights of the citizen under it, are

positive and practical regulations plainly written down. The people of the United States have delegated to it certain enumerated powers, and forbidden it to exercise others. It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the government, or take from the citizens the rights they have reserved. And if the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the government.

Now, as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years. And the government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words—too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the Act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.

We have so far examined the case, as it stands under the Constitution of the United States, and the powers thereby delegated to the Federal Government.

But there is another point in the case which depends on state power and state law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States; and being so made free, he was not again reduced to a state of slavery by being brought back to Missouri.

Our notice of this part of the case will be very brief; for the principle on which it depends was decided in this court, upon much consideration, in the case of *Strader et al. v. Graham,* reported in 10th Howard, 82. In that case, the slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterwards brought back to Kentucky. And this court held that their *status*or condition, as free or slave, depended upon the laws of Kentucky, when they were brought back into that State, and not of Ohio; and that this court had no jurisdiction to revise the judgment of a state court upon its own laws. This was the point directly before the court, and the decision that this court had not jurisdiction, turned upon it, as will be seen by the report of the case.

So in this case: as Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his *status,* as free or slave, depended on the laws of Missouri, and not of Illinois….

Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it.

Its judgment for the defendant must, consequently, be reversed, and a mandate issued directing the suit to be dismissed for want of jurisdiction.

1. 60 U.S. (19 How.) 393 (1857).

Friday, May 3, 2013 – Essay #55 – Dred Scott v. Sandford – Justice Roger Taney – Guest Essayist: Jeffrey Reed, former Constitutional Law Professor, Western Kentucky University, Bowling Green, Kentucky

On March 6, 1857, the United States Supreme Court handed down a ruling that would forever tarnish its reputation and that would help ignite the fires that led to the Civil War. That decision, ***Dred Scott v. Sandford***, 60 U.S. 393 (1857), held that African-Americans were not United States citizens and that the federal government had no power to regulate slavery in territories acquired after the creation of the United States.

The facts leading to the decision are a bit convoluted, but necessary to understand the case. Dred Scott was born a slave in Virginia. When he was about 25 years old, his owner took him to Missouri, where he was purchased by Dr. John Emerson. Emerson, a U.S. Army Surgeon, took him to Illinois, a free state, which had prohibited slavery in its constitution. Emerson moved with Scott to Fort Snelling, located in the Wisconsin territory (which would later become the state of Minnesota). Slavery in the territory was prohibited by the Missouri Compromise.

The 1820 Missouri Compromise primarily regulated slavery in the western territories. It prohibited slavery in the former Louisiana Territory north of a certain latitudinal line, except in Missouri. The law attempted to balance the number of free and slave states.

In 1837, the Army ordered Emerson to a post south of St. Louis, Missouri. He left Scott and his wife, at Fort Snelling, where he leased their services, effectively bringing slavery into a free state in violation of the compromise.

The Army reassigned Emerson to a fort in Louisiana, where he sent for Scott and his wife. After Emerson was re-assigned to Fort Snelling, Scott and his wife returned, again in violation of federal law. After Emerson died, his wife inherited the Scotts, whom she leased out as slaves. In

1846, Scott attempted to purchase his freedom, but Emerson's widow refused, which led to a lawsuit by Scott.

Scott sued the widow Emerson in Missouri court, claiming that his mere presence and residence in a free territory made him free. The suit was dismissed because Scott failed to prove that he was a slave belonging to the widow Emerson. After gaining a new trial, the court found in favor of Scott. The widow Emerson appealed. The Missouri Supreme Court reversed, holding that the Scotts were slaves who should have sued for freedom while living in a free state.

Scott then sued his current owner, John Sanford, in federal court. The trial judge directed the jury to rely on Missouri law. Since the Missouri Supreme Court had held that Scott was a slave, the jury found in favor of Sanford.

Scott appealed to the United States Supreme Court.

The court had several issues to decide. The first few dealt with whether the federal court had jurisdiction to hear the case. Scott claimed it had diversity jurisdiction because a citizen of one state was suing the citizen of another state. The court held that Scott could not be a citizen, because he was a descendent of an imported African slave. According to Justice Taney, the authors of the Constitution viewed blacks as inferior, unfit to associate with the white race, with no rights "which the white man was bound to respect."

The last issue was whether Scott's residency in modern day Minnesota made him a free man. The court held that Scott and his family were not free, but under the laws of Missouri, were the property of the defendant. The federal court had no jurisdiction because under Missouri law, Scott was a slave, not a citizen. Because the federal court had no jurisdiction, the Missouri decision applied.

Despite ruling that it lacked jurisdiction, the court went on to hold that Congress did not have the power to enact the Missouri Compromise. The Court said that Congress's power to acquire territories and create governments was limited to the Northwest Territory, not the Louisiana territory, which was acquired after the Constitution was adopted. Taney cited Article IV, Section 3 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States") and the clause, "…and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." Taney argued that the language protected permanent states. The Fifth Amendment barred any law that would deprive a slaveholder of his property, in this case slaves, upon moving into a free territory.

Republicans, and justices Curtis and McLean, argued that the last part of the ruling was dicta (gratuitous language) since the court had held that it lacked jurisdiction to decide the case.

The decision's effects were immediate. It triggered the Panic of 1857, because of uncertainty about whether the West would suddenly become a salve territory or like Kansas, which was engulfed in bloodshed over the slavery issue. Railroads and banks collapsed as well.

Although Congress had repealed the Missouri Compromise with the Kansas-Nebraska Act, permitting each newly admitted state south of the 40th parallel to decide the slavery issue, the Scott decision seemed to permit the expansion of slavery into the territories.

In effect, the Dred Scott case pushed the nation into the Civil War. The decision supported the Southern view that slaveholders had a right to bring slaves into the territories, regardless of territorial laws. If slavery expanded into the territories, Northerners would lose power, since new states would be admitted as slave states. Since slaves were counted as three-fifths of a person, slave states would have more representation in Congress.

Ironically, Taney saw the decision as a compromise that would permanently settle the slavery issue. Instead, the Dred Scott decision strengthened the North's opposition to slavery, divided the Democratic Party, encouraged Southern secessionists, and strengthened the Republican Party.

A private citizen accomplished for Scott what the laws of the nation could not do. The sons of Scott's first owner purchased freedom for him and his family. In his remaining years, Scott worked in a hotel in St. Louis, where he was considered a local celebrity.

Jeffrey Reed, a professional orchestra conductor, holds a degree from the Louis B. Brandeis School of Law. Before beginning his music career, he practiced law and taught constitutional law at Western Kentucky University in Bowling Green, Kentucky, where he resides.

Speech on the Dred Scott Decision by Abraham Lincoln

June 26, 1857

…And now as to the Dred Scott decision. That decision declares two propositions—first, that a negro cannot sue in the U.S. Courts; and secondly, that Congress cannot prohibit slavery in the Territories. It was made by a divided court—dividing differently on the different points. Judge Douglas does not discuss the merits of the decision; and, in that respect, I shall follow his example, believing I could no more improve on McLean and Curtis, than he could on Taney.

He denounces all who question the correctness of that decision, as offering violent resistance to it. But who resists it? Who has, in spite of the decision, declared Dred Scott free, and resisted the authority of his master over him?

Judicial decisions have two uses—first, to absolutely determine the case decided, and secondly, to indicate to the public how other similar cases will be decided when they arise. For the latter use, they are called "precedents" and "authorities."

We believe, as much as Judge Douglas, (perhaps more) in obedience to, and respect for the judicial department of government. We think its decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that

instrument itself. More than this would be revolution. But we think the Dred Scott decision is erroneous. We know the court that made it, has often overruled its own decisions, and we shall do what we can to have it to over-rule this. We offer no *resistance* to it.

Judicial decisions are of greater or less authority as precedents, according to circumstances. That this should be so, accords both with common sense, and the customary understanding of the legal profession.

If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent.

But when, as it is true we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country—But Judge Douglas considers this view awful. Hear him:

"The courts are the tribunals prescribed by the Constitution and created by the authority of the people to determine, expound and enforce the law. Hence, whoever resists the final decision of the highest judicial tribunal, aims a deadly blow to our whole Republican system of government—a blow, which if successful would place all our rights and liberties at the mercy of passion, anarchy and violence. I repeat, therefore, that if resistance to the decisions of the Supreme Court of the United States, in a matter like the points decided in the Dred Scott case, clearly within their jurisdiction as defined by the Constitution, shall be forced upon the country as a political issue, it will become a distinct and naked issue between the friends and the enemies of the Constitution—the friends and the enemies of the supremacy of the laws."

Why this same Supreme Court once decided a national bank to be constitutional; but General Jackson, as President of the United States, disregarded the decision, and vetoed a bill for a re-charter, partly on constitutional ground, declaring that each public functionary must support the Constitution, "as *he understands it."* But hear the General's own words. Here they are, taken from his veto message:

"It is maintained by the advocates of the bank, that its constitutionality, in all its features, ought to be considered as settled by precedent, and by the decision of the Supreme Court. To this conclusion I cannot assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power, except where the acquiescence of the people and the States can be considered as well settled. So far from this being the case on this subject, an argument against the bank might be based on precedent. One Congress in 1791, decided in favor of a bank; another in 1811, decided against it. One Congress in 1815 decided against a bank; another in 1816 decided in its favor. Prior to the present Congress, therefore the precedents drawn from that source were equal. If we resort to the States, the expressions of

legislative, judicial and executive opinions against the bank have been probably to those in its favor as four to one. There is nothing in precedent, therefore, which if its authority were admitted, ought to weigh in favor of the act before me."

I drop the quotations merely to remark that all there ever was, in the way of precedent up to the Dred Scott decision, on the points therein decided, had been against that decision. But hear General Jackson further—

"If the opinion of the Supreme court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the executive and the court, must each for itself be guided by its own opinion of the Constitution. Each public officer, who takes an oath to support the Constitution, swears that he will support it as he understands it, and not as it is understood by others."

Again and again have I heard Judge Douglas denounce that bank decision, and applaud General Jackson for disregarding it. It would be interesting for him to look over his recent speech, and see how exactly his fierce philippics against us for resisting Supreme Court decisions, fall upon his own head. It will call to his mind a long and fierce political war in this country, upon an issue which, in his own language, and, of course, in his own changeless estimation, was "a distinct and naked issue between the friends and the enemies of the Constitution," and in which war he fought in the ranks of the enemies of the Constitution.

I have said, in substance, that the Dred Scott decision was, in part; based on assumed historical facts which were not really true; and I ought not to leave the subject without giving some reasons for saying this; I therefore give an instance or two, which I think fully sustain me. Chief Justice Taney, in delivering the opinion of the majority of the Court, insists at great length that negroes were no part of the people who made, or for whom was made, the Declaration of Independence, or the Constitution of the United States.

On the contrary, Judge Curtis, in his dissenting opinion, shows that in five of the then thirteen states, to wit, New Hampshire, Massachusetts, New York, New Jersey and North Carolina, free negroes were voters, and, in proportion to their numbers, had the same part in making the Constitution that the white people had. He shows this with so much particularity as to leave no doubt of its truth; and, as a sort of conclusion on that point, holds the following language:

"The Constitution was ordained and established by the people of the United States, through the action, in each State, of those persons who were qualified by its laws to act thereon in behalf of themselves and all other citizens of the State. In some of the States, as we have seen, colored persons were among those qualified by law to act on the subject. These colored persons were not only included in the body of 'the people of the United States,' by whom the Constitution was ordained and established; but in at least five of the States they had the power to act, and, doubtless, did act, by their suffrages, upon the question of its adoption."

Again, Chief Justice Taney says: "It is difficult, at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the

United States was framed and adopted." And again, after quoting from the Declaration, he says: "The general words above quoted would seem to include the whole human family, and if they were used in a similar instrument at this day, would be so understood."

In these the Chief Justice does not directly assert, but plainly assumes, as a fact, that the public estimate of the black man is more favorable *now* than it was in the days of the Revolution. This assumption is a mistake. In some trifling particulars, the condition of that race has been ameliorated; but, as a whole, in this country, the change between then and now is decidedly the other way; and their ultimate destiny has never appeared so hopeless as in the last three or four years. In two of the five States—New Jersey and North Carolina—that then gave the free negro the right of voting, the right has since been taken away; and in a third—New York—it has been greatly abridged; while it has not been extended, so far as I know, to a single additional State, though the number of the States has more than doubled. In those days, as I understand, masters could, at their own pleasure, emancipate their slaves; but since then, such legal restraints have been made upon emancipation, as to amount almost to prohibition. In those days, Legislatures held the unquestioned power to abolish slavery in their respective States; but now it is becoming quite fashionable for State Constitutions to withhold that power from the Legislatures. In those days, by common consent, the spread of the black man's bondage to new countries was prohibited; but now, Congress decides that it *will* not continue the prohibition, and the Supreme Court decides that it *could*not if it would. In those days, our Declaration of Independence was held sacred by all, and thought to include all; but now, to aid in making the bondage of the negro universal and eternal, it is assailed, and sneered at, and construed, and hawked at, and torn, till, if its framers could rise from their graves, they could not at all recognize it. All the powers of earth seem rapidly combining against him. Mammon is after him; ambition follows, and philosophy follows, and the Theology of the day is fast joining the cry. They have him in his prison house; they have searched his person, and left no prying instrument with him. One after another they have closed the heavy iron doors upon him, and now they have him, as it were, bolted in with a lock of a hundred keys, which can never be unlocked without the concurrence of every key; the keys in the hands of a hundred different men, and they scattered to a hundred different and distant places; and they stand musing as to what invention, in all the dominions of mind and matter, can be produced to make the impossibility of his escape more complete than it is.

It is grossly incorrect to say or assume, that the public estimate of the negro is more favorable now than it was at the origin of the government.

Three years and a half ago, Judge Douglas brought forward his famous Nebraska bill. The country was at once in a blaze. He scorned all opposition, and carried it through Congress. Since then he has seen himself superseded in a Presidential nomination, by one endorsing the general doctrine of his measure, but at the same time standing clear of the odium of its untimely agitation, and its gross breach of national faith; and he has seen that successful rival Constitutionally elected, not by the strength of friends, but by the division of adversaries, being in a popular minority of nearly four hundred thousand votes. He has seen his chief aids in his own State, Shields and Richardson, politically speaking, successively tried, convicted, and executed, for an offense not their own, but his. And now he sees his own case, standing next on the docket for trial.

There is a natural disgust in the minds of nearly all white people, to the idea of an indiscriminate amalgamation of the white and black races; and Judge Douglas evidently is basing his chief hope, upon the chances of being able to appropriate the benefit of this disgust to himself. If he can, by much drumming and repeating, fasten the odium of that idea upon his adversaries, he thinks he can struggle through the storm. He therefore clings to this hope, as a drowning man to the last plank. He makes an occasion for lugging it in from the opposition to the Dred Scott decision. He finds the Republicans insisting that the Declaration of Independence includes all men, black as well as white; and forthwith he boldly denies that it includes negroes at all, and proceeds to argue gravely that all who contend it does, do so only because they want to vote, and eat, and sleep, and marry with negroes! He will have it that they cannot be consistent else. Now I protest against that counterfeit logic which concludes that, because I do not want a black woman for a *slave* I must necessarily want her for a *wife.*I need not have her for either, I can just leave her alone. In some respects she certainly is not my equal; but in her natural right to eat the bread she earns with her own hands without asking leave of any one else, she is my equal, and the equal of all others.

Chief Justice Taney, in his opinion in the Dred Scott case, admits that the language of the Declaration is broad enough to include the whole human family, but he and Judge Douglas argue that the authors of that instrument did not intend to include negroes, by the fact that they did not at once, actually place them on an equality with the whites. Now this grave argument comes to just nothing at all, by the other fact, that they did not at once, *or ever afterwards,* actually place all white people on an equality with one or another. And this is the staple argument of both the Chief Justice and the Senator, for doing this obvious violence to the plain unmistakable language of the Declaration. I think the authors of that notable instrument intended to include *all* men, but they did not intend to declare all men equal *in all respects.* They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal—equal in "certain inalienable rights, among which are life, liberty, and the pursuit of happiness." This they said, and this meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant 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, and augmenting the happiness and value of life to all people of all colors everywhere. 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, nor for that, but for future use. Its authors meant it to be, thank God, it is now proving itself, a stumbling block to those who in after times might seek to turn a free people back into the hateful paths of despotism. They knew the proneness of prosperity to breed tyrants, and they meant when such should reappear in this fair land and commence their vocation they should find left for them at least one hard nut to crack.

I have now briefly expressed my view of the *meaning* and *objects* of that part of the Declaration of Independence which declares that "all men are created equal."

Now let us hear Judge Douglas' view of the same subject, as I find it in the printed report of his late speech. Here it is:

"No man can vindicate the character, motives and conduct of the signers of the Declaration of Independence, except upon the hypothesis that they referred to the white race alone, and not to the African, when they declared all men to have been created equal—that they were speaking of British subjects on this continent being equal to British subjects born and residing in Great Britain—that they were entitled to the same inalienable rights, and among them were enumerated life, liberty and the pursuit of happiness. The Declaration was adopted for the purpose of justifying the colonists in the eyes of the civilized world in withdrawing their allegiance from the British crown, and dissolving their connection with the mother country."

My good friends, read that carefully over some leisure hour, and ponder well upon it—see what a mere wreck—mangled ruin—it makes of our once glorious Declaration.

"They were speaking of British subjects on this continent being equal to British subjects born and residing in Great Britain!" Why, according to this, not only negroes but white people outside of Great Britain and America are not spoken of in that instrument. The English, Irish and Scotch, along with white Americans, were included to be sure, but the French, Germans and other white people of the world are all gone to pot along with the Judge's inferior races.

I had thought the Declaration promised something better than the condition of British subjects; but no, it only meant that we should be *equal* to them in their own oppressed and *unequal*condition. According to that, it gave no promise that having kicked off the King and Lords of Great Britain, we should not at once be saddled with a King and Lords of our own.

I had thought the Declaration contemplated the progressive improvement in the condition of all men everywhere; but no, it merely "was adopted for the purpose of justifying the colonists in the eyes of the civilized world in withdrawing their allegiance from the British crown, and dissolving their connection with the mother country." Why, that object having been effected some eighty years ago, the Declaration is of no practical use now—mere rubbish—old wadding left to rot on the battle-field after the victory is won.

I understand you are preparing to celebrate the "Fourth," tomorrow week. What for? The doings of that day had no reference to the present; and quite half of you are not even descendants of those who were referred to at that day. But I suppose you will celebrate; and will even go so far as to read the Declaration. Suppose after you read it once in the old fashioned way, you read it once more with Judge Douglas' version. It will then run thus: "We hold these truths to be self-evident that all British subjects who were on this continent eighty-one years ago, were created equal to all British subjects born and *then*residing in Great Britain."

And now I appeal to all—to Democrats as well as others,—are you really willing that the Declaration shall be thus frittered away?—thus left no more, at most, than an interesting memorial of the dead past? thus shorn of its vitality, and practical value; and left without the *germ* or even the *suggestion* of the individual rights of man in it?…

1. Abraham Lincoln, "Speech at Springfield, Illinois," June 26, 1857, in Roy P. Basler, ed., *The Collected Works of Abraham Lincoln,* Vol. 2 (New Brunswick, NJ: Rutgers University Press, 1953), 400-407. Reprinted with the permission of the Abraham Lincoln Association, Springfield, IL.

Monday, May 5, 2013 – Essay #56 – Abraham Lincoln's Speech on the Dred Scott Decision – Guest Essayist: Professor Joerg Knipprath, Professor of Law at Southwestern Law School

Abraham Lincoln's speech on the *Dred Scott Case* reveals the complex nature of his views on slavery and racial equality, complexity that reflected the divided national psyche. Many Americans in the broad middle rejected the Southern defense of slavery and believed that the "peculiar institution" violated basic human rights and the fundamental equality of life, liberty, and the pursuit of happiness promised to all in the Declaration of Independence. At the same time, they also rejected the radical abolitionist egalitarianism that Black Americans, free or slave, in fact were equal to Whites in their capacities.

As Lincoln declared, "Now I protest against that counterfeit logic which concludes that, because I do not want a black woman for a *slave* I must necessarily want her for a *wife*. I need not have her for either, I can just leave her alone. In some respects she certainly is not my equal; but in her natural right to eat the bread she earns with her own hands without asking leave of anyone else, she is my equal, and the equal of all others."

The speech addresses three themes that Lincoln repeatedly revisited over the years, namely, the spread of slavery, his vision for the eventual emancipation of slaves, and the role of the Supreme Court in settling constitutional issues. As to the first, Lincoln categorically rejected Senator Stephen Douglas's "popular sovereignty" policy in the Kansas-Nebraska Act of 1854, which would allow the settlers of a territory to decide whether the eventual state organized from the territory would be free or slave. To the Republicans and Lincoln, this was unacceptable as it permitted potential extension of slavery to new territories beyond the existing slave states. Worse, it did so in negation of the Missouri Compromise of 1820 that had prohibited the further organization of slave states north of the southern boundary line of Missouri. As a moderate of whom both Northern abolitionists and Southern slave-holders were suspicious, Lincoln was prepared to protect slavery in the existing states, even by a constitutional amendment as he later offered, but would go no further. As to the second, Lincoln's speech here makes clear his opposition to "amalgamation" of the races. He accuses Douglas of raising the specter of racial intermarriage as a wedge to drive undecided voters and moderate opponents of slavery into supporting the continuation of the system. Lincoln spends the remaining portions of the speech (not included in the Hillsdale reader) emphatically opposing racial intermarriage. But he turns Douglas's argument against itself. Citing extensive statistics, he argues that the number of mulattoes is higher, the more entrenched slavery is in the state. Therefore, he sees the institution of slavery itself, and the expansion of that institution into new states, as increasing the likelihood

of racial mixing.

His solution to racial amalgamation is the re-colonization of emancipated slaves to Africa, as had been undertaken on a small scale during President Monroe's tenure. Indeed, Lincoln laments the lack of will of both parties in pursuing such re-colonization and urges a new political commitment to that end: "Will springs from the two elements of moral sense and self-interest. Let us be brought to believe it is morally right, and, at the same time, favorable to, or, at least, not against, our interest, to transfer the African to his native clime, and we shall find a way to do it, however great the task may be." Using his signature Biblical imagery, he adds, "The children of Israel, to such numbers as to include four hundred thousand fighting men, went out of Egyptian bondage in a body." This gradual approach to eventual actual separation of the races was analogous to other of Lincoln's positions regarding the eventual ending of slavery through gradual means, such as compensation to slave-holders. Left unsaid was to what extent, if any, the wishes of Black Americans themselves would matter.

As to the *Dred Scott Case* itself, Lincoln restates the dissenting Justice Curtis's critique of the majority's historical interpretation that Blacks, free or slave, were not deemed "citizens" of the United States under the Constitution or "men" protected by the principles of the Declaration of Independence. He also turns his considerable capacity for sarcasm to lampooning Douglas's support for the decision. But, woven into the polemics of his message is a serious analysis of the jurisprudence of constitutional decisions. Specifically, Lincoln considers the binding nature of Supreme Court precedent within a system of separation of powers. He properly distinguishes between the decision itself, which is treated as final between the parties (Dred Scott and Sandford), and the precedential effect of the holding as a rule of constitutional law (the status of slavery as beyond the constitutional power of Congress to regulate). He accepts the former, but rejects the finality of the latter.

Lincoln sets forth the parameters for obedience to judicial precedent, two of which are particularly salient. If the decision regarding a constitutional matter is not solitary but is the latest in a line of similar decisions, its holding might be settled law. It has become part of the constitutional fabric through repeated judicial affirmance. In similar vein, the more the decision is in accordance with the practice of the other branches of government and with public expectations, the more respect it deserves. There, the decision simply confirms the understanding of the Constitution shaped by popular custom and reflected in acts of the political bodies accountable to the people. In turn, a holding that departs from these principles likely upsets settled constitutional understanding and is a mistake.

What to do about "errors" by a politically-unaccountable judiciary deeply troubled the opponents of the Constitution in the 1780s. Lincoln recalls Andrew Jackson's famous message on the veto of the re-charter of the Second Bank of the United States in 1832. As part of that message, Old Hickory defiantly declared the power of each branch of government to have independent—and final—authority to decide constitutional matters within its domain: "If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the executive and the court, must each for itself be guided by its own opinion of the Constitution. Each public officer, who takes an oath to support the Constitution, swears that he will support it as he understands it, and not as it is understood by

others." The Supreme Court is not the Constitution.

Popular perception today is that the Supreme Court's decisions are final and binding on the other branches and all Americans. The Court has assiduously cultivated that notion. "We are not final because we are infallible, but infallible only because we are final," said Justice Robert Jackson. "The Supreme Court is the ultimate interpreter of the Constitution," wrote Justice William Brennan in *Baker v. Carr*. Similar sentiments have been voiced in many other opinions, though not before the middle of the 20th century.

No such declaration of judicial supremacy is as bold—or arrogant—as that in the opinion by Justices Sandra Day O'Connor, David Souter, and Anthony Kennedy in the 1992 abortion case *Planned Parenthood v. Casey*. Previous such assertions were addressed to other politicians. Not so in that case. There, the Court essentially tells the American people that any further challenge by them to the principles of *Roe v. Wade* as affirmed in *Planned Parenthood* would be illegitimate and call into question the rule of law, especially when "the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in [Supreme Court's version of] the Constitution."

The *Planned Parenthood* opinion's anti-democratic elitism mirrors Douglas's attack on those who opposed the *Dred Scott* decision. In each case, the Court sought to settle a divisive national controversy that had proved incapable of easy political compromise. In each, it failed. In each, the Court's defenders sought to make opposition to the decision an attack on the rule of law. In each, it was claimed that maintaining the Court's legitimacy required adherence to the result. In each, the contrary occurred, and the Court's legitimacy took a hit.

Let Abraham Lincoln have the last word, when he revisited the theme during his First Inaugural Address: "At the same time the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court…the people will have ceased to be their own rulers, having, to that extent, practically resigned their government into the hands of that eminent tribunal."

An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

A House Divided by Abraham Lincoln

June 16, 1858

Mr. President and Gentlemen of the Convention:

If we could first know *where* we are, and *whither* we are tending, we could then better judge *what* to do, and *how* to do it.

We are now far into the *fifth* year, since a policy was initiated, with the *avowed* object, and *confident* promise, of putting an end to slavery agitation.

Under the operation of that policy, that agitation has not only, *not ceased,* but has *constantly augmented.*

In *my* opinion, it *will* not cease, until a *crisis* shall have been reached, and passed.

"A house divided against itself cannot stand."

I believe this government cannot endure, permanently half *slave* and half *free.*

I do not expect the Union to be *dissolved*—I do not expect the house to *fall*— but I *do* expect it will cease to be divided.

It will become *all* one thing, or *all* the other.

Either the *opponents* of slavery, will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction; or its *advocates* will push it forward, till it shall become alike lawful in *all* the States, *old* as well as *new—North* as well as *South.*

Have we no *tendency* to the latter condition?

Let any one who doubts, carefully contemplate that now almost complete legal combination—piece of *machinery* so to speak—compounded of the Nebraska doctrine, and the Dred Scott decision. Let him consider not only *what work* the machinery is adapted to do, and *how well* adapted; but also, let him study the *history* of its construction, and trace, if he can, or rather *fail,* if he can, to trace the evidences of design, and concert of action, among its chief bosses, from the beginning.

But, so far, *Congress* only, had acted; and an *endorsement* by the people, *real* or apparent, was indispensable, to *save* the point already gained, and give chance for more.

The new year of 1854 found slavery excluded from more than half the States by State Constitutions, and from most of the national territory by Congressional prohibition.

Four days later, commenced the struggle, which ended in repealing that Congressional prohibition.

This opened all the national territory to slavery; and was the first point gained.

This necessity had not been overlooked; but had been provided for, as well as might be, in the notable argument of *"squatter sovereignty,"* otherwise called *"sacred right of self government,"* which latter phrase, though expressive of the only rightful basis of any government, was so perverted in this attempted use of it as to amount to just this: That if any *one* man, choose to enslave *another,* no *third* man shall be allowed to object.

That argument was incorporated into the Nebraska Bill itself, in the language which follows: *"It being the true intent and meaning of this act not to legislate slavery into any Territory or state, not to exclude it therefrom; but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States."*

Then opened the roar of loose declamation in favor of "Squatter Sovereignty" and "Sacred right of self government."

"But," said opposition members, "let us be more *specific*—let us *amend* the bill so as to expressly declare that the people of the territory *may* exclude slavery." "Not we," said the friends of the measure; and down they voted the amendment.

While the Nebraska bill was passing through congress, a *law case,* involving the question of a negro's freedom, by reason of his owner having voluntarily taken him first into a free state and then a territory covered by the congressional prohibition, and held him as a slave, for a long time in each, was passing through the U. S. Circuit Court for the District of Missouri; and both Nebraska bill and law suit were brought to a decision in the same month of May, 1854. The negro's name was "Dred Scott," which name now designates the decision finally made in the case.

Before the *then* next Presidential election, the law case came to, and was argued *in* the Supreme Court of the United States; but the *decision* of it was deferred until *after* the election. Still, *before* the election, Senator Trumbull, on the floor of the Senate, requests the leading advocate of the Nebraska Bill to state *his opinion* whether the people of a territory can constitutionally exclude slavery from their limits; and the latter answers, "That is a question for the Supreme Court."

The election came. Mr. Buchanan was elected, and the *endorsement,* such as it was, secured. That was the *second* point gained. The endorsement, however, fell short of a clear popular majority by nearly four hundred thousand votes, and so, perhaps, was not overwhelmingly reliable and satisfactory.

The *outgoing* President, in his last annual message, as impressively as possible *echoed back* upon the people the *weight* and *authority* of the endorsement.

The Supreme Court met again; *did not* announce their decision, but ordered a re-argument.

The Presidential inauguration came, and still no decision of the court; but the *incoming* President, in his inaugural address, fervently exhorted the people to abide by the forthcoming decision, *whatever it might be.*

Then, in a few days, came the decision.

The reputed author of the Nebraska bill finds an early occasion to make a speech at this capitol endorsing the Dred Scott Decision, and vehemently denouncing all opposition to it.

The new President, too, seizes the early occasion of the Silliman letter to *endorse* and strongly *construe* that decision, and to express his *astonishment* that any different view had ever been entertained.

At length a squabble springs up between the President and the author of the Nebraska bill, on the *mere* question of *fact,* whether the Lecompton constitution was or was not, in any just sense, made by the people of Kansas; and in that squabble the latter declares that all he wants is a fair vote for the people, and that he *cares* not whether slavery be voted *down* or voted *up.* I do not understand his declaration that he cares not whether slavery be voted down or voted up, to be intended by him other than as an *apt definition* of the *policy* he would impress upon the public mind—the *principle* for which he declares he has suffered much, and is ready to suffer to the end.

And well may he cling to that principle. If he has any parental feeling, well may he cling to it. That principle, is the only *shred* left of his original Nebraska doctrine. Under the Dred Scott decision, "squatter sovereignty"squatted out of existence, tumbled down like temporary scaffolding—like the mold at the foundry served through one blast and fell back into loose sand—helped to carry an election, and then was kicked to the winds. His late *joint* struggle with the Republicans, against the Lecompton Constitution, involves nothing of the original Nebraska doctrine. That struggle was made on a point, the right of a people to make their own constitution, upon which he and the Republicans have never differed.

The several points of the Dred Scott decision, in connection with Senator Douglas' "care not" policy, constitute the piece of machinery, in its *present* state of advancement. This was the third point gained.

The *working* points of that machinery are:

First, that no negro slave, imported as such from Africa, and no descendant of such slave can ever be a *citizen* of any State, in the sense of that term as used in the Constitution of the United States.

This point is made in order to deprive the negro, in every possible event, of the benefit of this provision of the United States Constitution, which declares that—

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

Secondly, that "subject to the Constitution of the United States," neither *Congress* nor a *Territorial Legislature* can exclude slavery from any United States territory.

This point is made in order that individual men may *fill up* the territories with slaves, without danger of losing them as property, and thus to enhance the chances of *permanency* to the institution through all the future.

Thirdly, that whether the holding a negro in actual slavery in a free State, makes him free, as against the holder, the United States courts will not decide, but will leave to be decided by the courts of any slave State the negro may be forced into by the master.

This point is made, not to be pressed *immediately;* but, if acquiesced in for a while, and apparently *endorsed* by the people at an election, *then* to sustain the logical conclusion that what Dred Scott's master might lawfully do with Dred Scott, in the free State of Illinois, every other master may lawfully do with any other *one,* or one *thousand* slaves, in Illinois, or in any other free State.

Auxiliary to all this, and working hand in hand with it, the Nebraska doctrine, or what is left of it, is to *educate* and *mold* public opinion, at least *Northern* public opinion, not to *care* whether slavery is voted *down* or voted *up.*

This shows exactly where we now are; and *partially* also, whither we are tending.

It will throw additional light on the latter, to go back, and run the mind over the string of historical facts already stated. Several things will *now* appear less *dark* and *mysterious* than they did *when* they were transpiring. The people were to be left "perfectly free" "subject only to the Constitution." What the *Constitution* had to do with it, outsiders could not *then* see. Plainly enough *now,* it was an exactly fitted *niche,* for the Dred Scott decision to afterwards come in, and declare the *perfect freedom* of the people, to be just no freedom at all.

Why was the amendment, expressly declaring the right of the people to exclude slavery, voted down? Plainly enough *now,* the adoption of it, would have spoiled the niche for the Dred Scott decision.

Why was the Court decision held up? Why, even a Senator's individual opinion withheld, till *after* the Presidential election? Plainly enough *now,* the speaking out *then* would have damaged the *"perfectly free"* argument upon which the election was to be carried.

Why the *outgoing* President's felicitation on the endorsement? Why the delay of a reargument? Why the incoming President's *advance* exhortation in favor of the decision?

These things *look* like the cautious *patting* and *petting* of a spirited horse, preparatory to mounting him, when it is dreaded that he may give the rider a fall.

And why the hasty after endorsements of the decision by the President and others?

We can not absolutely *know* that all these exact adaptations are the result of preconcert. But when we see a lot of framed timbers, different portions of which we know have been gotten out at different times and places and by different workmen—Stephen, Franklin, Roger and James,

for instance—and when we see these timbers joined together, and see they exactly make the frame of a house or a mill, all the tenons and mortices exactly fitting, and all the lengths and proportions of the different pieces exactly adapted to their respective places, and not a piece too many or too few—not omitting even scaffolding—or, if a single piece be lacking, we can see the place in the frame exactly fitted and prepared to yet bring such piece in—in *such* a case, we find it impossible to not *believe* that Stephen and Franklin and Roger and James all understood one another from the beginning, and all worked upon a common *plan* or *draft* drawn up before the first lick was struck….

Abraham Lincoln, "'A House Divided': Speech at Springfield, Illinois," June 16, 1858, in Roy P. Basler, ed., *The Collected Works of Abraham Lincoln,* Vol. 2 (New Brunswick, NJ: Rutgers University Press, 1953), 461–66. Reprinted with the permission of the Abraham Lincoln Association, Springfield, IL.

Tuesday, May 7, 2013 – Essay #57 – Abraham Lincoln's "House Divided" Speech – Guest Essayist: Tony Williams, Program Director for the Washington-Jefferson-Madison Institute

On June 16, 1858, Abraham Lincoln won the Republican nomination for the vacant U.S. Senate seat from Illinois. His opponent in the election would be Stephen Douglas. Upon his nomination, Lincoln delivered the "House Divided" speech in the war of words of what would culminate in the Lincoln-Douglas debates later that year.

Lincoln's law partner, William Herndon, reports that Lincoln composed the speech by writing out drafts on small scraps of paper which he numbered. He then put the pieces of paper in his tall hat for safekeeping. When he thought he had completed the speech, Lincoln assembled the pieces into their proper order and wrote out the entire speech.

The humble beginnings of the speech from a couple of scraps of paper to Lincoln's masterpiece started with a well-known biblical quote (for a biblically literate audience) from the Gospel of Matthew 12:25: "Every kingdom divided against itself is brought to desolation, and every city or house divided against itself will not stand."

The topics he addressed would be the "popular sovereignty" doctrine enunciated by Douglas in the Kansas-Nebraska Act (1854) and the more recent *Dred Scott* v. *Sandford* (1857) decision by the Supreme Court. Kansas-Nebraska allowed for popular sovereignty, or the principle that the territories could decide whether to allow slavery. The *Dred Scott* decision declared the Missouri Compromise unconstitutional because the Court decided that Congress could not regulate slavery in the new territories. These would be the object of Lincoln's attack on the morality of slavery and its spread in the new territories.

Lincoln opens the speech by declaring that Congress passed the Kansas-Nebraska Act with the

intention of quelling the agitation of the slavery question. That object was a fool's hope and the act augmented rather than soothed the sectional tensions. Lincoln therefore predicted that, "In my opinion, it *will* not cease, until a *crisis* shall have been reached, and passed."

After quoting Matthew, he then predicted that, "This government cannot endure, permanently half *slave* and half *free* . . . . It will become *all* one thing, or *all* the other." Lincoln had a moral vision of self-government and slavery. He understood that logically slavery must eventually exist everywhere or nowhere according to the popular sovereignty doctrine. If slavery were right, then "its *advocates* will push it forward, till it shall become alike lawful in all the States, *old* as well as *new – North* as well as *South*." If it were wrong, however, then, "The *opponents* of slavery, will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction."

Lincoln believed that the Founding Fathers compromised temporarily with slavery to create the Union, but they thought it wrong and put it on the path to gradual extinction. He and the Republicans wanted to restrict slavery to where it already existed and yet halt the expansion of the institution into the territories. The Congress had the plain power to regulate the territories in Article IV, but the Kansas-Nebraska Act and *Dred Scott* reversed the constitutional authority to ban slavery in the territories.

Lincoln lambasted popular sovereignty as "*squatter sovereignty*" and nothing more than moral relativism. He embraced the right of self-government but thought that Douglas' version was "so perverted" that it reduced self-government to the idea that, "If any *one* man, choose to enslave another, no *third* man shall be allowed to object." Lincoln, like Thomas Jefferson, did not believe that one had a natural or constitutional right to do a wrong. The foundation for republican government was rooted in natural law. As Jefferson stated in his First Inaugural Address: "All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression." Therefore, if popular sovereignty included the right to enslave another, the system would eventually spread throughout the Union.

Finally, Lincoln detected a conspiracy to expand slavery among Douglas, former President Franklin Pierce, Chief Justice Roger Taney, and current President James Buchanan. Lincoln charged that they were erecting a framework and scaffolding to promote the acceptance of *Dred Scott* and popular sovereignty among the American people. Buchanan, Lincoln said, "fervently exhorted the people to abide by the forthcoming decision, *whatever it might be*." Meanwhile, Douglas' popular sovereignty doctrine worked to "*educate* and *mold* public opinion, at least Northern public opinion, not to *care* whether slavery is voted *down* or voted *up*." In other words, they plotted to erect a morally relativist republic where slavery could be decided on by a democratic vote and spread all over the Union.

Lincoln lost the election to Douglas, but the two would square off again for the presidency in 1860. Throughout these campaigns, Lincoln consistently maintained that slavery was an evil that should be restricted to where it already existed. Thus, his ideas accorded with those of the Founders and the natural law ideals of the Declaration of Independence and Constitution, the

"apple of gold" in the "picture of silver" as he would put it.

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Speech at Chicago by Stephen Douglas (1813-1861)

July 9, 1858

…Fellow-citizens, while I devoted my best energies—all my energies, mental and physical—to the vindication of the great principle, and whilst the result has been such as will enable the people of Kansas to come into the Union with such a constitution as they desire, yet the credit of this great moral victory is to be divided among a large number of men of various and different political creeds. I was rejoiced when I found in this great contest the Republican party coming up manfully and sustaining the principle that the people of each Territory, when coming into the Union, have the right to decide for themselves whether slavery shall or shall not exist within their limits. I have seen the time when that principle was controverted. I have seen the time when all parties did not recognize the right of a people to have slavery or freedom, to tolerate or prohibit slavery as they deemed best, but claimed that power for the Congress of the United States, regardless of the wishes of the people to be affected by it; and when I found upon the Crittenden-Montgomery bill the Republicans and Americans of the North, and I may say, too, some glorious Americans and old-line Whigs from the South, like Crittenden and his patriotic associates, joined with a portion of the Democracy to carry out and vindicate the right of the people to decide whether slavery should or should not exist within the limits of Kansas, I was rejoiced within my secret soul, for I saw an indication that the American people, when they came to understand the principle, would give it their cordial support….

I regard the great principle of popular sovereignty as having been vindicated and made triumphant in this land as a permanent rule of public policy in the organization of Territories and the admission of new States. Illinois took her position upon this principle many years ago. You all recollect that in 1850, after the passage of the Compromise measures of that year, when I returned to my home there was great dissatisfaction expressed at my course in supporting those measures. I appeared before the people of Chicago at a mass meeting, and vindicated each and every one of those measures; and by reference to my speech on that occasion, which was printed and circulated broadcast throughout the State at the time, you will find that I then and there said that those measures were all founded upon the great principle that every people ought to possess the right to form and regulate their own domestic institutions in their own way, and that, that right being possessed by the people of the States, I saw no reason why the same principle should not be extended to all of the Territories of the United States. A general election was held in this State a few months afterwards, for members of the Legislature, pending which all these questions were thoroughly canvassed and discussed, and the nominees of the different parties instructed in regard to the wishes of their constituents upon them. When that election was over, and the

Legislature assembled, they proceeded to consider the merits of those Compromise measures, and the principles upon which they were predicated. And what was the result of their action? They passed resolutions, first repealing the Wilmot Proviso instructions, and in lieu thereof adopted another resolution, in which they declared the great principle which asserts the right of the people to make their own form of government and establish their own institutions. That resolution is as follows:

Resolved, That our liberty and independence are based upon the right of the people to form for themselves such a government as they may choose; that this great principle, the birthright of freemen, the gift of Heaven, secured to us by the blood of our ancestors, ought to be secured to future generations, and no limitation ought to be applied to this power in the organization of any Territory of the United States, of either Territorial Government or State Constitution, provided the Government so established shall be republican, and in conformity with the Constitution of the United States.

That resolution, declaring the great principle of self-government as applicable to the Territories and new States, passed the House of Representatives of this State by a vote of sixty-one in the affirmative, to only four in the negative. Thus you find that an expression of public opinion—enlightened, educated, intelligent public opinion—on this question, by the representatives of Illinois in 1851, approaches nearer to unanimity than has ever been obtained on any controverted question. That resolution was entered on the journal of the Legislature of the State ofIllinois, and it has remained there from that day to this, a standing instruction to her Senators, and a request to her Representatives, in Congress to carry out that principle in all future cases. Illinois, therefore, stands pre-eminent as the State which stepped forward early and established a platform applicable to this slavery question, concurred in alike by Whigs and Democrats, in which it was declared to be the wish of our people that thereafter the people of the Territories should be left perfectly free to form and regulate their domestic institutions in their own way, and that no limitation should be placed upon that right in any form.

Hence what was my duty in 1854, when it became necessary to bring forward a bill for the organization of the Territories of Kansas and Nebraska? Was it not my duty, in obedience to the Illinois platform, to your standing instructions to your Senators, adopted with almost entire unanimity, to incorporate in that bill the great principle of self-government, declaring that it was "the true intent and meaning of the Act not to legislate slavery into any State or Territory, or to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States?" I did incorporate that principle in the Kansas-Nebraska Bill, and perhaps I did as much as any living man in the enactment of that bill, thus establishing the doctrine in the public policy of the country. I then defended that principle against assaults from one section of the Union. During this last winter it became my duty to vindicate it against assaults from the other section of the Union. I vindicated it boldly and fearlessly, as the people of Chicago can bear witness, when it was assailed by Free-soilers; and during this winter I vindicated and defended it as boldly and fearlessly when it was attempted to be violated by the almost united South. I pledged myself to you on every stump in Illinois in 1854, I pledged myself to the people of other States north and south, wherever I spoke; and in the United States Senate and elsewhere, in every form in which I could reach the public mind or the public ear, I gave the pledge that I, so far as the power should

be in my hands, would vindicate the principle of the right of the people to form their own institutions, to establish free States or slave States as they chose, and that that principle should never be violated either by fraud, by violence, by circumvention, or by any other means, if it was in my power to prevent it. I now submit to you, my fellow-citizens, whether I have not redeemed that pledge in good faith. Yes, my friends, I have redeemed it in good faith; and it is a matter of heartfelt gratification to me to see these assembled thousands here tonight bearing their testimony to the fidelity with which I have advocated that principle, and redeemed my pledges in connection with it.

I will be entirely frank with you. My object was to secure the right of the people of each State and of each Territory, north or south, to decide the question for themselves, to have slavery or not, just as they chose; and my opposition to the Lecompton Constitution was not predicated upon the ground that it was a pro-slavery constitution, nor would my action have been different had it been a Free-soil constitution. My speech against the Lecompton fraud was made on the 9th of December, while the vote on the slavery clause in that constitution was not taken until the 21st of the same month, nearly two weeks after. I made my speech against the Lecompton monstrosity solely on the ground that it was a violation of the fundamental principles of free government; on the ground that it was not the act and deed of the people of Kansas; that it did not embody their will; that they were averse to it; and hence I denied the right of Congress to force it upon them, either as a free State or a slave State. I deny the right of Congress to force a slaveholding State upon an unwilling people. I deny their right to force a free State upon an unwilling people. I deny their right to force a good thing upon a people who are unwilling to receive it. The great principle is the right of every community to judge and decide for itself whether a thing is right or wrong, whether it would be good or evil for them to adopt it; and the right of free action, the right of free thought, the right of free judgment, upon the question is dearer to every true American than any other under a free government. My objection to the Lecompton contrivance was that it undertook to put a constitution on the people of Kansas against their will, in opposition to their wishes, and thus violated the great principle upon which all our institutions rest. It is no answer to this argument to say that slavery is an evil, and hence should not be tolerated. You must allow the people to decide for themselves whether it is a good or an evil. You allow them to decide for themselves whether they desire a Maine liquor law or not; you allow them to decide for themselves what kind of common schools they will have, what system of banking they will adopt, or whether they will adopt any at all; you allow them to decide for themselves the relations between husband and wife, parent and child, guardian and ward,—in fact, you allow them to decide for themselves all other questions: and why not upon this question? Whenever you put a limitation upon the right of any people to decide what laws they want, you have destroyed the fundamental principle of self-government….

But I am equally free to say that the reason assigned by Mr. Lincoln for resisting the decision of the Supreme Court in the Dred Scott case does not in itself meet my approbation. He objects to it because that decision declared that a negro descended from African parents, who were brought here and sold as slaves, is not and cannot be a citizen of the United States. He says it is wrong because it deprives the negro of the benefits of that clause of the Constitution which says that citizens of one State shall enjoy all the privileges and immunities of citizens of the several States; in other words, he thinks it wrong because it deprives the negro of the privileges, immunities, and rights of citizenship, which pertain, according to that decision, only to the white man. I am

free to say to you that in my opinion this government of ours is founded on the white basis. It was made by the white man, for the benefit of the white man, to be administered by white men, in such manner as they should determine. It is also true that a negro, an Indian, or any other man of inferior race to a white man should be permitted to enjoy, and humanity requires that he should have, all the rights, privileges, and immunities which he is capable of exercising consistent with the safety of society. I would give him every right and every privilege which his capacity would enable him to enjoy, consistent with the good of the society in which he lived. But you ask me, What are these rights and these privileges? My answer is, that each State must decide for itself the nature and extent of these rights. Illinois has decided for herself. We have decided that the negro shall not be a slave, and we have at the same time decided that he shall not vote, or serve on juries, or enjoy political privileges. I am content with that system of policy which we have adopted for ourselves. I deny the right of any other State to complain of our policy in that respect, or to interfere with it, or to attempt to change it. On the other hand, the State of Maine has decided that in that State a negro man may vote on an equality with the white man. The sovereign power of Maine had the right to prescribe that rule for herself. Illinois has no right to complain of Maine for conferring the right of negro suffrage, nor has Maine any right to interfere with or complain of Illinois because she has denied negro suffrage.

The State of New York has decided by her constitution that a negro may vote, provided that he own $250 worth of property, but not otherwise. The rich negro can vote, but the poor one cannot. Although that distinction does not commend itself to my judgment, yet I assert that the sovereign power of New York had a right to prescribe that form of the elective franchise. Kentucky, Virginia, and other States have provided that negroes, or a certain class of them in those States, shall be slaves, having neither civil nor political rights. Without endorsing the wisdom of that decision, I assert that Virginia has the same power, by virtue of her sovereignty, to protect slavery within her limits as Illinois has to banish it forever from our own borders. I assert the right of each State to decide for itself on all these questions, and I do not subscribe to the doctrine of my friend Mr. Lincoln, that uniformity is either desirable or possible. I do not acknowledge that the States must all be free or must all be slave.

I do not acknowledge that the negro must have civil and political rights everywhere or nowhere. I do not acknowledge that the Chinese must have the same rights in California that we would confer upon him here. I do not acknowledge that the coolie imported into this country must necessarily be put upon an equality with the white race. I do not acknowledge any of these doctrines of uniformity in the local and domestic regulations in the different States.

Thus you see, my fellow-citizens, that the issues between Mr. Lincoln and myself, as respective candidates for the United States Senate, as made up, are direct, unequivocal, and irreconcilable. He goes for uniformity in our domestic institutions, for a war of sections, until one or the other shall be subdued. I go for the great principle of the Kansas-Nebraska Bill,—the right of the people to decide for themselves.

On the other point, Mr. Lincoln goes for a warfare upon the Supreme Court of the United States because of their judicial decision in the Dred Scott case. I yield obedience to the decisions in that court,—to the final determination of the highest judicial tribunal known to our Constitution. He objects to the Dred Scott decision because it does not put the negro in the possession of the rights

of citizenship on an equality with the white man. I am opposed to negro equality. I repeat that this nation is a white people,—a people composed of European descendants, a people that have established this government for themselves and their posterity,—and I am in favor of preserving, not only the purity of the blood, but the purity of the government from any mixture or amalgamation with inferior races. I have seen the effects of this mixture of superior and inferior races, this amalgamation of white men and Indians and negroes; we have seen it in Mexico, in Central America, in South America, and in all the Spanish-American States; and its result has been degeneration, demoralization, and degradation below the capacity for self-government.

I am opposed to taking any step that recognizes the negro man or the Indian as the equal of the white man. I am opposed to giving him a voice in the administration of the government. I would extend to the negro and the Indian and to all dependent races every right, every privilege, and every immunity consistent with the safety and welfare of the white races; but equality they never should have, either political or social, or in any other respect whatever.

My friends, you see that the issues are distinctly drawn. I stand by the same platform that I have so often proclaimed to you and to the people of Illinois heretofore. I stand by the Democratic organization, yield obedience to its usages, and support its regular nominations. I endorse and approve the Cincinnati platform, and I adhere to and intend to carry out, as part of that platform, the great principle of self-government, which recognizes the right of the people in each State and Territory to decide for themselves their domestic institutions. In other words, if the Lecompton issue shall arise again, you have only to turn back and see where you have found me during the last six months, and then rest assured that you will find me in the same position, battling for the same principle, and vindicating it from assault from whatever quarter it may come, so long as I have the power to do it….

1. Stephen Douglas, "Speech of Senator Douglas, On the Occasion of his Public Reception at Chicago," July 9, 1858, in Stephen Douglas, Abraham Lincoln, *Political Debates between Abraham Lincoln and Stephen A. Douglas* (New York: G. P. Putnam's Sons, 1912), 16–23, 30–35.

Wednesday, May 8, 2013 – Essay #58 – Stephen Douglas's Speech at Chicago – Guest Essayist: Tony Williams, Program Director for the Washington-Jefferson-Madison Institute

In his "House Divided" speech, Abraham Lincoln contested the "popular sovereignty" doctrine of Stephen Douglas by stating "a house divided against itself cannot stand." His opponent for the Illinois senate seat, Douglas, nicknamed the "Little Giant," answered Lincoln's charges a few weeks later in a speech in Chicago. Douglas adamantly defended the principle of popular sovereignty and revealed his understanding of the principles of the Declaration of Independence.

Douglas reasserted the principle of popular sovereignty that each state and territory would decide

for itself whether or not to have slaves. He disagreed with Lincoln that the United States could not endure as a House divided on the slavery question. "I do not subscribe to the doctrine of my friend Mr. Lincoln, that uniformity is either desirable or possible. I do not acknowledge that the States must all be free or must all be slave."

Douglas reviews the history of his key role in formulating the popular sovereignty doctrine throughout the late 1840s and 1850s. Indeed, he even pledges that, "so far as the power should be in my hands, would vindicate the principle of the right of the people to form their own institutions, to establish free States or slave States as they chose, and that that principle should never be violated . . . if it was in my power to prevent it." Douglas was unquestionably committed to the rightness of popular sovereignty regarding slavery.

For Douglas, popular sovereignty was a moral principle. The self-governing people had the right to decide for themselves whether or not an action was moral. This was, according to Douglas, a fundamental right of free thought and free judgment. He saw it as deeply rooted in principles of the American republic. "The great principle is the right of every community to judge and decide for itself whether a thing is right or wrong, whether it would be good or evil for them to adopt it." This was true, Douglas argues, for establishing temperance laws, public schools, marriage regulations, and banks. Every state has a different character and should be allowed to make its own laws and institutions.

Douglas' statement was moral relativism masquerading as self-government. He held fast to the idea that a people could democratically decide whether an action was good or evil. Nothing was objectively right or wrong; it was simply a matter of collective decision. Douglas does not follow the principle to its logical conclusion and weigh in on whether a state could allow murder, rape, or polygamy within its borders if the democratic people so decided. However, he does baldly state that, "Whenever you put a limitation upon the right of any people to decide what laws they want, you have destroyed the fundamental principle of self-government."

It should probably not be surprising then that Douglas continues by rejecting the universal natural right principles of the Declaration of Independence and engages in horrific racism. He says that, "I am free to say to you that in my opinion this government of ours is founded on the white basis. It was made by the white man, for the benefit of the white man, to be administered by white men." He does aver that "a negro, an Indian, or any other man of inferior race" should have rights and privileges, but he qualifies the statement by arguing that those rights only exist to the extent that they do not interfere with the good and safety of white society. Additionally, he defines the rights loosely on a shaky foundation. "Each state must decide for itself the nature and extent of these rights." During the Founding, Alexander Hamilton wrote that, "The sacred rights of mankind . . . are written, as with a sun beam, in the whole *volume* of human nature, by the hand of divinity itself; and can never be erased or obscured by mortal power." Contrarily, Stephen Douglas offers the principle of "Who's to say?"

Douglas discusses several different state laws regarding slavery and celebrates their diversity. Illinois for example decided that "the negro shall not be a slave, and we have at the same time decided that he shall not vote, or serve on juries, or enjoy political privileges." But, the sovereign people of other states may feel differently. His principle is, "I wouldn't personally

own a slave, but I won't judge those who do."

In his speech in Chicago, Douglas reaffirmed the idea of popular sovereignty which seemed to him an American foundational principle. He did so with the best of intentions to save the Union from growing sectionalism and a possible civil war. But, Douglas was perverting Jefferson's ideals into the self-evident truth that all men were created unequal, and only the white man had any rights entitled to respect. Douglas sought to rest the American republic upon the foundations of racial inequality rather than the "laws of nature and nature's God."

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Seventh Lincoln-Douglas Debate

October 15, 1858

Senator Douglas's Speech

…The issue thus being made up between Mr. Lincoln and myself on three points, we went before the people of the State. During the following seven weeks, between the Chicago speeches and our first meeting at Ottawa, he and I addressed large assemblages of the people in many of the central counties. In my speeches I confined myself closely to those three positions which he had taken controverting his proposition that this Union could not exist as our fathers made it, divided into free and slave States, controverting his proposition of a crusade against the Supreme Court because of the Dred Scott decision, and controverting his proposition that the Declaration of Independence included and meant the negroes as well as the white men, when it declared all men to be created equal. I supposed at that time that these propositions constituted a distinct issue between us, and that the opposite positions we had taken upon them we would be willing to be held to in every part of the State. I never intended to waver one hair's breadth from that issue either in the north or the south, or wherever I should address the people of Illinois. I hold that when the time arrives that I cannot proclaim my political creed in the same terms not only in the northern but the southern part of Illinois, not only in the northern but the southern States, and wherever the American flag waves over American soil, that then there must be something wrong in that creed. So long as we live under a common constitution, so long as we live in a confederacy of sovereign and equal States, joined together as one for certain purposes, that any political creed is radically wrong which cannot be proclaimed in every State, and every section of that Union alike. I took up Mr. Lincoln's three propositions in my several speeches, analyzed them, and pointed out what I believed to be the radical errors contained in them. First, in regard to his doctrine that this government was in violation of the law of God which says, that a house divided against itself cannot stand, I repudiated it as a slander upon the immortal framers of our constitution. I then said, have often repeated, and now again assert, that in my opinion this government can endure forever, divided into free and slave States as our fathers made it,—each

State having the right to prohibit, abolish or sustain slavery just as it pleases. This government was made upon the great basis of the sovereignty of the States, the right of each State to regulate its own domestic institutions to suit itself, and that right was conferred with understanding and expectation that inasmuch as each locality had separate interests, each locality must have different and distinct local and domestic institutions, corresponding to its wants and interests. Our fathers knew when they made the government, that the laws and institutions which were well adapted to the green mountains of Vermont, were unsuited to the rice plantations of South Carolina. They knew then, as well as we know now, that the laws and institutions which would be well adapted to the beautiful prairies of Illinois would not be suited to the mining regions of California. They knew that in a Republic as broad as this, having such a variety of soil, climate and interest, there must necessarily be a corresponding variety of local laws—the policy and institutions of each State adapted to its condition and wants. For this reason this Union was established on the right of each State to do as it pleased on the question of slavery, and every other question; and the various States were not allowed to complain of, much less interfere, with the policy of their neighbors.

Suppose the doctrine advocated by Mr. Lincoln and the abolitionists of this day had prevailed when the Constitution was made, what would have been the result? Imagine for a moment that Mr. Lincoln had been a member of the convention that framed the Constitution of the United States, and that when its members were about to sign that wonderful document, he had arisen in that convention as he did at Springfield this summer, and addressing himself to the President, had said, "a house divided against itself cannot stand; this government divided into free and slave States cannot endure, they must all be free or all be slave, they must all be one thing or all the other, otherwise, it is a violation of the law of God, and cannot continue to exist;"—suppose Mr. Lincoln had convinced that body of sages, that that doctrine was sound, what would have been the result? Remember that the Union was then composed of thirteen States, twelve of which were slaveholding and one free. Do you think that the one free State would have outvoted the twelve slaveholding States, and thus have secured the abolition of slavery? On the other hand, would not the twelve slaveholding States have outvoted the one free State, and thus have fastened slavery, by a Constitutional provision, on every foot of the American Republic forever? You see that if this abolition doctrine of Mr. Lincoln had prevailed when the government was made, it would have established slavery as a permanent institution, in all the States whether they wanted it or not, and the question for us to determine in Illinois now as one of the free States is, whether or not we are willing, having become the majority section, to enforce a doctrine on the minority, which we would have resisted with our heart's blood had it been attempted on us when we were in a minority. How has the South lost her power as the majority section in this Union, and how have the free States gained it, except under the operation of that principle which declares the right of the people of each State and each territory to form and regulate their domestic institutions in their own way. It was under that principle that slavery was abolished in New Hampshire, Rhode Island, Connecticut, New York, New Jersey, and Pennsylvania; it was under that principle that one half of the slaveholding States became free; it was under that principle that the number of free States increased until from being one out of twelve States, we have grown to be the majority of States of the whole Union, with the power to control the House of Representatives and Senate, and the power, consequently, to elect a President by Northern votes without the aid of a Southern State. Having obtained this power under the operation of that great principle, are you now prepared to abandon the principle and declare that merely because we

have the power you will wage a war against the Southern States and their institutions until you force them to abolish slavery everywhere….

But the Abolition party really think that under the Declaration of Independence the negro is equal to the white man, and that negro equality is an inalienable right conferred by the Almighty, and hence, that all human laws in violation of it are null and void. With such men it is no use for me to argue. I hold that the signers of the Declaration of Independence had no reference to negroes at all when they declared all men to be created equal. They did not mean negro, nor the savage Indians, nor the Fejee Islanders, nor any other barbarous race. They were speaking of white men. They alluded to men of European birth and European descent—to white men, and to none others, when they declared that doctrine. I hold that this Government was established on the white basis. It was established by white men for the benefit of white men and their posterity forever, and should be administered by white men, and none others. But it does not follow, by any means, that merely because the negro is not a citizen, and merely because he is not our equal, that, therefore, he should be a slave. On the contrary, it does follow, that we ought to extend to the negro race, and to all other dependent races all the rights, all the privileges, and all the immunities which they can exercise consistently with the safety of society. Humanity requires that we should give them all these privileges; Christianity commands that we should extend those privileges to them. The question then arises what are those privileges, and what is the nature and extent of them. My answer is that that is a question which each State must answer for itself. We in Illinois have decided it for ourselves. We tried slavery, kept it up for twelve years, and finding that it was not profitable we abolished it for that reason, and became a free State. We adopted in its stead the policy that a negro in this State shall not be a slave and shall not be a citizen. We have a right to adopt that policy. For my part I think it is a wise and sound policy for us. You in Missouri must judge for yourselves whether it is a wise policy for you. If you choose to follow our example, very good; if you reject it, still well, it is your business, not ours. So with Kentucky. Let Kentucky adopt a policy to suit herself. If we do not like it we will keep away from it, and if she does not like ours let her stay at home, mind her own business and let us alone. If the people of all the States will act on that great principle, and each State mind its own business, attend to its own affairs, take care of its own negroes and not meddle with its neighbors, then there will be peace between the North and the South, the East and the West, throughout the whole Union. Why can we not thus have peace? Why should we thus allow a sectional party to agitate this country, to array the North against the South, and convert us into enemies instead of friends, merely that a few ambitious men may ride into power on a sectional hobby? How long is it since these ambitious Northern men wished for a sectional organization? Did any one of them dream of a sectional party as long as the North was the weaker section and the South the stronger? Then all were opposed to sectional parties; but the moment the North obtained the majority in the House and Senate by the admission of California, and could elect a President without the aid of Southern votes, that moment ambitious Northern men formed a scheme to excite the North against the South, and make the people be governed in their votes by geographical lines, thinking that the North, being the stronger section, would outvote the South, and consequently they, the leaders, would ride into office on a sectional hobby. I am told that my hour is out. It was very short.

Mr. Lincoln's Reply

…At Galesburg the other day, I said in answer to Judge Douglas, that three years ago there never had been a man, so far as I knew or believed, in the whole world, who had said that the Declaration of Independence did not include negroes in the term "all men." I reassert it today. I assert that Judge Douglas and all his friends may search the whole records of the country, and it will be a matter of great astonishment to me if they shall be able to find that one human being three years ago had ever uttered the astounding sentiment that the term "all men" in the Declaration did not include the negro. Do not let me be misunderstood. I know that more than three years ago there were men who, finding this assertion constantly in the way of their schemes to bring about the ascendancy and perpetuation of slavery,*denied the truth of it.* I know that Mr. Calhoun and all the politicians of his school denied the truth of the Declaration. I know that it ran along in the mouths of some Southern men for a period of years, ending at last in that shameful though rather forcible declaration of Pettit of Indiana, upon the floor of the United States Senate, that the Declaration of Independence was in that respect "a self-evident lie," rather than a self-evident truth. But I say, with a perfect knowledge of all this hawking at the Declaration without directly attacking it, that three years ago there never had lived a man who had ventured to assail it in the sneaking way of pretending to believe it and then asserting it did not include the negro. I believe the first man who ever said it was Chief Justice Taney in the Dred Scott case, and the next to him was our friend Stephen A. Douglas. And now it has become the catch-word of the entire party. I would like to call upon his friends everywhere to consider how they have come in so short a time to view this matter in a way so entirely different from their former belief? to ask whether they are not being borne along by an irresistible current—whither, they know not?…

And when this new principle—this new proposition that no human being ever thought of three years ago,—is brought forward, *I combat it* as having an evil tendency, if not an evil design; I combat it as having a tendency to dehumanize the negro—to take away from him the right of ever striving to be a man. I combat it as being one of the thousand things constantly done in these days to prepare the public mind to make property, and nothing but property of the *negro in all the States of this Union*….

Again; the institution of slavery is only mentioned in the Constitution of the United States two or three times, and in neither of these cases does the word "slavery" or "negro race" occur; but covert language is used each time, and for a purpose full of significance. What is the language in regard to the prohibition of the African slave trade? It runs in about this way: "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight."

The next allusion in the Constitution to the question of slavery and the black race, is on the subject of the basis of representation, and there the language used is, "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed—three-fifths of all other persons."

It says "persons," not slaves, not negroes; but this "three-fifths" can be applied to no other class among us than the negroes.

Lastly, in the provision for the reclamation of fugitive slaves it is said: "No person held to service or labor in one State under the laws thereof escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due." There again there is no mention of the word "negro" or of slavery. In all three of these places, being the only allusions to slavery in the instrument, covert language is used. Language is used not suggesting that slavery existed or that the black race were among us. And I understand the contemporaneous history of those times to be that covert language was used with a purpose, and that purpose was that in our Constitution, which it was hoped and is still hoped will endure forever—when it should be read by intelligent and patriotic men, after the institution of slavery had passed from among us—there should be nothing on the face of the great charter of liberty suggesting that such a thing as negro slavery had ever existed among us. This is part of the evidence that the fathers of the Government expected and intended the institution of slavery to come to an end. They expected and intended that it should be in the course of ultimate extinction. And when I say that I desire to see the further spread of it arrested I only say I desire to see that done which the fathers have first done. When I say I desire to see it placed where the public mind will rest in the belief that it is in the course of ultimate extinction, I only say I desire to see it placed where they placed it. It is not true that our fathers, as Judge Douglas assumes, made this government part slave and part free. Understand the sense in which he puts it. He assumes that slavery is a rightful thing within itself,—was introduced by the framers of the Constitution. The exact truth is, that they found the institution existing among us, and they left it as they found it. But in making the government they left this institution with many clear marks of disapprobation upon it. They found slavery among them and they left it among them because of the difficulty— the absolute impossibility of its immediate removal. And when Judge Douglas asks me why we cannot let it remain part slave and part free as the fathers of the government made, he asks a question based upon an assumption which is itself a falsehood; and I turn upon him and ask him the question, when the policy that the fathers of the government had adopted in relation to this element among us was the best policy in the world—the only wise policy—the only policy that we can ever safely continue upon—that will ever give us peace unless this dangerous element masters us all and becomes a national institution—*I turn upon him and ask him why he could not let it alone?* I turn and ask him why he was driven to the necessity of introducing a *new policy* in regard to it? He has himself said he introduced a new policy. He said so in his speech on the 22nd of March of the present year, 1858. I ask him why he could not let it remain where our fathers placed it? I ask too of Judge Douglas and his friends why we shall not again place this institution upon the basis on which the fathers left it? I ask you when he infers that I am in favor of setting the free and slave States at war, when the institution was placed in that attitude by those who made the constitution, *did they make any war?* If we had no war out of it when thus placed, wherein is the ground of belief that we shall have war out of it if we return to that policy? Have we had any peace upon this matter springing from any other basis? I maintain that we have not. I have proposed nothing more than a return to the policy of the fathers….

I have stated upon former occasions, and I may as well state again, what I understand to be the real issue in this controversy between Judge Douglas and myself. On the point of my wanting to make war between the free and the slave States, there has been no issue between us. So, too, when he assumes that I am in favor of introducing a perfect social and political equality between the white and black races. These are false issues, upon which Judge Douglas has tried to force

the controversy. There is no foundation in truth for the charge that I maintain either of these propositions. The real issue in this controversy—the one pressing upon every mind—is the sentiment on the part of one class that looks upon the institution of slavery *as a wrong,* and of another class that *does not* look upon it as a wrong. The sentiment that contemplates the institution of slavery in this country as a wrong is the sentiment of the Republican party.It is the sentiment around which all their actions—all their arguments circle—from which all their propositions radiate. They look upon it as being a moral, social and political wrong; and while they contemplate it as such, they nevertheless have due regard for its actual existence among us, and the difficulties of getting rid of it in any satisfactory way and to all the constitutional obligations thrown about it. Yet having a due regard for these, they desire a policy in regard to it that looks to its not creating any more danger. They insist that it should as far as may be, *be treated* as a wrong, and one of the methods of treating it as a wrong is to *make provision that it shall grow no larger.* They also desire a policy that looks to a peaceful end of slavery at sometime, as being wrong. These are the views they entertain in regard to it as I understand them; and all their sentiments—all their arguments and propositions are brought within this range. I have said and I repeat it here, that if there be a man amongst us who does not think that the institution of slavery is wrong in any one of the aspects of which I have spoken, he is misplaced and ought not to be with us. And if there be a man amongst us who is so impatient of it as a wrong as to disregard its actual presence among us and the difficulty of getting rid of it suddenly in a satisfactory way, and to disregard the constitutional obligations thrown about it, that man is misplaced if he is on our platform. We disclaim sympathy with him in practical action. He is not placed properly with us.

On this subject of treating it as a wrong, and limiting its spread, let me say a word. Has any thing ever threatened the existence of this Union save and except this very institution of Slavery? What is it that we hold most dear amongst us? Our own liberty and prosperity. What has ever threatened our liberty and prosperity save and except this institution of Slavery? If this is true, how do you propose to improve the condition of things by enlarging Slavery—by spreading it out and making it bigger? You may have a wen or a cancer upon your person and not be able to cut it out lest you bleed to death; but surely it is no way to cure it, to engraft it and spread it over your whole body. That is no proper way of treating what you regard a wrong. You see this peaceful way of dealing with it as a wrong—restricting the spread of it, and not allowing it to go into new countries where it has not already existed. That is the peaceful way, the old-fashioned way, the way in which the fathers themselves set us the example.

On the other hand, I have said there is a sentiment which treats it as *not*being wrong. That is the Democratic sentiment of this day. I do not mean to say that every man who stands within that range positively asserts that it is right. That class will include all who positively assert that it is right, and all who like Judge Douglas treat it as indifferent and do not say it is either right or wrong. These two classes of men fall within the general class of those who do not look upon it as a wrong. And if there be among you anybody who supposes that he as a Democrat, can consider himself "as much opposed to slavery as anybody," I would like to reason with him. You never treat it as a wrong. What other thing that you consider as a wrong, do you deal with as you deal with that? Perhaps you *say* it is wrong, *but your leader never does, and you quarrel with anybody who says it is wrong.*Although you pretend to say so yourself you can find no fit place to deal with it as a wrong. You must not say anything about it in the free States,*because it is not*

here. You must not say anything about it in the slave States, *because it is there.* You must not say anything about it in the pulpit, because that is religion and has nothing to do with it. You must not say anything about it in politics, *because that will disturb the security of "my place."* There is no place to talk about it as being a wrong, although you say yourself it *is* a wrong. But finally you will screw yourself up to the belief that if the people of the slave States should adopt a system of gradual emancipation on the slavery question, you would be in favor of it. You would be in favor of it. You say that is getting it in the right place, and you would be glad to see it succeed. But you are deceiving yourself. You all know that Frank Blair and Gratz Brown, down there in St. Louis, undertook to introduce that system in Missouri. They fought as valiantly as they could for the system of gradual emancipation which you pretend you would be glad to see succeed. Now I will bring you to the test. After a hard fight they were beaten, and when the news came over here you threw up your hats and *hurrahed for Democracy.* More than that, take all the argument made in favor of the system you have proposed, and it carefully excludes the idea that there is anything wrong in the institution of slavery. The arguments to sustain that policy carefully excluded it. Even here today you heard Judge Douglas quarrel with me because I uttered a wish that it might sometime come to an end. Although Henry Clay could say he wished every slave in the United States was in the country of his ancestors, I am denounced by those pretending to respect Henry Clay for uttering a wish that it might sometime, in some peaceful way, come to an end. The Democratic policy in regard to that institution will not tolerate the merest breath, the slightest hint, of the least degree of wrong about it. Try it by some of Judge Douglas' arguments. He says he "don't care whether it is voted up or voted down" in the Territories. I do not care myself in dealing with that expression, whether it is intended to be expressive of his individual sentiments on the subject, or only of the national policy he desires to have established. It is alike valuable for my purpose. Any man can say that who does not see anything wrong in slavery, but no man can logically say it who does see a wrong in it; because no man can logically say he don't care whether a wrong is voted up or voted down. He may say he don't care whether an indifferent thing is voted up or down, but he must logically have a choice between a right thing and a wrong thing. He contends that whatever community wants slaves has a right to have them. So they have if it is not a wrong. But if it is a wrong, he cannot say people have a right to do wrong. He says that upon the score of equality, slaves should be allowed to go in a new Territory, like other property. This is strictly logical if there is no difference between it and other property. If it and other property are equal, his argument is entirely logical. But if you insist that one is wrong and the other right, there is no use to institute a comparison between right and wrong. You may turn over everything in the Democratic policy from beginning to end, whether in the shape it takes on the statute book, in the shape it takes in the Dred Scott decision, in the shape it takes in conversation or the shape it takes in short maxim-like arguments—it everywhere carefully excludes the idea that there is anything wrong in it.

That is the real issue. That is the issue that will continue in this country when these poor tongues of Judge Douglas and myself shall be silent. It is the eternal struggle between these two principles—right and wrong—throughout the world. They are the two principles that have stood face to face from the beginning of time; and will ever continue to struggle. The one is the common right of humanity and the other the divine right of kings. It is the same principle in whatever shape it develops itself. It is the same spirit that says, "You work and toil and earn bread, and I'll eat it." No matter in what shape it comes, whether from the mouth of a king who

seeks to bestride the people of his own nation and live by the fruit of their labor, or from one race of men as an apology for enslaving another race, it is the same tyrannical principle. I was glad to express my gratitude at Quincy, and I re-express it here to Judge Douglas—*that he looks to no end of the institution of slavery.* That will help the people to see where the struggle really is. It will hereafter place with us all men who really do wish the wrong may have an end. And whenever we can get rid of the fog which obscures the real question—when we can get Judge Douglas and his friends to avow a policy looking to its perpetuation—we can get out from among them that class of men and bring them to the side of those who treat it as a wrong. Then there will soon be an end of it, and that end will be its "ultimate extinction." Whenever the issue can be distinctly made, and all extraneous matter thrown out so that men can fairly see the real difference between the parties, this controversy will soon be settled, and it will be done peaceably too. There will be no war, no violence. It will be placed again where the wisest and best men of the world, placed it. Brooks of South Carolina once declared that when this Constitution was framed, its framers did not look to the institution existing until this day. When he said this, I think he stated a fact that is fully borne out by the history of the times. But he also said they were better and wiser men than the men of these days; yet the men of these days had experience which they had not, and by the invention of the cotton gin it became a necessity in this country that slavery should be perpetual. I now say that willingly or unwillingly, purposely or without purpose, Judge Douglas has been the most prominent instrument in changing the position of the institution of slavery which the fathers of the government expected to come to an end ere this—*and putting it upon Brooks' cotton gin basis*,—placing it where he openly confesses he has no desire there shall ever be an end of it….

Mr. Douglas's Reply

Mr. Lincoln has concluded his remarks by saying that there is not such an Abolitionist as I am in all America. If he could make the Abolitionists of Illinois believe that, he would not have much show for the Senate. Let him make the Abolitionists believe the truth of that statement and his political back is broken.

His first criticism upon me is the expression of his hope that the war of the administration will be prosecuted against me and the Democratic party of his State with vigor. He wants that war prosecuted with vigor; I have no doubt of it. His hopes of success, and the hopes of his party depend solely upon it. They have no chance of destroying the Democracy of this State except by the aid of federal patronage. He has all the federal office-holders here as his allies, running separate tickets against the Democracy to divide the party although the leaders all intend to vote directly the Abolition ticket, and only leave the green-horns to vote this separate ticket who refuse to go into the Abolition camp. There is something really refreshing in the thought that Mr. Lincoln is in favor of prosecuting one war vigorously. It is the first war I ever knew him to be in favor of prosecuting. It is the first war that I ever knew him to believe to be just or constitutional. When the Mexican war [was] being waged, and the American army was surrounded by the enemy in Mexico, he thought that war was unconstitutional, unnecessary and unjust. He thought it was not commenced on the right *spot.*

When I made an incidental allusion of that kind in the joint discussion over at Charleston some weeks ago, Lincoln, in replying, said that I, Douglas, had charged him with voting against

supplies for the Mexican war, and then he reared up, full length, and swore that he never voted against the supplies—that it was a slander—and caught hold of Ficklin, who sat on the stand, and said, "Here, Ficklin, tell the people that it is a lie." Well, Ficklin, who had served in Congress with him, stood up and told them all that he recollected about it. It was that when George Ashmun, of Massachusetts, brought forward a resolution declaring the war unconstitutional, unnecessary, and unjust, that Lincoln had voted for it. "Yes," said Lincoln, "I did." Thus he confessed that he voted that the war was wrong, that our country was in the wrong, and consequently that the Mexicans were in the right; but charged that I had slandered him by saying that he voted against the supplies. I never charged him with voting against the supplies in my life, because I knew that he was not in Congress when they were voted. The war was commenced on the 13th day of May, 1846, and on that day we appropriated in Congress ten millions of dollars and fifty thousand men to prosecute it. During the same session we voted more men and more money, and at the next session we voted more men and more money, so that by the time Mr. Lincoln entered Congress we had enough men and enough money to carry on the war, and had no occasion to vote any more. When he got into the House, being opposed to the war, and not being able to stop the supplies, because they had all gone forward, all he could do was to follow the lead of Corwin, and prove that the war was not begun on the right spot, and that it was unconstitutional, unnecessary, and wrong. Remember, too, that this he did after the war had been begun. It is one thing to be opposed to the declaration of a war, another and very different thing to take sides with the enemy against your own country after the war has been commenced. Our army was in Mexico at the time, many battles had been fought; our citizens, who were defending the honor of their country's flag, were surrounded by the daggers, the guns and the poison of the enemy. Then it was that Corwin made his speech in which he declared that the American soldiers ought to be welcomed by the Mexicans with bloody hands and hospitable graves; then it was that Ashmun and Lincoln voted in the House of Representatives that the war was unconstitutional and unjust; and Ashmun's resolution, Corwin's speech, and Lincoln's vote were sent to Mexico and read at the head of the Mexican army, to prove to them that there was a Mexican party in the Congress of the United States who were doing all in their power to aid them. That a man who takes sides with the common enemy against his own country in time of war should rejoice in a war being made on me now, is very natural. And in my opinion, no other kind of a man would rejoice in it….

Mr. Lincoln tries to avoid the main issue by attacking the truth of my proposition, that our fathers made this government divided into free and slave States, recognizing the right of each to decide all its local questions for itself. Did they not thus make it? It is true that they did not establish slavery in any of the States, or abolish it in any of them; but finding thirteen States twelve of which were slave and one free, they agreed to form a government uniting them together, as they stood divided into free and slave States, and to guarantee forever to each State the right to do as it pleased on the slavery question. Having thus made the government, and conferred this right upon each State forever, I assert that this government can exist as they made it, divided into free and slave States, if any one State chooses to retain slavery. He says that he looks forward to a time when slavery shall be abolished everywhere. I look forward to a time when each State shall be allowed to do as it pleases. If it chooses to keep slavery forever, it is not my business, but its own; if it chooses to abolish slavery, it is its own business—not mine. I care more for the great principle of self-government, the right of the people to rule, than I do for all the negroes in Christendom. I would not endanger the perpetuity of this Union. I would not blot

out the great inalienable rights of the white men for all the negroes that ever existed. Hence, I say, let us maintain this government on the principles that our fathers made it, recognizing the right of each State to keep slavery as long as its people determine, or to abolish it when they please. But Mr. Lincoln says that when our fathers made this government they did not look forward to the state of things now existing; and therefore he thinks the doctrine was wrong; and he quotes Brooks, of South Carolina, to prove that our fathers then thought that probably slavery would be abolished, by each State acting for itself before this time. Suppose they did; suppose they did not foresee what has occurred,—does that change the principles of our government? They did not probably foresee the telegraph that transmits intelligence by lightning, nor did they foresee the railroads that now form the bonds of union between the different States, or the thousand mechanical inventions that have elevated mankind. But do these things change the principles of the government? Our fathers, I say, made this government on the principle of the right of each State to do as it pleases in its own domestic affairs, subject to the constitution, and allowed the people of each to apply to every new change of circumstance such remedy as they may see fit to improve their condition. This right they have for all time to come….

1. Abraham Lincoln and Stephen Douglas, "Seventh and Last Debate with Stephen A. Douglas at Alton, Illinois," October 15, 1858, in Roy P. Basler, ed., *The Collected Works of Abraham Lincoln,* Vol. 3 (New Brunswick, NJ: Rutgers University Press, 1953), 285–87, 296–97, 301–2, 304, 307–8, 312–16, 318–20, 322–23. Reprinted with the permission of the Abraham Lincoln Association, Springfield, IL.

Thursday May 9, 2013 – Essay #59 – Seventh Lincoln-Douglas Debate – Guest Essayist: Charles K. Rowley, Duncan Black Professor Emeritus of Economics at George Mason University and General Director of The Locke Institute in Fairfax, Virginia

The State of Nature has a Law of Nature to govern it, which obliges everyone: And Reason, which is the Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions"

John Locke, Second Treatise of Government. 1690

"*We hold these truths to be self-evident, that all men are created equal,that they are endowed by their Creator with certain unalienable Rights, that among those are Life, Liberty and the pursuit of Happiness – That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed – That whenever any Form of government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government"*

The Declaration of Independence July 4, 1776

Well those two statements, if accepted at face value, identify Abraham Lincoln as a clear moral victor over Stephen Douglas in the nine debates over the future of slavery in the United States, held in the nine congressional districts of the State of Illinois. The final debate in that series, held in Alton, and labeled the Seventh Debate because two of the debates – in Chicago and Springfield – had already occurred before the debate formula was approved, is the subject matter of this essay. I do not intend to restate the debate itself – the two speakers are clear and unambiguous in what they have to say. Suffice it to say that Stephen Douglas won the political battle, which took him to the United States Senate, but lost the political war, which took Abraham Lincoln to the United States Presidency, and that took the United States to the Thirteenth Amendment, that abolished slavery across the United States.

Let me begin this discussion by noting certain ironies relating to the two statements cited above. John Locke was a protégé of Ashley Cooper, Earl of Shaftsbury, who owned the territory then known as the Carolinas. John Locke drafted the Constitution for the Carolinas – a constitution that allowed for slavery. The author of The Declaration of Independence, Thomas Jefferson was a significant slave owner in the Commonwealth of Virginia. He was a significant breeder of slaves for profitable sale to the Deep South. He also contributed personally to the slave population by exercising the 'privilege of slave row' to engage in a long-term sexual relationship – whether by force or by consent we do not know – with one of his female slaves, by the name of Sally Hemings.

So there must be more to the Lincoln-Douglas debates than the seemingly unequivocal messages conveyed by John Locke and Thomas Jefferson, two important intellectual sources of the Constitution of the United States of America. I suggest that the missing elements are to be recovered from philosophy and economic interest.

First let us explore a crucial philosophical issue. Both John Locke and Thomas Jefferson refer to human beings. The Constitution itself refers exclusively to persons. Primitive and disgusting though this now appears, many white people during the seventeenth and even the eighteenth centuries refused to recognize Africans as true human beings endowed with souls. Surely many American slave-owners reconciled their consciences by adopting this convenient fiction, even as they instructed their slaves in Christianity, which would be a pointless exercise for creatures without a soul. The Constitution itself, inexcusably, adopted such a fiction by counting a slave as three-quarters of a non-slave for purposes of electoral representation.

Interestingly, Abraham Lincoln veered dangerously in this direction during his debates with Stephen Douglas: 'I agree with Judge Douglas he (a slave) is not my equal in many respects – certainly not in color, perhaps not in moral or intellectual endowment. But in the right to eat the bread, without the leave of anybody else, which his own hand earns, he is my equal and the equal of Judge Douglas, and the equal of every living man.' (Debate at Ottawa, Illinois, August 21, 1858)

Lincoln himself was unsure about how emancipation might proceed. His preference was to colonize all slaves outside the United States, perhaps on the continent of Africa, but he admitted that this solution was impracticable. Only when the South looked like it might force partition in 1883, was Lincoln moved by political opportunism to emancipate all slaves in the Confederacy,

while retaining slavery where it existed in the North. Of course, a presidential decree has no constitutional or legislative force in the United States, always assuming that the constitution is upheld by the federal courts.

Economic interest is always of immense importance in understanding specific events such as the debate over slavery in 1858. In 1787, at the founding of the United States, the Union was composed of thirteen states, twelve of which were slaveholding and one free. So any notion of emancipating the slaves across the new nation was never seriously on the negotiating table. However the issue of abolition of the slave trade was on the table. And the convention divided essentially on lines of economic interest in eventually endorsing a continuation of slave importation into the United States at least until 1808 (when many of the delegates would have passed on).

The major proponents of prohibiting slave importation were members of the Virginia delegation. The Maryland delegation was also strongly supportive. The North Carolina delegates were less enthusiastically supportive. All three of these states had large slave populations. The delegates of New York, Pennsylvania and Delaware were also advocates of an immediate prohibition. These states had relatively small slave populations and a few years later actually passed laws providing for gradual emancipation. The primary opposition to prohibiting slave importations came from delegations from South Carolina and Georgia, both of which had large slave populations. Allied to these states were the New England colonies, led by Connecticut, all of which had relatively small slave populations, and which provided for gradual emancipation during the nineteenth century. So the opposing coalitions were not aligned along any obvious North-South or pro-slavery/pro-abolition spectra.

The coalition alignments were precisely along the lines of economic interest. Over the course of the eighteenth century, slave imports into Virginia and Maryland had declined sharply, and after 1790, they fell to a negligible level. Over the same period, slave imports into the Deep South from outside the colonies had steadily increased. Some historians have attributed this relative increase to the harsh climate and prevalence of disease – especially malaria – in that region, leading to high death rates among the slave population. Others argue that the relative increase reflected an increased demand for slave labor because of the shift towards labor-intensive agricultural production, specifically in rice and cotton.

In any event, by the time of the Philadelphia convention, Virginia and Maryland were net exporters of slaves whereas Georgia and South Carolina were net importers within the colonies themselves. Because of this differential, slave-owners were sharply at variance with respect to prohibiting slave imports from outside the colonies. Those in Virginia and Maryland stood to make significant capital gains from prohibition which would significantly increase the value of their slave-holdings in trading with the Deep South. Conversely, those in the Deep South confronted significant capital losses as the price of slave-labor increased as a consequence of declining supply.

The New England states entered into a winning coalition with the Deep South, not because they were significant slave-users, but because of their shipping interests. Most slaves, upon arrival to the colonies, were shipped south in hulls owned by New England firms and individuals. In

addition, the New England states desired to restrict the competitive entry of foreign shipping into American markets. So they entered into a logrolling deal with the Deep South, agreeing to vote in favor of continuing slave importation in return for the Deep South voting with them against the proposed requirement for a two-thirds majority in the Congress to pass navigation laws.

Over the twenty year interlude between ratification of the Constitution and the guaranteed period of grace for slave importation, the economic interest in the Deep South became more complex as a consequence of the changing pattern of agricultural production. Planters in the low-country area of South Carolina and the planters in the back country of that state, (as well as the frontier of Georgia and Kentucky) developed opposed interests regarding slave importation, The immediate cause was a decline in the labor-intensive production of rice in favor of the less labor-intensive production of short-staple cotton. The large plantations in the lowlands achieved significant economies of scale. The climate was healthier so the slave death-rate fell sharply. Between 1800 and 1810 some 81 per cent of imported slaves were destined for the labor-intensive backlands. The Deep South now split internally on the issue of prohibiting slave imports, although at the federal level they continued to oppose it.

Thomas Jefferson, as a major slave-owner and slave seller to the Deep South was president of the United States when the opportunity arose to ban slave imports. He jumped at the opportunity, not least with a view to restoring his declining business fortunes. A prohibition bill was ready in early 1807. The final bill passed with a vote of sixty-three to forty-nine, reflecting a clear North-South split. The South Carolina and the Georgia delegations voted against, this time with the support of Virginia, because the bill prohibited the transportation of their slaves south by their own coastal-water ships. New England now supported the bill because the restriction did not apply to their ocean-going vessels. President Jefferson was pressured by Virginia colleagues to veto the bill, but his own self-interest prevailed. He signed it into law and raised the price of his marketable slave cohort. Jefferson was a notoriously incompetent manager of his estate.

The passage of this bill indicates that a little bit of rent-seeking, especially by a U.S. president, sometimes is good for individual liberty and individual well-being. Banning the importation of slaves, surely improved the liberty of Africans who otherwise might have been entrapped into slavery. By raising the value of slaves, owners invested more in maintaining the value of their capital asset, treating and feeding them better, not necessarily out of altruism, bur rather out of self-interest. In Brazil, where no such restrictions applied, slave-owners brutally worked their slaves to early deaths replacing them with low-cost substitutes.

Gold and the gold-rush effectively changed the political composition of the United States during the half century between abolition of the slave trade and the Lincoln-Douglas debates. Manifest Destiny and the railroad weakened the vote power of the South both in presidential and in Congressional elections. The South generously had not pushed for a pro-slavery clause in the original constitution, when they had the vote power to succeed, preferring to leave the issue to individual states. By the time of the debates, Lincoln was well aware of his political advantage over Douglas who advocated state rights over the issue although his own state was free.

Lincoln, as we now know, was no advocate of state rights. He won the 1860 presidential election as a Republican Party candidate without a single southern electoral-college vote, his

victory achieved only because the Democratic Party split over slavery and ran competing candidates, one of whom was Stephen Douglas. He then bulldozed state rights, using armed force to put down secessions that were in no way barred by the original constitution. With the South banned from Congress, as a consequence of secession, the Thirteenth Amendment was driven through Congress, only with extraordinary presidential arm-twisting and bribery that had no place in the amendment process.

The outcome was morally good in the sense that liberty was extended to those who were not free. But the result was achieved at an enormous cost to life and property, the other important inalienable rights advanced by John Locke. With the benefit of hindsight, Abraham Lincoln should have proceeded to emancipation once he achieved high office by working through Congress to raise revenues sufficient to pay slave-owners the full market price for the property that was being taken from them. The Fifth Amendment should have been the route to pursue, enabling the federal government to exercise a taking while paying just compensation. Rightly or wrongly, the slave-owners had purchased slaves under the ruling legal system. Those rights should not have been expropriated by force without compensation.

Abraham Lincoln was an Illinois politician trained in the law, not in economics. Such politicians often do great harm to the people they represent by ignoring gains-from-trade deals in favor of brutal confiscation by force.

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The Dividing Line between Federal and Local Authority: Popular Sovereignty in the Territories by Stephen Douglas

September 1859

Under our complex system of government it is the first duty of American statesmen to mark distinctly the dividing line between Federal and Local Authority. To do this with accuracy involves an inquiry, not only into the powers and duties of the Federal Government under the Constitution, but also into the rights, privileges, and immunities of the people of the Territories, as well as of the States composing the Union. The relative powers and functions of the Federal

and State governments have become well understood and clearly defined by their practical operation and harmonious action for a long series of years; while the disputed question — involving the right of the people of the Territories to govern themselves in respect to their local affairs and internal polity—remains a fruitful source of partisan strife and sectional controversy. The political organization which was formed in 1854, and has assumed the name of the Republican Party, is based on the theory that African slavery, as it exists in this country, is an evil of such magnitude—social, moral, and political—as to justify and require the exertion of the entire power and influence of the Federal Government to the full extent that the Constitution, according to their interpretation, will permit for its ultimate extinction….

This dividing line between Federal and Local authority was familiar to the framers of the Constitution. It is clearly defined and distinctly marked on every page of history which records the great events of that immortal struggle between the American Colonies and the British Government, which resulted in the establishment of our national independence. In the beginning of that struggle the Colonies neither contemplated nor desired independence. In all their addresses to the Crown, and to the Parliament, and to the people of Great Britain, as well as to the people of America, they averred that as loyal British subjects they deplored the causes which impelled their separation from the parent country. They were strongly and affectionately attached to the Constitution, civil and political institutions and jurisprudence of Great Britain, which they proudly claimed as the birth-right of all Englishmen, and desired to transmit them unimpaired as a precious legacy to their posterity. For a long series of years they remonstrated against the violation of their inalienable rights of self-government under the British Constitution, and humbly petitioned for the redress of their grievances.

They acknowledged and affirmed their allegiance to the Crown, their affection for the people, and their devotion to the Constitution of Great Britain; and their only complaint was that they were not permitted to enjoy the rights and privileges of self-government, in the management of their internal affairs and domestic concerns, in accordance with the guarantees of that Constitution and of the colonial charters granted by the Crown in pursuance of it. They conceded the right of the Imperial government to make all laws and perform all acts concerning the colonies, which were in their nature *Imperial* and not *Colonial*—which affected the general welfare of the Empire, and did not interfere with the "internal polity" of the Colonies. They recognized the right of the Imperial government to declare war and make peace; to coin money and determine its value; to make treaties and conduct intercourse with foreign nations; to regulate commerce between the several colonies, and between each colony and the parent country, and with foreign countries; and in general they recognized the right of the Imperial government of Great Britain to exercise all the powers and authority which, under our Federal Constitution, are delegated by the people of the several States to the Government of the United States.

Recognizing and conceding to the Imperial government all these powers—*including the right to institute governments for the colonies,* by granting charters under which the inhabitants residing within the limits of any specified Territory might be organized into a political community, with a government consisting of its appropriate departments, executive, legislative, and judicial; conceding all these powers, the colonies emphatically denied that the Imperial government had any rightful authority to impose taxes upon them without their consent, or to interfere with their

internal polity; claiming that it was the birth-right of all Englishmen—inalienable when formed into a political community—to exercise and enjoy all the rights, privileges, and immunities of self-government in respect to all matters and things, which were Local and not General—Internal and not External—Colonial and not Imperial—as fully as if they were inhabitants of England, with a fair representation in Parliament.

Thus it appears that our fathers of the Revolution were contending, not for Independence in the first instance, but for the inestimable right of Local Self-Government under the British Constitution; the right of every distinct political community—dependent Colonies, Territories, and Provinces, as well as sovereign States—to make their own local laws, form their own domestic institutions, and manage their own internal affairs in their own way, subject only to the Constitution of Great Britain as the paramount law of the Empire.

The government of Great Britain had violated this inalienable right of local self-government by a long series of acts on a great variety of subjects. The first serious point of controversy arose on the slavery question as early as 1699, which continued a fruitful source of irritation until the Revolution, and formed one of the causes for the separation of the colonies from the British Crown.

For more than forty years the Provincial Legislature of Virginia had passed laws for the protection and encouragement of African slavery within her limits. This policy was steadily pursued until the white inhabitants of Virginia became alarmed for their own safety, in view of the numerous and formidable tribes of Indian savages which surrounded and threatened the feeble white settlements, while ship-loads of African savages were being daily landed in their midst. In order to check and restrain a policy which seemed to threaten the very existence of the colony, the Provincial Legislature enacted a law imposing a tax upon every slave who should be brought into Virginia. The British merchants, who were engaged in the African slave-trade, regarding this legislation as injurious to their interests and in violation of their rights, petitioned the King of England and his Majesty's ministers to annul the obnoxious law and protect them in their right to carry their slaves into Virginia and all other British colonies which were the common property of the Empire—acquired by the common blood and common treasure—and from which a few adventurers who had settled on the Imperial domain by his Majesty's sufferance, had no right to exclude them or discriminate against their property by a mere Provincial enactment. Upon a full consideration of the subject the King graciously granted the prayer of the petitioners; and accordingly issued peremptory orders to the Royal Governor of Virginia, and to the Governors of all the other British colonies in America, forbidding them to sign or approve any Colonial or Provincial enactment injurious to the African Slave-Trade, unless such enactment should contain a clause suspending its operation until his Majesty's pleasure should be made known in the premises.

Judge Tucker, in his Appendix to Blackstone, refers to thirty-one acts of the Provincial Legislature of Virginia, passed at various periods from 1662 to 1772, upon the subject of African slavery, showing conclusively that Virginia always considered this as one of the questions affecting her "internal polity," over which she, in common with the other colonies, claimed "the right of exclusive legislation in their Provincial Legislatures" within their respective limits. Some of these acts, particularly those which were enacted prior to the year 1699, were evidently

intended to foster and encourage, as well as to regulate and control African slavery, as one of the domestic institutions of the colony. The act of 1699, and most of the enactments subsequent to that date, were as obviously designed to restrain and check the growth of the institution with the view of confining it within the limit of the actual necessities of the community, or its ultimate extinction, as might be deemed most conducive to the public interests, by a system of unfriendly legislation, such as imposing a tax on all slaves introduced into the colony, which was increased and renewed from time to time, as occasion required, until the period of the Revolution. Many of these acts never took effect, in consequence of the King withholding his assent, even after the Governor had approved the enactment, in cases where it contained a clause suspending its operation until his Majesty's pleasure should be made known in the premises.

In 1772 the Provincial Legislature of Virginia, after imposing another tax of five per cent, on all slaves imported into the colony, petitioned the King to remove all those restraints which inhibited his Majesty's Governors assenting to such laws as might check so very pernicious a commerce as slavery. Of this petition Judge Tucker says:

"The following extract from a petition to the Throne, presented from the House of Burgesses of Virginia, April 1st, 1772, will show the sense of the people of Virginia on the subject of slavery at that period:

"'The importation of slaves into the colony from the coast of Africa hath long been considered as a trade of great inhumanity; and under its present encouragement we have too much reason to fear will endanger the very existence of your Majesty's American dominions.'"

Mark the ominous words! Virginia tells the King of England in 1772, four years prior to the Declaration of Independence, that his Majesty's Americandominions are in danger: Not because of the Stamp duties—not because of the tax on Tea—not because of his attempts to collect revenue in America! These have since been deemed sufficient to justify rebellion and revolution. But none of these are referred to by Virginia in her address to the Throne—there being another wrong which, in magnitude and enormity, so far exceeded these and all other causes of complaint that the very existence of his Majesty's American dominions depended upon it! That wrong consisted in forcing African slavery upon a dependent colony without her consent, and in opposition to the wishes of her own people!

The people of Virginia at that day did not appreciate the force of the argument used by the British merchants, who were engaged in the African slave-trade, and which was afterward endorsed, at least by implication, by the King and his Ministers; that the colonies were the common property of the Empire—acquired by the common blood and treasure—and therefore all British subjects had the right to carry their slaves into the colonies and hold them in defiance of the local law and in contempt of the wishes and safety of the colonies.

The people of Virginia not being convinced by this process of reasoning, still adhered to the doctrine which they held in common with their sister colonies, that it was the birth-right of all freemen—inalienable when formed into political communities—to exercise exclusive legislation in respect to all matters pertaining to their internal polity—slavery not excepted; and rather than surrender this great right they were prepared to withdraw their allegiance from the Crown.

Again referring to this petition to the King, the same learned Judge adds:

"This petition produced no effect, as appears from the first clause of our [Virginia] Constitution, where, among other acts of misrule, the inhuman use of the Royal negative in refusing us [the people of Virginia] permission to exclude slavery from us by law, is enumerated among the reasons for separating from Great Britain."

This clause in the Constitution of Virginia, referring to the inhuman use of the Royal negative, in refusing the Colony of Virginia permission to exclude slavery from her limits by law as one of the reasons for separating from Great Britain, was adopted on the 12th day of June, 1776, three weeks and one day previous to the Declaration of Independence by the Continental Congress; and after remaining in force as a part of the Constitution for a period of fifty-four years, was re-adopted, without alteration, by the Convention which framed the new Constitution in 1830, and then ratified by the people as a part of the new Constitution; and was again re-adopted by the Convention which amended the Constitution in 1850, and again ratified by the people as a part of the amended Constitution, and at this day remains a portion of the fundamental law of Virginia—proclaiming to the world and to posterity that one of the reasons for separating from Great Britain was "the inhuman use of the Royal negative in refusing us [the Colony of Virginia] permission to exclude slavery from us by law!"

The legislation of Virginia on this subject may be taken as a fair sample of the legislative enactments of each of the thirteen Colonies, showing conclusively that slavery was regarded by them all as a domestic question to be regarded and determined by each Colony to suit itself, without the intervention of the British Parliament or "the inhuman use of the Royal negative." Each Colony passed a series of enactments, beginning at an early period of its history and running down to the commencement of the Revolution, either protecting, regulating, or restraining African Slavery within its respective limits and in accordance with their wishes and supposed interests. North and South Carolina, following the example of Virginia, at first encouraged the introduction of slaves, until the number increased beyond their wants and necessities, when they attempted to check and restrain the further growth of the institution, by imposing a high rate of taxation upon all slaves which should be brought into those colonies; and finally, in 1764, South Carolina passed a law imposing a penalty of one hundred pounds (or five hundred dollars) for every negro slave subsequently introduced into that Colony.

The Colony of Georgia was originally founded on strict anti-slavery principles, and rigidly maintained this policy for a series of years, until the inhabitants became convinced by experience, that, with their climate and productions, slave labor, if not essential to their existence, would prove beneficial and useful to their material interests. Maryland and Delaware protected and regulated African Slavery as one of their domestic institutions. Pennsylvania, under the advice of William Penn, substituted fourteen years' service and perpetual adscript to the soil for hereditary slavery, and attempted to legislate, not for the total abolition of slavery, but for the sanctity of marriage among slaves, and for their personal security. New Jersey, New York, and Connecticut, recognized African Slavery as a domestic institution lawfully existing within their respective limits, and passed the requisite laws for its control and regulation.

Rhode Island provided by law that no slave should serve more than ten years, at the end of which

time he was to be set free; and if the master should refuse to let him go free, or sold him elsewhere for a longer period of service, he was subject to a penalty of forty pounds, which was supposed at that period to be nearly double the value of the slave.

Massachusetts imposed heavy taxes upon all slaves brought into the Colony, and provided in some instances for sending the slaves back to their native land; and finally prohibited the introduction of any more slaves into the Colony under any circumstances.

When New Hampshire passed laws which were designed to prevent the introduction of any more slaves, the British Cabinet issued the following order to Governor Wentworth: "You are not to give your assent to, or pass any law imposing duties upon Negroes imported into New Hampshire."

While the legislation of the several Colonies exhibits dissimilarity of views, founded on a diversity of interests, on the merits and policy of slavery, it shows conclusively that they all regarded it as a domestic question affecting their internal polity in respect to which they were entitled to a full and exclusive power of legislation in the several provincial Legislatures. For a few years immediately preceding the American Revolution the African Slave-Trade was encouraged and stimulated by the British Government and carried on with more vigor by the English merchants than at any other period in the history of the Colonies; and this fact, taken in connection with the extraordinary claim asserted in the Memorable Preamble to the act repealing the Stamp duties, that "Parliament possessed the right to bind the Colonies in all cases whatsoever," not only in respect to all matters affecting the general welfare of the empire, but also in regard to the domestic relations and internal polity of the Colonies—produced a powerful impression upon the minds of the colonists, and imparted peculiar prominence to the principle involved in the controversy.

Hence the enactments by the several colonial Legislatures calculated and designed to restrain and prevent the increase of slaves; and, on the other hand, the orders issued by the Crown instructing the Colonial Governors not to sign or permit any legislative enactment prejudicial or injurious to the African Slave-Trade, unless such enactment should contain a clause suspending its operation until the royal pleasure should be made known in the premises; or, in other words, until the King should have an opportunity of annulling the acts of the colonial Legislatures by the "inhuman use of the Royal negative."

Thus the policy of the Colonies on the slavery question had assumed a direct antagonism to that of the British Government; and this antagonism not only added to the importance of the principle of local self-government in the Colonies, but produced a general concurrence of opinion and action in respect to the question of slavery in the proceedings of the Continental Congress, which assembled at Philadelphia for the first time on the 5th of September, 1774.

On the 14th of October the Congress adopted a Bill of Rights for the Colonies, in the form of a series of resolutions, in which, after conceding to the British Government the power to regulate commerce and do such other things as affected the general welfare of the empire without interfering with the internal polity of the Colonies, they declared "That they are entitled to a free and exclusive power in their several provincial Legislatures, where their right of representation

can alone be preserved, in all cases of taxation and internal polity." Having thus defined the principle for which they were contending, the Congress proceeded to adopt the following "Peaceful Measures," which they still hoped would be sufficient to induce compliance with their just and reasonable demands. These "Peaceful Measures" consisted of addresses to the King, to the Parliament, and to the people of Great Britain, together with an Association of Non-Intercourse to be observed and maintained so long as their grievances should remain unredressed.

The second article of this Association, which was adopted without opposition and signed by the Delegates from all the Colonies, was in these words:

"That we will neither import nor purchase any slave imported after the first day of December next; after which time we will wholly discontinue the Slave-Trade, and will neither be concerned in it ourselves, nor will we hire our vessels, nor sell our commodities or manufactures to those who are engaged in it."

This Bill of Rights, together with these articles of association, were subsequently submitted to and adopted by each of the thirteen Colonies in their respective Provincial Legislatures.

Thus was distinctly formed between the Colonies and the parent country that issue upon which the Declaration of Independence was founded and the battles of the Revolution were fought. It involved the specific claim on the part of the Colonies—denied by the King and Parliament—to the exclusive right of legislation touching all local and internal concerns,*slavery included.* This being the principle involved in the contest, a majority of the Colonies refused to permit their Delegates to sign the Declaration of Independence except upon the distinct condition and express reservation to each Colony of the exclusive right to manage and control its local concerns and police regulations without the intervention of any general Congress which might be established for the United Colonies….

Let us pause at this point for a moment, and inquire whether it be just to those illustrious patriots and sages who formed the Constitution of the United States, to assume that they intended to confer upon Congress that unlimited and arbitrary power over the people of the American Territories, which they had resisted with their blood when claimed by the British Parliament over British Colonies in America? Did they confer upon Congress the right to bind the people of the American Territories in all cases whatsoever, after having fought the battles of the Revolution against a "Preamble" declaring the right of Parliament "to bind the Colonies in all cases whatsoever?"

If, as they contended before the Revolution, it was the birth-right of all Englishmen, inalienable when formed into political communities, to exercise exclusive power of legislation in their local legislatures in respect to all things affecting their internal polity—slavery not excepted—did not the same right, after the Revolution, and by virtue of it, become the birth-right of all Americans, in like manner inalienable when organized into political communities—no matter by what name, whether Colonies, Territories, Provinces, or new States?

Names often deceive persons in respect to the nature and substance of things. A signal instance

of this kind is to be found in that clause of the Constitution which says:

"Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States."

This being the only clause of the Constitution in which the word "territory" appears, that fact alone has doubtless led many persons to suppose that the right of Congress to establish temporary governments for the Territories, in the sense in which the word is now used, must be derived from it, overlooking the important and controlling facts that at the time the Constitution was formed the word "territory" had never been used or understood to designate a political community or government of any kind in any law, compact, deed of cession, or public document; but had invariably been used either in its geographical sense to describe the superficial area of a State or district of country, as in the Virginia deed of cession of the "territory or *tract of country*" northwest of the River Ohio; or as meaning land in its character as property, in which latter sense it appears in the clause of the Constitution referred to, when providing for the disposition of the "territory or other property belonging to the United States." These facts, taken in connection with the kindred one that during the whole period of the Confederation and the formation of the Constitution the temporary governments which we now call "Territories," were invariably referred to in the deeds of cession, laws, compacts, plans of government, resolutions of congress, public records, and authentic documents as "States," or "new States," conclusively show that the words "territory and other property" in the Constitution were used to designate the unappropriated lands and other property which the United States owned, and not the people who might become residents on those lands, and be organized into political communities after the United States had parted with their title.

It is from this clause of the Constitution alone that Congress derives the power to provide for the surveys and sale of the public lands and all other property belonging to the United States, not only in the Territories, but also in the several States of the Union. But for this provision Congress would have no power to authorize the sale of the public lands, military sites, old ships, cannon, muskets, or other property, real or personal, which belong to the United States and are no longer needed for any public purpose. It refers exclusively to property in contradistinction to persons and communities. It confers the same power "to make all needful rules and regulations" in the States as in the Territories, and extends wherever there may be any land or other property belonging to the United States to be regulated or disposed of; but does not authorize Congress to control or interfere with the domestic institutions and internal polity of the people (either in the States or the Territories) who may reside upon lands which the United States once owned. Such a power, had it been vested in Congress, would annihilate the sovereignty and freedom of the States as well as the great principle of self-government in the Territories, wherever the United States happen to own a portion of the public lands within their respective limits, as, at present, in the States of Alabama, Florida, Mississippi, Louisiana, Arkansas, Missouri, Illinois, Indiana, Ohio, Michigan, Wisconsin, Iowa, Minnesota, California, and Oregon, and in the Territories of Washington, Nebraska, Kansas, Utah, and New Mexico. The idea is repugnant to the spirit and genius of our complex system of government; because it effectually blots out the dividing line between Federal and Local authority which forms an essential barrier for the defense of the independence of the States and the liberties of the people against Federal invasion. With one anomalous exception, all the powers conferred on Congress are *Federal,* and not *Municipal,* in

their character—affecting the general welfare of the whole country without interfering with the internal polity of the people—and can be carried into effect by laws which apply alike to States and Territories. The exception, being in derogation of one of the fundamental principles of our political system (because it authorizes the Federal Government to control the municipal affairs and internal polity of the people in certain specified, limited localities), was not left to vague inference or loose construction, nor expressed in dubious or equivocal language; but is found plainly written in that Section of the Constitution which says:

"Congress shall have power to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

No such power "to exercise exclusive legislation in all cases whatsoever," nor indeed any legislation in any case whatsoever, is conferred on Congress in respect to the municipal affairs and internal polity, either of the States or of the Territories. On the contrary, after the Constitution had been finally adopted, with its Federal powers delegated, enumerated, and defined, in order to guard in all future time against any possible infringement of the reserved rights of the States, or of the people, an amendment was incorporated into the Constitution which marks the dividing line between Federal and Local authority so directly and indelibly that no lapse of time, no partisan prejudice, no sectional aggrandizement, no frenzied fanaticism can efface it. The amendment is in these words:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This view of the subject is confirmed, if indeed any corroborative evidence is required, by reference to the proceedings and debates of the Federal Convention, as reported by Mr. Madison. On the 18th of August, after a series of resolutions had been adopted as the basis of the proposed Constitution and referred to the Committee of Detail for the purpose of being put in proper form, the record says:

"Mr. Madison submitted, in order to be referred to the Committee of Detail, the following powers, as proper to be added to those of the General Legislature (Congress):

"To dispose of the unappropriated lands of the United States.

"To institute temporary governments for the new States arising therein.

"To regulate affairs with the Indians, as well within as without the limits of the United States.

"To exercise exclusively legislative authority at the seat of the general government, and over a district around the same not exceeding—square miles, the consent of the Legislature of the State or States comprising the same being first obtained."

Here we find the original and rough draft of these several powers as they now exist, in their revised form, in the Constitution. The provision empowering Congress "to dispose of the unappropriated lands of the United States" was modified and enlarged so as to include "other property belonging to the United States," and to authorize Congress to "make all needful rules and regulations" for the preservation, management, and sale of the same.

The provision empowering Congress "to institute temporary governments for the new States arising in the unappropriated lands of the United States," taken in connection with the one empowering Congress "to exercise exclusively Legislative authority at the seat of the general government, and over a district of country around the same," clearly shows the difference in the extent and nature of the powers intended to be conferred to the new States or Territories on the one hand, and in the District of Columbia on the other. In the one case it was proposed to authorize Congress "to institute temporary governments for the new States," or Territories, as they are now called, just as our Revolutionary fathers recognized the right of the British crown to institute local governments for the colonies, by issuing charters, under which the people of the colonies were "entitled (according to the Bill of Rights adopted by the Continental Congress) to a free and exclusive power of legislation, in their several Provincial Legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity;" while, in the other case, it was proposed to authorize Congress to exercise, exclusively, legislative authority over the municipal and internal polity of the people residing within the district which should be ceded for that purpose as the seat of the general government.

Each of these provisions was modified and perfected by the Committees of Detail and Revision, as will appear by comparing them with the corresponding clauses as finally incorporated into the Constitution. The provision to authorize Congress to institute temporary governments for the new States or Territories, and to provide for their admission into the Union, appears in the Constitution in this form:

"New States may be admitted by the Congress into this Union."

The power to admit *"new States"* and "to make all laws which shall be necessary and proper" to that end, may fairly be construed to include the right to institute temporary governments for such new States or Territories, the same as Great Britain could rightfully institute similar governments for the colonies; but certainly not to authorize Congress to legislate in respect to their municipal affairs and internal concerns, without violating that great fundamental principle in defense of which the battles of the Revolution were fought….

This exposition of the history of these measures shows conclusively that the authors of the Compromise Measures of 1850, and of the Kansas-Nebraska Act of 1854, as well as the members of the Continental Congress of 1774, and the founders of our system of government subsequent to the Revolution, regarded the people of the Territories and Colonies as political Communities which were entitled to a free and exclusive power of legislation in their Provincial legislatures, where their representation could alone be preserved, in all cases of taxation and internal polity. This right pertains to the people collectively as a law-abiding and peaceful community, and not to the isolated individuals who may wander upon the public domain in violation of law. It can only be exercised where there are inhabitants sufficient to constitute a

government, and capable of performing its various functions and duties—a fact to be ascertained and determined by Congress. Whether the number shall be fixed at ten, fifteen, or twenty thousand inhabitants does not affect the principle.

The principle, under our political system, is *that every distinct political Community, loyal to the Constitution and the Union, is entitled to all the rights, privileges, and immunities of self-government in respect to their local concerns and internal polity, subject only to the Constitution of the United States.*

1. Stephen Douglas, "The Dividing Line between Federal and Local Authority: Popular Sovereignty in the Territories," *Harper's New Monthly Magazine* 19, no. 112 (September 1859): 519, 521-24, 527-29, 537.

Friday, May 10, 2013 – Essay #60 – Stephen Douglas's "The Dividing Line between Federal and Local Authority: Popular Sovereignty in the Territories" – Guest Essayist: Tony Williams, Program Director for the Washington-Jefferson-Madison Institute

1859 was an ominous year for America as civil war between the sections threatened despite the attempts to avert it. Back in 1854, Stephen Douglas had tried to quell sectionalism with the Kansas-Nebraska Act that would grant the seeming American principle of popular sovereignty regarding slavery in the territories, but Kansas became "bleeding Kansas" as a shooting war between pro and anti-slavery forces erupted after they flooded the state to institute their vision of popular sovereignty. In 1857, Chief Justice Roger B. Taney injected the Court into the political question and tried to help prevent civil war with the *Dred Scott* opinion, stating that blacks were not and could not be citizens and that the Missouri Compromise was unconstitutional. But, it too only fueled tensions between sections over the spread of the peculiar institution.

In the 1858 Lincoln-Douglas debates, Douglas defended his view of popular sovereignty. In the seventh and final debate (reprinted in the Hillsdale College Constitution Reader), Douglas contradicted Lincoln's "House Divided" speech in which he said that a house divided against itself (on slavery) cannot stand. Douglas averred that, "In my opinion our government can endure forever, divided into free and slave States as our fathers made it, – each State having the right to prohibit, abolish or sustain slavery just as it pleases." Douglas believed that the sovereign people could decide whether or not to own slaves. Douglas maintained this position by arguing that blacks were not meant to be included in the natural rights of the Declaration of Independence because they were created unequal.

In the debates with Lincoln, Douglas continued, "This government was made upon the great basis of the sovereignty of the States, the right of each State to regulate its own domestic institutions to suit itself." Because of the varied interests, character, and agriculture among the states, the sovereign people of each state would create unique institutions. Slavery was one of

those institutions, Douglas believed, that might be suitable for Virginia but not for Massachusetts. The people could thus decide for themselves whether or not to have it. Douglas stated that the Founding Fathers agreed with his position. "They knew that in a Republic as broad as this . . . there must necessarily be a corresponding variety of local laws . . . For this reason this Union was established on the right of each State to do as it pleased on the question of slavery."

So when Democratic presidential hopeful Douglas published the article, "The Dividing Line between Federal and Local Authority: Popular Sovereignty in the Territories," in *Harper's* in late 1859, he consistently held fast to the principle and logic of popular sovereignty regarding the expansion of slavery.

In the article, Douglas reaches back into the Revolutionary era for support for his case. Through a number of examples, he presents evidence that states that the Founders fight for local self-government against the tyrannical encroachments of British imperial authority especially over slavery. In a shrewd debating move that might appeal to anti-slavery Republicans, Douglas used examples from the First Continental Congress and the Virginia Declaration of Rights to prove that the colonists had wanted to ban the national slave trade and exclude slavery from the state respectively, but the king imposed his will on them and prevented such acts.

Douglas declares popular sovereignty to be a basic inalienable right of a self-governing people. "That it was the birthright of all freemen – inalienable when formed into political communities – to exercise exclusive legislation in respect to all matters pertaining to their internal polity." This sounds like a distinctly American ideal, until Douglas states that the internal matters included the right to own another human being without their consent. Thus, he uses manipulates the Founding principles of self-government to bolster his case for a slaveholding republic.

Abraham Lincoln would readily concede many times that the national government had no control over slavery where it already existed in the South. But, he believed the Congress had plain constitutional authority in Article IV, section 3, to regulate it in the territories. The entire crux of the question was whether slavery was right or wrong. In his Cooper Union address a few months after Douglas' article was published, Lincoln stated that, "If slavery is right, all words, acts, laws, and constitutions against it, are themselves wrong, and should be silenced, and swept away. If it is right we cannot justly object to its nationality – its universality; if it is wrong, they cannot justly insist upon its extension – its enlargement."

But, Douglas does object. He is agnostic on the rightness or wrongness of slavery and abides by popular sovereignty and the belief that the Constitution does not confer Congress any power over slavery in the new territories. After all, he writes, "Such a power, had it been vested in Congress, would annihilate the sovereignty and freedom of the States as well as the great principle of self-government in the Territories."

Douglas and Lincoln battled one another not only in the 1860 presidential election but rhetorically as well. Lincoln's argument supported a constitutional republic rooted upon the moral foundation of restricting the expansion of slavery. Douglas was seeking a republic rooted upon slavery and its expansion wherever majority rule embraced it. Tragically, this battle over

the meaning of the Founding – the real "dividing line" – could only be resolved by the death of 600,000 Americans.

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Address at Cooper Institute by Abraham Lincoln

February 27, 1860

…But enough! *Let all who believe that "our fathers, who framed the Government under which we live, understood this question just as well, and even better, than we do now," speak as they spoke, and act as they acted upon it. This is all Republicans ask—all Republicans desire—in relation to slavery. As those fathers marked it, so let it be again marked, as an evil not to be extended, but to be tolerated and protected only because of and so far as its actual presence among us makes that toleration and protection a necessity. Let all the guarantees those fathers gave it, be, not grudgingly, but fully and fairly maintained.* For this Republicans contend, and with this, so far as I know or believe, they will be content.

And now, if they would listen—as I suppose they will not—I would address a few words to the Southern people….

Your purpose, then, plainly stated, is, that you will destroy the Government, unless you be allowed to construe and enforce the Constitution as you please, on all points in dispute between you and us.You will rule or ruin in all events.

This, plainly stated, is your language. Perhaps you will say the Supreme Court has decided the disputed Constitutional question in your favor. Not quite so. But waiving the lawyer's distinction between dictum and decision, the Court have decided the question for you in a sort of way. The Court have substantially said, it is your Constitutional right to take slaves into the federal territories, and to hold them there as property. When I say the decision was made in a sort of way, I mean it was made in a divided Court, by a bare majority of the Judges, and they not quite agreeing with one another in the reasons for making it; that it is so made as that its avowed supporters disagree with one another about its meaning, and that it was mainly based upon a mistaken statement of fact—the statement in the opinion that "the right of property in a slave is distinctly and expressly affirmed in the Constitution."

An inspection of the Constitution will show that the right of property in a slave is not *"distinctly* and *expressly* affirmed" in it. Bear in mind, the Judges do not pledge their judicial opinion that such right is *impliedly*affirmed in the Constitution; but they pledge their veracity that it is*"distinctly* and *expressly"* affirmed there—"distinctly," that is, not mingled with anything else—"expressly," that is, in words meaning just that, without the aid of any inference,

and susceptible of no other meaning.

If they had only pledged their judicial opinion that such right is affirmed in the instrument by implication, it would be open to others to show that neither the word "slave" nor "slavery" is to be found in the Constitution, nor the word "property" even, in any connection with language alluding to the things slave, or slavery, and that wherever in that instrument the slave is alluded to, he is called a "person;"—and wherever his master's legal right in relation to him is alluded to, it is spoken of as "service or labor which may be due,"—as a debt payable in service or labor. Also, it would be open to show, by contemporaneous history, that this mode of alluding to slaves and slavery, instead of speaking of them, was employed on purpose to exclude from the Constitution the idea that there could be property in man.

To show all this, is easy and certain.

When this obvious mistake of the Judges shall be brought to their notice, is it not reasonable to expect that they will withdraw the mistaken statement, and reconsider the conclusion based upon it?

And then it is to be remembered that "our fathers, who framed the Government under which we live"—the men who made the Constitution—decided this same Constitutional question in our favor, long ago—decided it without division among themselves, when making the decision; without division among themselves about the meaning of it after it was made, and, so far as any evidence is left, without basing it upon any mistaken statement of facts.

Under all these circumstances, do you really feel yourselves justified to break up this Government, unless such a court decision as yours is, shall be at once submitted to as a conclusive and final rule of political action? But you will not abide the election of a Republican President! In that supposed event, you say, you will destroy the Union; and then, you say, the great crime of having destroyed it will be upon us! That is cool. A highwayman holds a pistol to my ear, and mutters through his teeth, "Stand and deliver, or I shall kill you, and then you will be a murderer!"

To be sure, what the robber demanded of me—my money—was my own; and I had a clear right to keep it; but it was no more my own than my vote is my own; and the threat of death to me, to extort my money, and the threat of destruction to the Union, to extort my vote, can scarcely be distinguished in principle.

A few words now to Republicans. *It is exceedingly desirable that all parts of this great Confederacy shall be at peace, and in harmony, one with another. Let us Republicans do our part to have it so. Even though much provoked, let us do nothing through passion and ill temper. Even though the southern people will not so much as listen to us, let us calmly consider their demands, and yield to them if, in our deliberate view of our duty, we possibly can.* Judging by all they say and do, and by the subject and nature of their controversy with us, let us determine, if we can, what will satisfy them.

Will they be satisfied if the Territories be unconditionally surrendered to them? We know they

will not. In all their present complaints against us, the Territories are scarcely mentioned. Invasions and insurrections are the rage now. Will it satisfy them, if, in the future, we have nothing to do with invasions and insurrections? We know it will not. We so know, because we know we never had anything to do with invasions and insurrections; and yet this total abstaining does not exempt us from the charge and the denunciation.

The question recurs, what will satisfy them? Simply this: We must not only let them alone, but we must, somehow, convince them that we do let them alone. This, we know by experience, is no easy task. We have been so trying to convince them from the very beginning of our organization, but with no success. In all our platforms and speeches we have constantly protested our purpose to let them alone; but this has had no tendency to convince them. Alike unavailing to convince them, is the fact that they have never detected a man of us in any attempt to disturb them.

These natural, and apparently adequate means all failing, what will convince them? This, and this only: cease to call slavery *wrong,* and join them in calling it *right.* And this must be done thoroughly—done in *acts* as well as in *words.* Silence will not be tolerated—we must place ourselves avowedly with them. Senator Douglas's new sedition law must be enacted and enforced, suppressing all declarations that slavery is wrong, whether made in politics, in presses, in pulpits, or in private. We must arrest and return their fugitive slaves with greedy pleasure. We must pull down our Free State constitutions. The whole atmosphere must be disinfected from all taint of opposition to slavery, before they will cease to believe that all their troubles proceed from us.

I am quite aware they do not state their case precisely in this way. Most of them would probably say to us, "Let us alone, *do* nothing to us, and say what you please about slavery." But we do let them alone—have never disturbed them— so that, after all, it is what we say, which dissatisfies them. They will continue to accuse us of doing, until we cease saying.

I am also aware they have not, as yet, in terms, demanded the overthrow of our Free-State Constitutions. Yet those Constitutions declare the wrong of slavery, with more solemn emphasis, than do all other sayings against it; and when all these other sayings shall have been silenced, the overthrow of these Constitutions will be demanded, and nothing be left to resist the demand. It is nothing to the contrary, that they do not demand the whole of this just now. Demanding what they do, and for the reason they do, they can voluntarily stop nowhere short of this consummation. Holding, as they do, that slavery is morally right, and socially elevating, they cannot cease to demand a full national recognition of it, as a legal right, and a social blessing.

Nor can we justifiably withhold this, on any ground save our conviction that slavery is wrong. If slavery is right, all words, acts, laws, and constitutions against it, are themselves wrong, and should be silenced, and swept away. If it is right, we cannot justly object to its nationality—its universality; if it is wrong, they cannot justly insist upon its extension—its enlargement. All they ask, we could readily grant, if we thought slavery right; all we ask, they could as readily grant, if they thought it wrong. Their thinking it right, and our thinking it wrong, is the precise fact upon which depends the whole controversy. Thinking it right, as they do, they are not to blame for desiring its full recognition, as being right; but, thinking it wrong, as we do, can we yield to

them? Can we cast our votes with their view, and against our own? In view of our moral, social, and political responsibilities, can we do this?

Wrong as we think slavery is, we can yet afford to let it alone where it is, because that much is due to the necessity arising from its actual presence in the nation; but can we, while our votes will prevent it, allow it to spread into the National Territories, and to overrun us here in these Free States? If our sense of duty forbids this, then let us stand by our duty, fearlessly and effectively. Let us be diverted by none of those sophistical contrivances wherewith we are so industriously plied and belabored—contrivances such as groping for some middle ground between the right and the wrong, vain as the search for a man who should be neither a living man nor a dead man—such as a policy of "don't care" on a question about which all true men do care—such as Union appeals beseeching true Union men to yield to Disunionists, reversing the divine rule, and calling, not the sinners, but the righteous to repentance—such as invocations to Washington, imploring men to unsay what Washington said, and undo what Washington did.

Neither let us be slandered from our duty by false accusations against us, nor frightened from it by menaces of destruction to the Government nor of dungeons to ourselves. Let us have faith that right makes might, and in that faith, let us, to the end, dare to do our duty as we understand it.

1. Abraham Lincoln, "Address at Cooper Institute, New York City," February 27, 1860, in Roy P. Basler, ed., *The Collected Works of Abraham Lincoln,* Vol. 3 (New Brunswick, NJ: Rutgers University Press, 1953), 535, 543-50. Reprinted with the permission of the Abraham Lincoln Association, Springfield, IL.

Monday, May 13, 2013 – Essay #61 – Abraham Lincoln's Address at Cooper Institute – Guest Essayist: Brenda Hafera, Finance and Events Co-Ordinator at the Matthew J. Ryan Center For the Study of Free Institutions and the Public Good at Villanova University

"No former effort in the line of speech-making had cost Lincoln so much time and thought as this one." Considering the nuances and rhetoric of Lincoln's speeches in the Lincoln-Douglas debates, it is perhaps shocking that law partner William Herndon was referring to the Cooper Union Address. Lincoln meticulously poured over dusty parchment for several months in preparation for this speech. His painstaking research included the examination of six volumes of Debates on the Federal Constitution by Elliott, the official records of the proceedings of Congress, the Congressional Globe, American history books, and other sources. He traced the actual legislative votes of thirty-nine of the Constitution's signers to determine how they later acted on the question of slavery to prove that the Founders did indeed intend for slavery to become extinct.

Such research had a deliberate purpose. Abraham Lincoln, ever the adapt statesman, sought to teach young citizens something about republican principles and the Constitution. Rather than

concentrating on the Declaration of Independence and the maxim "all men are created equal," as Lincoln traditionally did in his speeches, at Cooper Union he talked about the Constitution, its principles, and the duties citizens owed to the document. Such a tone was perhaps more appropriate, as it was a speech given to the Young Men's Republican Union and served to propel him into the presidency.

In one of the most revealing fragments of Lincoln's political philosophy on the Constitution, he wrote, "'Liberty to all'…The assertion of that *principle*, at *that time*, was *the* word, '*fitly spoken*' which has proved an 'apple of gold' to us. The *Union*, and the *Constitution*, are the *picture* of *silver*, subsequently framed around it. The picture was made, not to *conceal*, or *destroy* the apple; but to *adorn*, and *preserve* it. The *picture* was made *for* the apple–*not* the apple for the picture." The Union and the Constitution protect the principles espoused in the Declaration. Such principles are the soul of America; they are more sacred, for they are the very essence of the country. Yet the Constitution and the Union are the body, and though not as lofty in value, the soul cannot exist without the body.

While less abstract than the Declaration, the Constitution is not simply procedural. It too has underlying principles. As, "neither the word 'slave' nor 'slavery' is to be found in the Constitution, nor the word 'property' even, in any connection with language alluding to the things slave, or slavery…this mode of alluding to slaves and slavery, instead of speaking of them, was employed on purpose to exclude from the Constitution the idea that there could be property in a man." Though the Founding Fathers were forced to allow slavery to continue to preserve the Union, referring to men as property would be to deny the notion that "all men are created equal." For it would be to say that there are some who are naturally born to be masters and others their property. As Thomas Jefferson wrote, "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." No man is naturally born with the right to rule another. For this reason, the Founding Fathers consciously refused to characterize a slave as property and instead referred to him as a person. They preserved his status as nothing less than a human being, with the understanding that one day his rights as such would be fully recognized.

America would eventually have to make an ultimate decision on the question of slavery, and it was the duty of citizens to ensure that "right would make might" and morality would prevail. Since "If slavery is right, all words, acts, laws, and constitutions against it, are themselves wrong, and should be silenced, and swept away. If it is right, we cannot justly object to its nationality- its universality; if it is wrong, they cannot justly insist upon its extension- its enlargement." In order to ensure that slavery would not expand and become legal, those in the north were to exert political pressure on others: "When this obvious mistake of the judges shall be brought to their notice, is it not reasonable to expect that they will withdraw the mistaken statement, and reconsider the conclusion based upon it?" It is the duty of the citizen to ensure the law becomes a better reflection of true justice. Rather than using violence and encouraging insurrections, Lincoln implored the young men of the Republican Union to converse with their fellow citizens and persuade them of slavery's abhorrence.

For any other means of extinguishing slavery besides persuasion would undermine the Constitution and the principles upon which it was founded. The Constitution is the supreme law

of the land, ratified by the people of the United States. It is the tangible expression of the will of the majority. Such a will cannot simply be ignored, because it is given its force by nature, by the principle "all men are created equal." Though not perfect, the law of the land must be respected, and violent actions and insurrections to force others to change their opinions jeopardizes the Union and the Constitution: "It is exceedingly desirable that all parts of this great Confederacy shall be at peace, and in harmony, one with another. Let us Republicans do our part to have it so. Even though the southern people will not so much as listen to us, let us calmly consider their demands, and yield to them if, in our deliberate view of our duty, we possibly can." To save the Union and respect the Constitution, Lincoln would tolerate the evil of slavery, provided it was marked "as an evil not to be extended" and not as a positive good.

Such a compromise could only be made for something as fundamental as the Constitution. The Cooper Union Address is the speech in which Lincoln gives homage to that document. Though the Declaration eloquently frames the principles of the American regime, the Constitution is just as essential and principled in its own way. It is the guardian of America, protecting the idea that "all men are created equal."

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Reply in the Senate to William Seward by Jefferson Davis (1808-1889)

February 29, 1860

…When the Senator from New York closed the studied and elaborate address which he delivered today, I rose for the purpose, not of replying to all the points which he had made, wherein I found rather those generalities not sufficiently glittering to delude, but only for the purpose of noticing some of the salient positions which he assumed, and to one of which the Senator from Illinois has very happily responded—that wherein he charged the Democratic party with having violated its faith which was pledged in 1850. The Senator from Illinois performed his duty on two occasions: first, his duty to the whole country, when he moved an amendment which he believed would bring to it peace and a permanent settlement of a grave question; next, he performed the duty which he owed to himself; for when the Congress enacted measures against the voice of certain southern Senators and members, and pledged themselves to the policy of non-intervention with slavery in the Territories, he, being a party to that transaction, owed it to himself, and discharged a duty which it imposed upon his honor, when he moved to repeal the restriction in palpable violation of the agreement which was then made. He has answered well as to that point, and I have nothing to add.

But the Senator from New York invokes us by his love for the Union, and in the spirit of fraternity. I have nothing to object to the tone in which he has addressed us, but I wish we could have acts instead of words. Faith might follow something more significant than high-sounding professions of attachment to the Union, and fraternity to its various members. If the Senator

would show to us, by his adherence to the Constitution, and his faithful maintenance of the oath he has taken to support it, that we may rely on the pledge which he gives us that the Republican party, bound by its oath, cannot trespass on the rights of any section, our faith might follow, however far behind, such manifestations upon his own part of the good faith which he proclaims to be within the breast of his political party.

But are we to believe these mere professions of the lips whilst he proclaims opposition to one of the most marked features of the Constitution? whilst he and those with whom he is associated, not only here, but at home, are endeavoring to trample under foot the laws of the United States enacted in conformity with the Constitution, and to secure one of its provisions—a provision so significant that it has been remarked, and is a part of history, that the Union could not have been formed if it had not been incorporated in the Constitution? The oaths of such men become cheap as custom-house oaths, and we are asked to stake our future security on the mere guarantee which such an oath gives!

But the Senator from New York arraigns those who speak in a certain contingency of providing for their own safety out of the Union, as being in opposition to his love for the Union; and he manifests his incapacity to understand our doctrine of State rights by the very simile which he employs when he speaks of our fathers building a temple wherein they had a collision of opinion as to whether the marble should be white or whether it should be manifold in its color, and at last agreed together—forgetful that our fathers were occupied in providing a common agent for the States, not building up a central government to look over them. The States remained each its own temple. They made an agent. Their controversy was as to the functions and powers of that agent—not as to the nature of the temple in which they should preserve their liberties. That temple is the State governments. Beneath that we sit down as under our own vine and fig tree, secure in our power to maintain our rights.

But the Senator asks, how is it that, whilst we are professing this general fraternity and adherence to the Union, we still assert that if one of his party is elected President, we are ready to dissolve the Union? I do not know who has made that assertion, if it has been made. However, the language employed may have imperfectly conveyed the idea that the position was assumed as the Senator fairly presented it, under the conviction that they spoke of those who sought the Government to use it for their destruction. That was the provocation, that was the contingency, however it may have been expressed, that was the idea I have seen embodied in every resolution of that kind wherever it has been passed. To ask us that we shall sit still, under such a Government, is as though we were to be asked to sit in this Senate Chamber, whilst we knew that some one was destroying the foundation on which it rested; to ask us to rely upon the durability which that foundation had when the building was constructed; to rely confidently on the strength we knew it once to possess, even when we had been advertised that that foundation was being destroyed. Are we not advertised that the Senator and those with whom he cooperates are assailing our constitutional rights? How, then, can we sit quietly? If, instead of sitting here to admire the panel and the pilaster and the typical decorations of the ceiling, one, aware that the foundation was being undermined, should walk out of the Chamber, would you arraign him for endeavoring to destroy the building, or would you level your charges against the sapper and miner who was at work on its foundation? That is the proposition.

Who has been more industrious, patient, and skillful, as a sapper and miner against the foundations of the Constitution, than the Senator himself? Who has been in advance of him in the fiery charge on the rights of the States, and in assuming to the Federal Government the power to crush and to coerce them? Even today he has repeated his doctrines. He tells us this is a Government which we will learn is not merely a Government of the States, but a Government of each individual of the people of the United States; and he refers to that doctrine of coercion which the great mind of Hamilton (the mighty intellect of New York, which, in his day, like a lens, gathered in all which could illuminate the subject upon which his mind was concentrated) said was a proposition not to provide for a union of the States, but for their destruction. Such was the view which he who led the forces of the strong Government party took of this idea of enabling the Federal Government to coerce a State. Here the Senator, in advance of that, still mistaking the fundamental principles on which our Government rests, talks about the individual masses coercing the sovereign States of this Union. Sir, when it comes to that, there will be an "irrepressible conflict" indeed; and I have now the faith I have before announced, that, when it comes to that, he will find men loyal to the Government and true to its institutions, residing around his own home, who will arrest his footsteps, and hold him prisoner in the name of liberty and the Constitution.

There is nothing, Mr. President, which has led men to greater confusion of ideas than this term of "free States" and "slave States;" and I trusted that the Senator, with his discriminating and logical mind, was going to give us something tangible, instead of dealing in a phrase never applicable. He applied another; but what was his phrase? "Capital States" and "labor States." And where is the State in which nobody labors? The fallacy upon which the Senator hung adjective after adjective was, that all the labor of the southern States was performed by negroes. Did he not know that the negroes formed but a small part of the people of the southern States? Did he suppose nobody labored but a negro, there? If so, he was less informed than I had previously believed him to be. Negro slavery exists in the South, and by the existence of negro slavery, the white man is raised to the dignity of a freeman and an equal. Nowhere else will you find every white man superior to menial service. Nowhere else will you find every white man recognized so far as an equal as never to be excluded from any man's house or any man's table. Your own menial who blacks your boots, drives your carriage, who wears your livery, and is your own in every sense of the word, is not your equal; and such is society wherever negro slavery is not the substratum on which the white race is elevated to its true dignity. We, however, have no theory to press upon you; we leave you to such institutions as you may prefer; but when you assail ours, we come to the vindication of our institutions by showing you that all your phrases are false; that we are the freemen. With us, and with us alone, as I believe, the white man attains to his true dignity in the Government. So much for the great fallacy on which the Senator's argument hangs, that the labor of the South is all negro labor, and that the white man must there be degraded if he labors; or that we have no laboring white men. I do not know which is his opinion; one of the two. The Senator has himself resided in a southern State, and therefore I say I believed him to be better informed before he spoke. I must suppose him to be as ignorant as his speech would indicate. No man, however, who has seen any portion of southern society, can entertain any such opinion as that which he presents; and it is in order that the statement he has made may not go out to deceive those less informed than himself, that I offer at this time the correction.

The Senator makes a rather hackneyed argument, that, in asserting our right to go into the Territory and enjoy it, we are seeking to take exclusive possession of it. I shall not dwell on that point further than to say that we have sought to exclude nobody. We have sought not to usurp the Territory to our exclusive possession; we have sought that government should be instituted in order that every person and property might be protected that went into it—the white man coming from the North, and the white man coming from the South, both meeting on an equality in the Territory, and each with whatever property he may hold under the laws of his State and the Constitution of the United States. Such is our position. It is to array a prejudice, which does not justly attach to us, to assume that we have ever sought to exclude any citizen from any State or Territory from going into any Territory and there possessing all the rights which we claim to ourselves.

We have heard time and again this session the same point made against the Democratic party, that they were hedging themselves behind the decision of the Supreme Court. If this had been presented in the beginning, it might have had some fairness; but, after years of conflict, and after we had found it utterly impossible ever to reach a conclusion satisfactory to both sides—in other words, to enact a law which would answer the purpose—we then agreed to postpone a question judicial in its character, and thus agreed to be bound, legislatively and politically, by the decision which that judicial question should receive. Now, the Senator pleads to the jurisdiction, as though we had ever asserted that the Supreme Court could decide a political question; but he was bound in honor, and so were all who acted with him, to abide by the decision of an umpire to which they had themselves referred the case. We are willing to abide by it. We but claim from them that to which we pledged ourselves, and that to which they were mutually pledged when this position was taken by the two Houses of Congress.

But the Senator in his zeal depicts the negro slave of the South as a human being reduced to the condition of a mere chattel. Is it possible that the Senator did not know that the negro slave in every southern State was still a person, protected by all the laws which punish crime in other persons?Could the Senator have failed to know that no master could take the life of or maim his slave without being held responsible under the criminal laws of any southern State, and held to a responsibility as rigid as though that negro had been a white man? How, then, is it asserted that these are not persons in the eye of the law, not protected by the law as persons. The venerable Senator from Kentucky knows very well that this is not law in any State of the Union where slaves are held, but that everywhere they are protected; that the criminal law covers them as perfectly as it covers the white man….

…Several southern Senators around have spoken to me to the effect that in each of their States the protection is secured, and a suit may be instituted at common law for assault and battery, to protect a negro as well as a white man. The condition of slavery with us is, in a word, Mr. President, nothing but the form of civil government instituted for a class of people not fit to govern themselves. It is exactly what in every State exists in some form or other. It is just that kind of control which is extended in every northern State over its convicts, its lunatics, its minors, its apprentices. It is but a form of civil government for those who by their nature are not fit to govern themselves. We recognize the fact of the inferiority stamped upon that race of men by the Creator, and from the cradle to the grave, our Government, as a civil institution, marks that inferiority. In their subject and dependent state, they are not the objects of cruelty as they

would be if left to the commission of crime, for which they should be incarcerated in penitentiaries and work-houses, and put under hired overseers, having no interest in them and no relation to them, no affiliation, growing out of the associations of childhood and the tender care of age. Is there nothing of the balm needed in the Senator's own State, that he must needs go abroad to seek objects for his charity and philanthropy? What will he say of those masses in New York now memorializing for something very like an agrarian law? What will he say to the throngs of beggars who crowd the streets of his great commercial emporium? What will he say to the multitudes collected in the penitentiaries and prisons of his own State? I seek not, sir, to inquire into the policy and propriety of the institutions of other States; I assume not to judge of their fitness; it belongs to the community to judge, and I know not under what difficulties they may have been driven to what I cannot approve; but never, sir, in all my life, have I seen anything that so appealed to every feeling of humanity and manliness, as the suffering of the poor children imprisoned in your juvenile penitentiaries—imprisoned before they were old enough to know the nature of crime—there held to such punishment as we never inflict save upon those of mature years. I arraign you not for this: I know not what your crowded population and increasing wants may demand; I know not how far it may be the necessary result of crime which follows in the footsteps of misery; I know not how far the parents have become degraded, and how far the children have become outcast, and how far it may have devolved on the State to take charge of them; but, I thank my God, that in the state of society where I reside, we have no scenes so revolting as these.

Why then not address yourselves to the evils which you have at home? Why not confine your inquiries to the remedial measures which will relieve the suffering of and stop the progress of crime among your own people?Very intent in looking into the distance for the mote in your brother's eye, is it to be wondered that we turn back and point to the beam in your own?

1. Jefferson Davis, "Reply to William H. Seward," February 29, 1860, in Lynda L. Crist et al., eds., *The Papers of Jefferson Davis,* Vol. 6 (Baton Rouge: Louisiana State University Press, 1971–present), 278–84.

Tuesday, May 14, 2013 – Essay #62 – Reply in the Senate to William Seward by Jefferson Davis – Guest Essayist: James Legee, Graduate Fellow at the Matthew J. Ryan Center for the study of Free Institutions and the Public Good, Villanova University

Senator Jefferson Davis' response to William Seward's State of the Country Speech was effectively a political speech- it was not meant to fully articulate the Southern cause of State's Rights, nor was it a long-winded justification of that "peculiar institution," slavery. Rather, Davis' goal was to respond to Seward's earlier speech, which condemned slavery. Within Davis' speech, though, we find an idea more dangerous and pernicious than slavery as a positive good or that a State has rights; Davis rejected the central principle of the American Founding and

Declaration of Independence, that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Davis also failed to grasp that the federal government derives its power from the sovereignty of the people. Rather, he viewed the Constitution as an agreement between the state governments.

The basis for representative self-government in America is that principle in the Declaration, that "all men are created equal…" Davis fundamentally rejected the idea that all men, particularly whites and blacks, share equality. Davis was clear when he said, "Negro slavery exists in the South, and by the existence of Negro slavery, the white man is raised to the dignity of a freeman and an equal." For Davis, the existence of freeman seems to necessitate the existence of slaves, but there is no principle that makes Africans the enslaved race other than their skin color. Davis seems to view them as slaves by nature. He continued on, "Your own menial [slave] who blacks your boots, drives your carriage, who wears your livery, and is your own in every sense of the word is not your equal; and such is society wherever negro slavery is not the substratum on which the white race is elevated to its true dignity…we come to the vindication of our institutions by showing you that all your phrases are false; that we are the freeman." The falsehood that Davis spoke of was not just "Capital States" and "Slave States", as Seward said, but equality. "All men are created equal" is that false phrase. Davis says explicitly that a slave is "not your equal" and that he is necessary to raise the white race to its "true dignity." This is not just equality of condition or station, but a denial of the humanity of Africans.

Further in the speech Davis claimed that, "the condition of slavery with us is, in a word, Mr. President, nothing but the form of civil government instituted for a class of people not fit to govern themselves." And who selected the African people for slavery and as unfit to govern themselves? For Jefferson Davis, it is a power no less than God; "the inferiority stamped upon that race of men by the creator…" He seemed unaware that this was a rejection of our system of government and mirrors the divine right of kings, long claimed in Europe as the justification for rule. A class, selected by God as unfit to rule even their own lives, logically leaves a superior class of people fit to rule. Six years earlier, in Lincoln's 1854 reaction to the Kansas-Nebraska Act, he confronted this very idea and wrote, "When the white man governs himself that is self-government; but when he governs *another* man that is … despotism." This claim to a divine right to rule another people is anathema to the American Republic. In *Federalist 1*, Hamilton stated that the goal of the American experiment was to see "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." Davis determined that America was an accident, for he asserted that God chose a group to rule, and they are to rule through force.

Beyond rejecting the Declaration of Independence, Davis misunderstood the American Founding when he asserted, "our fathers were occupied in providing a common agent for the States, not building up a central government to look over them" and later contended the idea that, "this is a Government which we will learn is not merely a Government of the States, but a Government of each individual of the people of the United States…" was the wrong doctrine. The Constitution of the United States begins "We The People" not "We the Colonies," "We the States," or "We The White Land Owning Gentry"; it is a promise to all people, and to future generations of

Americans. This is explicit in the *Federalist Papers*, when Madison wrote in *Federalist 39* that ratification of the Constitution "must result from the *unanimous* assent of the several States that are parties to it, differing no otherwise from their ordinary assent than in its being express, not by the legislative authority, but by that of the people themselves." A republic is "a government which derives all its powers directly or indirectly from the great body of the people…" The States are not self-generating; rather, the people form the states, and the federal government. Thus, they give sovereignty, understood as power, to both the state and the federal government. Just governments are created by, and for, men and it is the people who determine which powers are reserved to the states and enumerated to the federal government. Davis is right in the sense that that the states helped to form the federal regime, with powers reserved to them (this is articulated best in the 10th Amendment), but incorrect in disregarding the role the body of the American people in the Federal Union.

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Reply in the Senate to Stephen Douglas by Jefferson Davis

May 17, 1860

…It is this confusion of ideas, it is this confounding of terms, this changing of language, this applying of special meanings to words, out of which, I think, a large portion of the dispute arises. For instance, it is claimed that President Pierce, in using the phrase "existing and incipient States," meant to include all Territories, and thus that he had bound me to a doctrine which precluded my strictures on what I termed squatter sovereignty. This all arises from the misuse of language. An incipient State, according to my idea, is the territorial condition at the moment it changes into that of a State. It is when the people assemble in convention to form a constitution as a State, that they are in the condition of an incipient State. Various names were applied to the Territories at an earlier period. Sometimes they were called "new States," because they were expected to be States; sometimes they were called "States in embryo," and it requires a determination of the language that is employed before it is possible to arrive at any conclusion as to the differences of understanding between gentlemen. Therefore it was, and, I think, very properly, (but not, as the Senator supposes, that I wanted to catechize him,) that I asked him what he meant by non-intervention, before I commenced these remarks.

In the same line of errors was the confusion which resulted in his assuming that the evils I described as growing out of his doctrine on the plains of Kansas, were a denunciation, on my part, of the bill called the Kansas-Nebraska bill. At the time that bill passed, I did not foresee all the evils which have resulted from the doctrine based upon it, but which I do not think it contains. I am not willing now to turn on those who were in a position which compelled them to act and made them responsible, and to divest myself of any responsibility which belongs to any opinion I entertained. I will not seek to judge after the fact and hold the measure up against those who had to judge before me. Therefore I will frankly avow that I should have sustained that bill

if I had been in the Senate; but I did not foresee or apprehend such evils as immediately grew up on the plains of Kansas. I looked then, as our fathers had looked before, to the settlement of the question of what institutions should exist there, as one to be determined by soil and climate, and by the pleasure of those who should voluntarily go into the country. Such, however, was not the case. The form of the Kansas-Nebraska bill invited to a controversy—not foreseen.

1. Jefferson Davis, "Reply to Stephen A. Douglas," May 17, 1860, in Lynda L. Crist et al., eds., *The Papers of Jefferson Davis,* Vol. 6 (Baton Rouge: Louisiana State University Press, 1971–present), 322.

Wednesday, May 15, 2013 – Essay #63 – Jefferson Davis' Reply in the Senate to Stephen Douglas – Guest Essayist: Professor Joerg Knipprath, Professor of Law at Southwestern Law School

American politics in the 1850s were dominated by the polarization over slavery, which was reflected in the increasingly menacing tone of the national political "conversation" and the retreat into starker sectionalism of political allegiances. Attempts at political compromise over this national sickness initially appeared promising, but ultimately provided only bandages, not cures. When politics failed, the doctors of the law on the Supreme Court stepped in with a massive dose of controversial and untried constitutional medicine in the *Dred Scott* decision. When that, too, failed, the only means left to stop the spread of the poison was through the extreme surgery of military conflict that cost the blood of over 600,000 Americans. The South wanted amputation of what it saw as the source of the poison—the North's crusade of political domination. The North rejected amputation and wanted to save the whole patient through radical surgery to cut out the evil—Southern slavery.

The political bandages appeared in the form of "popular sovereignty," a principle embedded in the Compromise of 1850 and the Kansas-Nebraska Act of 1854. Its architect in 1850 was Henry Clay, but as the light of that former star of American politics dimmed, the concept was appropriated by the rising "Little Giant" Stephen Douglas, Senator from Illinois. The concept suited a political slogan perfectly. It was ambiguous and allowed every participant in the debate to read into it what he wanted it to mean. It was all-American. Who, after all, could oppose the right of the people to self-government? It sounded intellectual, thereby providing—as Plato acidly wrote in *The Republic*—that tool by which those who truly wield political power in a democracy ingratiate themselves with the ignorant masses, flattery of the latter's self-delusion of wisdom. It was historical, in that it reflected the actual experience of many Americans in organizing politically the newly-settled territories during the westward movement of American empire.

The concrete issue was the potential expansion of slavery into new territories, specifically those obtained as a result of the war with Mexico. The Missouri Compromise of 1820 had worked because it effectively prevented the spread of slavery beyond existing states into the greatest

portion of the new territory obtained through the Louisiana Purchase. The new addition from the Mexican War lay below the exclusion line and, technically, opened a vast area to the "peculiar institution."

Broadly speaking, the idea of popular sovereignty was to allow the settlers of the territory that would be organized in that conquered area to decide whether their eventual state would be slave or free. The territorial legislature would make that decision. Congress would not interfere in the process by legislation, as had been the case with the Missouri Compromise in prohibiting slavery in those territories. But the unanswered question was just *when* the people in the territory could take action for or against slavery. Douglas and many other Northern Democrats believed that the territorial legislature could act immediately to permit or prohibit slavery, if it wished. Southerners argued that slavery was a matter of states' rights. Therefore, the territorial legislature could act only when the people wrote a constitution and submitted it to Congress with their petition for statehood. Until then, slaveholders were American citizens who had the right to take their property into the territory just as everyone had.

It is that contention over the timing of the territorial government's decision about slavery and the protection of slave-holding settlers until that point that Jefferson Davis addresses in this part of his speech. The decision to prohibit slavery could only be made by states and "incipient states." Senator Davis's position is the South's position—incipient states are those territories about to become states, not those in less mature political development.

In 1854, Stephen Douglas used popular sovereignty to push through the bill to organize the Nebraska Territory (including Kansas and Nebraska) as the last piece from the Louisiana Purchase. Douglas wanted the territory organized for both broad political reasons and narrower personal financial reasons. Douglas was a heavy investor in Western lands and Chicago real estate and wanted the central route (through Nebraska Territory) for the anticipated transcontinental railroad, rather than the Southern route. That required settlers in that area. To lessen Southern opposition to organizing a territory that had to be "free" under the Missouri Compromise of 1820, Douglas's proposed bill extended popular sovereignty into that area and, thereby, allowed the potential introduction of slavery into territory from which it had been excluded. That, in turn, enflamed Northern anti-slavery sentiment. Douglas further agreed to a formal division of the territory into Nebraska (expected to be settled by Iowans and free) and Kansas (expected to be settled by Missourians and slave). His efforts pleased formerly suspicious Southerners, as shown by the back-handed compliment he received from Senator Dixon of Kentucky, "Sir, I once recognized you as a demagogue, a mere manager, selfish, and intriguing. I now find you a warm-hearted and sterling patriot."

As any smart lawyer knows, carefully-contrived ambiguity in structuring "the deal" to get it done often merely delays the day of reckoning over the matter. The reality of life burns away the semantic fog of the conceptual artifice and exposes its essential weaknesses and inherent conflicts. The Framers of the Constitution understood that careful avoidance of outright mention of slavery in that instrument might buy time for a national resolution of the issue or a natural withering of the institution, but that euphemisms could not change what slavery was.

So it went with popular sovereignty. Theory clashed with reality in Kansas, and reality

mercilessly battered theory. Popular sovereignty induced a rush to "get there first," draft a constitution (with or without participation by the territorial legislature), establish one's doctrine about slavery as part of that constitution, and submit the matter to Congress. The result in Kansas was the Lecompton (pro-slavery) Constitution, which Douglas and others considered illegitimate since it had excluded anti-slavery participants. Meanwhile, in a pre-cursor of events to come, settlement of the issue of slavery in the territories, or at least in Kansas, was proceeding through a campaign of violence that earned it the sobriquet "Bleeding Kansas." These are the "evils" to which Jefferson Davis refers in his speech. Meanwhile, Douglas's new-found friends from the southern side of the Mason-Dixon Line soon reverted to their earlier estimations of his character.

At the end of his speech defending popular sovereignty, Davis notes the disappointed hopes of backers of popular sovereignty, "I looked then, as our fathers had looked before, to the settlement of the question of what institutions should exist there, as one to be determined by soil and climate, and by the pleasure of those who should voluntarily go into the country." Notably, many Northerners and Southerners alike agreed with that premise. At least silently, it was supposed that the extension of slavery into the cold states of the North or the hot, arid vastness of the Southwest was highly unlikely. But the expected demise of slavery had failed to occur previously, with the invention of the cotton gin and the expansion of cotton growing in the early 19th century. Moreover, for the opponents of slavery, the moral dimension of the question prohibited any extension of the institution. As Abraham Lincoln declared, the North was determined to give her emigrants "a clean bed, with no snakes in it." For the South, meanwhile, the idea that the extension of slavery into all territories was permissible represented redress for injured pride. More symbolic, it was, at last, a refutation of the moral condemnation that had underlain prior laws that were grounded on the supposed need to quarantine the South and its social institutions.

An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

South Carolina Secession Declaration

December 24, 1860

Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union

The People of the State of South Carolina, in Convention assembled, on the 26th day of April, A.D., 1852, declared that the frequent violations of the Constitution of the United States, by the Federal Government, and its encroachments upon the reserved rights of the States, fully justified

this State in then withdrawing from the Federal Union; but in deference to the opinions and wishes of the other slaveholding States, she forbore at that time to exercise this right. Since that time, these encroachments have continued to increase, and further forbearance ceases to be a virtue.

And now the State of South Carolina having resumed her separate and equal place among nations, deems it due to herself, to the remaining United States of America, and to the nations of the world, that she should declare the immediate causes which have led to this act.

In the year 1765, that portion of the British Empire embracing Great Britain, undertook to make laws for the government of that portion composed of the thirteen American Colonies. A struggle for the right of self-government ensued, which resulted, on the 4th July, 1776, in a Declaration, by the Colonies, "that they are, and of right ought to be, free and independent; and that, as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do."

They further solemnly declared that whenever any "form of government becomes destructive of the ends for which it was established, it is the right of the people to alter or abolish it, and to institute a new government." Deeming the Government of Great Britain to have become destructive of these ends, they declared that the Colonies "are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved."

In pursuance of this Declaration of Independence, each of the thirteen States proceeded to exercise its separate sovereignty; adopted for itself a Constitution, and appointed officers for the administration of government in all its departments—Legislative, Executive and Judicial. For purposes of defense, they united their arms and their counsels; and, in 1778, they entered into a League known as the Articles of Confederation, whereby they agreed to entrust the administration of their external relations to a common agent, known as the Congress of the United States, expressly declaring, in the first article, "that each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not, by this Confederation, expressly delegated to the United States in Congress assembled."

Under this Confederation the War of the Revolution was carried on, and on the 3rd September, 1783, the contest ended, and a definitive Treaty was signed by Great Britain, in which she acknowledged the Independence of the Colonies in the following terms:

"Article 1.—His Britannic Majesty acknowledges the said United States, viz: New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to befree, sovereign and independent states; that he treats them as such; and for himself, his heirs and successors, relinquishes all claims to the government, propriety and territorial rights of the same and every part thereof."

Thus were established the two great principles asserted by the Colonies, namely: the right of a

State to govern itself; and the right of a people to abolish a Government when it becomes destructive of the ends for which it was instituted. And concurrent with the establishment of these principles, was the fact, that each Colony became and was recognized by the mother Country as a free, sovereign and independent state.

In 1787, Deputies were appointed by the States to revise the Articles of Confederation, and on 17th September, 1787, these Deputies recommended, for the adoption of the States, the Articles of Union, known as the Constitution of the United States.

The parties to whom this Constitution was submitted, were the several sovereign States; they were to agree or disagree, and when nine of them agreed, the compact was to take effect among those concurring; and the General Government, as the common agent, was then to be invested with their authority.

If only nine of the thirteen States had concurred, the other four would have remained as they then were—separate, sovereign States, independent of any of the provisions of the Constitution. In fact, two of the States did not accede to the Constitution until long after it had gone into operation among the other eleven; and during that interval, they each exercised the functions of an independent nation.

By this Constitution, certain duties were imposed upon the several States, and the exercise of certain of their powers were restrained, which necessarily implied their continued existence as sovereign States. But, to remove all doubt, an amendment was added, which declared that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people. On 23rd May, 1788, South Carolina, by a Convention of her people, passed an Ordinance assenting to this Constitution, and afterwards altered her own Constitution, to conform herself to the obligations she had undertaken.

Thus was established, by compact between the States, a Government, with definite objects and powers, limited to the express words of the grant. This limitation left the whole remaining mass of power subject to the clause reserving it to the States or to the people, and rendered unnecessary any specification of reserved rights.

We hold that the Government thus established is subject to the two great principles asserted in the Declaration of Independence; and we hold further, that the mode of its formation subjects it to a third fundamental principle, namely: the law of compact. We maintain that in every compact between two or more parties, the obligation is mutual; that the failure of one of the contracting parties to perform a material part of the agreement, entirely releases the obligation of the other; and that where no arbiter is provided, each party is remitted to his own judgment to determine the fact of failure, with all its consequences.

In the present case, that fact is established with certainty. We assert, that fourteen of the States have deliberately refused for years past to fulfil their constitutional obligations, and we refer to their own Statutes for the proof.

The Constitution of the United States, in its 4th Article, provides as follows:

"No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due."

This stipulation was so material to the compact, that without it that compact would not have been made. The greater number of the contracting parties held slaves, and they had previously evinced their estimate of the value of such a stipulation by making it a condition in the Ordinance for the government of the territory ceded by Virginia, which now composes the States north of the Ohio river.

The same article of the Constitution stipulates also for rendition by the several States of fugitives from justice from the other States.

The General Government, as the common agent, passed laws to carry into effect these stipulations of the States. For many years these laws were executed. But an increasing hostility on the part of the non-slaveholding States to the Institution of Slavery has led to a disregard of their obligations, and the laws of the General Government have ceased to effect the objects of the Constitution. The States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, Illinois, Indiana, Michigan, Wisconsin and Iowa, have enacted laws which either nullify the Acts of Congress or render useless any attempt to execute them. In many of these States the fugitive is discharged from the service or labor claimed, and in none of them has the State Government complied with the stipulation made in the Constitution. The State of New Jersey, at an early day, passed a law in conformity with her constitutional obligation; but the current of anti-slavery feeling has led her more recently to enact laws which render inoperative the remedies provided by her own law and by the laws of Congress. In the State of New York even the right of transit for a slave has been denied by her tribunals; and the States of Ohio and Iowa have refused to surrender to justice fugitives charged with murder, and with inciting servile insurrection in the State of Virginia. Thus the constitutional compact has been deliberately broken and disregarded by the non-slaveholding States, and the consequence follows that South Carolina is released from her obligation.

The ends for which this Constitution was framed are declared by itself to be "to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."

These ends it endeavored to accomplish by a Federal Government, in which each State was recognized as an equal, and had separate control over its own institutions. The right of property in slaves was recognized by giving to free persons distinct political rights, by giving them the right to represent, and burdening them with direct taxes for three-fifths of their slaves; by authorizing the importation of slaves for twenty years; and by stipulating for the rendition of fugitives from labor.

We affirm that these ends for which this Government was instituted have been defeated, and the Government itself has been made destructive of them by the action of the non-slaveholding States. Those States have assumed the right of deciding upon the propriety of our domestic institutions; and have denied the rights of property established in fifteen of the States and

recognized by the Constitution; they have denounced as sinful the institution of Slavery; they have permitted the open establishment among them of societies, whose avowed object is to disturb the peace and to eloign the property of the citizens of other States. They have encouraged and assisted thousands of our slaves to leave their homes; and those who remain, have been incited by emissaries, books and pictures to servile insurrection.

For twenty-five years this agitation has been steadily increasing, until it has now secured to its aid the power of the Common Government. Observing the *forms* of the Constitution, a sectional party has found within that article establishing the Executive Department, the means of subverting the Constitution itself. A geographical line has been drawn across the Union, and all the States north of that line have united in the election of a man to the high office of President of the United States whose opinions and purposes are hostile to slavery. He is to be entrusted with the administration of the Common Government, because he has declared that that "Government cannot endure permanently half slave, half free," and that the public mind must rest in the belief that Slavery is in the course of ultimate extinction.

This sectional combination for the subversion of the Constitution, has been aided in some of the States by elevating to citizenship, persons, who, by the Supreme Law of the land, are incapable of becoming citizens; and their votes have been used to inaugurate a new policy, hostile to the South, and destructive of its peace and safety.

On the 4th March next, this party will take possession of the Government. It has announced, that the South shall be excluded from the common Territory; that the Judicial Tribunals shall be made sectional, and that a war must be waged against slavery until it shall cease throughout the United States.

The Guarantees of the Constitution will then no longer exist; the equal rights of the States will be lost. The slaveholding States will no longer have the power of self-government, or self-protection, and the Federal Government will have become their enemy.

Sectional interest and animosity will deepen the irritation, and all hope of remedy is rendered vain, by the fact that public opinion at the North has invested a great political error with the sanctions of a more erroneous religious belief.

We, therefore, the people of South Carolina, by our delegates, in Convention assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, have solemnly declared that the Union heretofore existing between this State and the other States of North America, is dissolved, and that the State of South Carolina has resumed her position among the nations of the world, as a separate and independent State; with full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do.

To Dissolve the Union between the State of South Carolina and other States united with her under the compact entitled "The Constitution of the United States of America."

We, the People of the State of South Carolina, in Convention assembled, do declare and ordain,

and it is hereby declared and ordained,

That the Ordinance adopted by us in Convention, on the twenty-third day of May, in the year of our Lord one thousand seven hundred and eighty-eight, whereby the Constitution of the United States of America was ratified, and also, all Acts and parts of Acts of the General Assembly of this State, ratifying amendments of the said Constitution, are hereby repealed; and that the union now subsisting between South Carolina and other States, under the name of "The United States of America," is hereby dissolved.

1. South Carolina Convention, *Declaration of the Immediate Causes which Induce and Justify the Secession of South Carolina from the Federal Union* (Charleston, SC: Evans and Cogswell, 1860), 3–11.

Thursday, May 16, 2013 – Essay #64 – South Carolina Secession Declaration – Guest Essayist: Horace Cooper, legal commentator and a fellow with Constituting America as well as an adjunct fellow with the National Center for Public Policy Research

On December 20, 1860 South Carolina became the first state to declare that it had seceded from the Federal union. Many modern historical revisionists will try to explain away slavery's role in the secessionist movement and the civil war, that followed. For these individuals it is critical that the conflicts that led to the Civil War involve issues such as tariffs and other domestic policies over which reasonable men might disagree.

Curiously the South Carolina Declaration fails to mention these issues. The Declaration begins with its claim that beginning on April 26, 1852, the citizens of the State of South Carolina declared that "the frequent violations of the Constitution of the United States, by the Federal Government, and its encroachments upon the reserved rights of the States, fully justified this State in then withdrawing from the Federal Union," but rather than do so they had waited another 8 years, "in deference to the opinions and wishes of the other slaveholding States."

Note: It was not the cotton producing states nor the construction producing states, or factory producing states or some other similarity that united their group. Solidarity among slaveholding was their cause.

Striking the pose of the oppressed colony of a European superstate, South Carolina recounted the arguments that ultimately led to America's revolution against Great Britain. Claiming "that they are, and of right ought to be, free and independent; and that, as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do."

And had they listed complaints unrelated to the horrific and inhumane policy of slavery (a policy

which has yet to be eradicated from the planet) their claims may have been more persuasive. South Carolina didn't claim that all of her agricultural products were seized without compensation or that her legal disputes about corporate contracts involving mergers and acquisitions were not upheld in federal courts. Instead, they argued that their claim to be able to hold one human against his will (and that of his children), a claim that violates natural law and that of the Almighty, was not being treated fairly in courts of the North and the Midwest.

It is this growing sense among people in Western Europe and in North and Midwest parts of America that the right to enslave was indeed a wrong that was the central basis of South Carolina's claim for abolition of the American union.

This claim ran in the face of the direction the modern world was headed.

Indeed, by 1850 England, Germany, Poland, Mexico, Spain, The Netherlands, France and Greece and nearly every other modern nation had all abolished slavery and the slave trade. Is it any wonder that in America –which had nearly 50 years earlier banned the importation of slaves – would see its nascent anti-slavery movement explode into a full blown national debate.

Starting with the abolitionist movement in New England in the 1700s, the American notion of every man being free and equal in the eyes of the law had by the 1850s led to a wholesale limitation on the ability of Southern states to rely upon their neighbors to the North and Midwest to aid and assist in keeping their policy of slavery intact.

What South Carolina declared to be a government "destructive of the ends for which it was established," on the contrary exhibited the very qualities of support for individual liberty and freedom that just governments exist to ensure.

South Carolina was correct: Juries were refusing to convict those who helped slaves escape. Judges were refusing to enforce obligations to return escaped slaves and some communities openly offered resettlement funds that encouraged slaves to leave the shackles of the South.

The freedom genie was being unleashed and South Carolina wanted the cap placed back on the bottle.

Ignoring the issue over which the secessionist movement was motivated by, South Carolina's declaration makes a fairly powerful argument for the right for South Carolina to leave the Union. "We maintain that in every compact between two or more parties, the obligation is mutual; that the failure of one of the contracting parties to perform a material part of the agreement, entirely releases the obligation of the other; and that where no arbiter is provided, each party is remitted to his own judgment to determine the fact of failure, with all its consequences."

But the very thing that South Carolina was asking the entire rest of the states to do was to reverse course and reject the lessons of history – to wit: natural law claims that every human was free and it was the duty of government to protect that status, not reverse it.

If one were to rely totally upon the construct of the Declaration, you might come to the curious conclusion that the only or primary benefit that South Carolina got from being a part of the

Union was the ability to get the rest of the states help it in its quest to capture escapees. How exactly that problem would be aided by ending their association with the Union is unclear.

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Cornerstone Speech by Alexander Stephens (1812-1883)

March 21, 1861

At half past seven o'clock on Thursday evening, the largest audience ever assembled at the Athenaeum was in the house, waiting most impatiently for the appearance of the orator of the evening, Honorable A. H. Stephens, Vice-President of the Confederate States of America. The committee, with invited guests, were seated on the stage, when, at the appointed hour, the Honorable C. C. Jones, Mayor, and the speaker, entered, and were greeted by the immense assemblage with deafening rounds of applause.

The Mayor then, in a few pertinent remarks, introduced Mr. Stephens, stating that at the request of a number of the members of the convention, and citizens of Savannah and the State, now here, he had consented to address them upon the present state of public affairs…

Mr. Stephens rose and said:

…[W]e are passing through one of the greatest revolutions in the annals of the world. Seven States have within the last three months thrown off an old government and formed a new. This revolution has been signally marked, up to this time, by the fact of its having been accomplished without the loss of a single drop of blood.

This new constitution, or form of government, constitutes the subject to which your attention will be partly invited. In reference to it, I make this first general remark. It amply secures all our ancient rights, franchises, and liberties. All the great principles of Magna Charta are retained in it. No citizen is deprived of life, liberty, or property, but by the judgment of his peers under the laws of the land. The great principle of religious liberty, which was the honor and pride of the old constitution, is still maintained and secured. All the essentials of the old constitution, which have endeared it to the hearts of the American people, have been preserved and perpetuated. Some changes have been made…. Some of these I should have preferred not to have seen made; but these, perhaps, meet the cordial approbation of a majority of this audience, if not an overwhelming majority of the people of the Confederacy. Of them, therefore, I will not speak. But other important changes do meet my cordial approbation. They form great improvements upon the old constitution. So, taking the whole new constitution, I have no hesitancy in giving it as my judgment that it is decidedly better than the old.

Allow me briefly to allude to some of these improvements. The question of building up class interests, or fostering one branch of industry to the prejudice of another under the exercise of the

revenue power, which gave us so much trouble under the old constitution, is put at rest forever under the new. We allow the imposition of no duty with a view of giving advantage to one class of persons, in any trade or business, over those of another. All, under our system, stand upon the same broad principles of perfect equality. Honest labor and enterprise are left free and unrestricted in whatever pursuit they may be engaged…. This old thorn of the tariff, which was the cause of so much irritation in the old body politic, is removed forever from the new.

Again, the subject of internal improvements, under the power of Congress to regulate commerce, is put at rest under our system. The power claimed by construction under the old constitution, was at least a doubtful one— it rested solely upon construction. We of the South, generally apart from considerations of constitutional principles, opposed its exercise upon grounds of its inexpediency and injustice. Notwithstanding this opposition, millions of money, from the common treasury had been drawn for such purposes. Our opposition sprang from no hostility to commerce, or all necessary aids for facilitating it. With us it was simply a question, upon*whom* the burden should fall. In Georgia, for instance, we have done as much for the cause of internal improvements as any other portion of the country according to population and means…. All this was done to open an outlet for our products of the interior, and those to the west of us, to reach the marts of the world. No State was in greater need of such facilities than Georgia, but we did not ask that these works should be made by appropriations out of the common treasury. The cost of the grading, the superstructure, and equipments of our roads, was borne by those who entered on the enterprise…. What justice was there in taking this money, which our people paid into the common treasury on the importation of our iron, and applying it to the improvement of rivers and harbors elsewhere?

The true principle is to subject the commerce of every locality, to whatever burdens may be necessary to facilitate it. If Charleston harbor needs improvement, let the commerce of Charleston bear the burden. If the mouth of the Savannah river has to be cleared out, let the seagoing navigation which is benefitted by it, bear the burden. So with the mouths of the Alabama and Mississippi river. Just as the products of the interior, our cotton, wheat, corn, and other articles, have to bear the necessary rates of freight over our railroads to reach the seas. This is again the broad principle of perfect equality and justice. And it is especially set forth and established in our new constitution…

But not to be tedious in enumerating the numerous changes for the better, allow me to allude to one other—though last, not least. The new constitution has put at rest, *forever,* all the agitating questions relating to our peculiar institution—African slavery as it exists amongst us—the proper*status* of the negro in our form of civilization. This was the immediate cause of the late rupture and present revolution. Jefferson in his forecast, had anticipated this, as the "rock upon which the old Union would split." He was right. What was conjecture with him, is now a realized fact. But whether he fully comprehended the great truth upon which that rock *stood*and *stands,* may be doubted. The prevailing ideas entertained by him and most of the leading statesmen at the time of the formation of the old constitution, were that the enslavement of the African was in violation of the laws of nature; that it was wrong in *principle,* socially, morally, and politically. It was an evil they knew not well how to deal with, but the general opinion of the men of that day was that, somehow or other in the order of Providence, the institution would be evanescent and pass away. This idea, though not incorporated in the

constitution, was the prevailing idea at that time. The constitution, it is true, secured every essential guarantee to the institution while it should last, and hence no argument can be justly urged against the constitutional guarantees thus secured, because of the common sentiment of the day. Those ideas, however, were fundamentally wrong. They rested upon the assumption of the equality of races. This was an error. It was a sandy foundation, and the government built upon it fell when the "storm came and the wind blew."

Our new government is founded upon exactly the opposite idea; its foundations are laid, its corner-stone rests upon the great truth, that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition.

This, our new government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth. This truth has been slow in the process of its development, like all other truths in the various departments of science. It has been so even amongst us. Many who hear me, perhaps, can recollect well, that this truth was not generally admitted, even within their day. The errors of the past generation still clung to many as late as twenty years ago. Those at the North, who still cling to these errors, with a zeal above knowledge, we justly denominate fanatics. All fanaticism springs from an aberration of the mind—from a defect in reasoning. It is a species of insanity. One of the most striking characteristics of insanity, in many instances, is forming correct conclusions from fancied or erroneous premises; so with the anti-slavery fanatics; their conclusions are right if their premises were. They assume that the negro is equal, and hence conclude that he is entitled to equal privileges and rights with the white man. If their premises were correct, their conclusions would be logical and just—but their premise being wrong, their whole argument fails.I recollect once of having heard a gentleman from one of the northern States, of great power and ability, announce in the House of Representatives, with imposing effect, that we of the South would be compelled, ultimately, to yield upon this subject of slavery, that it was as impossible to war successfully against a principle in politics, as it was in physics or mechanics. That the principle would ultimately prevail. That we, in maintaining slavery as it exists with us, were warring against a principle, a principle founded in nature, the principle of the equality of men. The reply I made to him was, that upon his own grounds, we should, ultimately, succeed, and that he and his associates, in this crusade against our institutions, would ultimately fail. The truth announced, that it was as impossible to war successfully against a principle in politics as it was in physics and mechanics, I admitted; but told him that it was he, and those acting with him, who were warring against a principle. They were attempting to make things equal which the Creator had made unequal.

In the conflict thus far, success has been on our side, complete throughout the length and breadth of the Confederate States. It is upon this, as I have stated, our social fabric is firmly planted; and I cannot permit myself to doubt the ultimate success of a full recognition of this principle throughout the civilized and enlightened world.

As I have stated, the truth of this principle may be slow in development, as all truths are and ever have been, in the various branches of science. It was so with the principles announced by Galileo—it was so with Adam Smith and his principles of political economy. It was so with Harvey, and his theory of the circulation of the blood. It is stated that not a single one of the medical profession, living at the time of the announcement of the truths made by him, admitted

them. Now, they are universally acknowledged. May we not, therefore, look with confidence to the ultimate universal acknowledgment of the truths upon which our system rests? It is the first government ever instituted upon the principles in strict conformity to nature, and the ordination of Providence, in furnishing the materials of human society. Many governments have been founded upon the principle of the subordination and serfdom of certain classes of the same race; such were and are in violation of the laws of nature. Our system commits no such violation of nature's laws. With us, all of the white race, however high or low, rich or poor, are equal in the eye of the law. Not so with the negro. Subordination is his place. He, by nature, or by the curse against Canaan, is fitted for that condition which he occupies in our system. The architect in the construction of buildings, lays the foundation with the proper material—the granite; then comes the brick or the marble. The substratum of our society is made of the material fitted by nature for it, and by experience we know, that it is best, not only for the superior, but for the inferior race, that it should be so. It is, indeed, in conformity with the ordinance of the Creator. It is not for us to inquire into the wisdom of his ordinances, or to question them. For his own purposes, he has made one race to differ from another, as he has made "one star to differ from another star in glory."

The great objects of humanity are best attained when there is conformity to his laws and decrees, in the formation of governments as well as in all things else. Our confederacy is founded upon principles in strict conformity with these laws. This stone which was rejected by the first builders "is become the chief of the corner"—the real "corner-stone"—in our new edifice.

I have been asked, what of the future? It has been apprehended by some that we would have arrayed against us the civilized world. I care not who or how many they may be against us, when we stand upon the eternal principles of truth, *if we are true to ourselves and the principles for which we contend,* we are obliged to, and must triumph.

Thousands of people who begin to understand these truths are not yet completely out of the shell; they do not see them in their length and breadth. We hear much of the civilization and christianization of the barbarous tribes of Africa. In my judgment, those ends will never be attained, but by first teaching them the lesson taught to Adam, that "in the sweat of his brow he should eat his bread," and teaching them to work, and feed, and clothe themselves….

…Looking to the distant future, and, perhaps, not very far distant either, it is not beyond the range of possibility, and even probability, that all the great States of the north-west will gravitate this way, as well as Tennessee, Kentucky, Missouri, Arkansas, etc. Should they do so, our doors are wide enough to receive them, but not until they are ready to assimilate with us in principle.

The process of disintegration in the old Union may be expected to go on with almost absolute certainty if we pursue the right course. We are now the nucleus of a growing power which, if we are true to ourselves, our destiny, and high mission, will become the controlling power on this continent. To what extent accessions will go on in the process of time, or where it will end, the future will determine… Such are some of the glimpses of the future as I catch them….

In olden times the olive branch was considered the emblem of peace; we will send to the nations of the earth another and far more potential emblem of the same, the cotton plant. The present

duties were levied with a view of meeting the present necessities and exigencies, in preparation for war, if need be; but if we have peace, and he hoped we might, and trade should resume its proper course, a duty of ten per cent. upon foreign importations it was thought might be sufficient to meet the expenditures of the government. If some articles should be left on the free list, as they now are, such as breadstuffs, etc., then, of course, duties upon others would have to be higher—but in no event to an extent to embarrass trade and commerce. He concluded in an earnest appeal for union and harmony, on part of all the people in support of the common cause, in which we were all enlisted, and upon the issues of which such great consequences depend.

If, said he, we are true to ourselves, true to our cause, true to our destiny, true to our high mission, in presenting to the world the highest type of civilization ever exhibited by man—there will be found in our lexicon no such word as fail.

Mr. Stephens took his seat, amid a burst of enthusiasm and applause, such as the Athenaeum has never had displayed within its walls, within "the recollection of the oldest inhabitant."

1. Alexander Stephens, "Sketch of the Corner-Stone Speech," March 21, 1861, in Henry Cleveland, ed., *Alexander H. Stephens, in Public and Private: With Letters and Speeches, Before, During, and Since the War* (Philadelphia: National Publishing Co., 1866), 717–23, 726, 728–29.

Friday, May 17, 2013 – Essay #65 – Cornerstone Speech by Alexander Stephens – Guest Essayist: David Eastman, Claremont Institute Abraham Lincoln Fellow

On March 4th 1861, Abraham Lincoln was inaugurated as president. One week later, *The Constitution of the Confederate States of America* was adopted by the Constitutional Convention in Montgomery, Alabama.[2] Midway into the ratification process, on March 21st, provisionally elected Vice President of the Confederate States, Alexander Stephens, mounted the stage of the Athenaeum Theatre in Savannah and delivered what has come to be known as the Cornerstone Speech. As he rose to the stage that day, the nation was at peace. Three weeks later the nation would be plunged into war.[3]

The name "Cornerstone" is drawn from Stephens' quoting of Psalm 118:22, "This stone which was rejected by the first builders "is become the chief of the corner"—the real "corner-stone"—in our new edifice." Stephens employs the Biblical reference to Christ in Psalm 118 to not only identify the Confederate States of America's enduring commitment to Christianity but to put at center stage the truly fundamental nature of negro slavery to the Confederation and its Constitution. Stephens accepts Lincoln's contention that America's founding fathers hoped for the eventual extinction of slavery, but while Lincoln supports the continuation of such efforts, Stephens criticizes their manifest error for rejecting the timeless and divinely sanctioned superiority of the white race. Where the founding fathers, and Jefferson in particular, rejected

negro slavery on principle, and expected its eventual disappearance in the United States, the Confederate States have staked their future on its perpetual continuance.

Using Biblical imagery found in the Gospel of Matthew and the Epistle of Romans, Stephens explains that the folly of the founders was in presuming an equality of the races, whereas the Confederate Constitution is founded on the great physical, philosophical and moral truth of the unequal nature of the races.[4] Stephens declares, "With us, all of the white race, however high or low, rich or poor, are equal in the eye of the law. Not so with the negro. Subordination is his place. He, by nature, or by the curse against Canaan, is fitted for that condition which he occupies in our system." Because of the timelessness of this eternal principle, Stephens is able to boast confidently of how firm a foundation it is upon which the Confederacy now rests and of the height it will one day reach; in Stephen's words, "The highest type of civilization ever exhibited by man."

Very few actual changes were made to the U.S. Constitution by the Confederate States, further bolstering the argument that it was not the Constitution itself that seceding States took issue with, but rather perverse interpretations. The small number of changes makes each of the changes themselves all the more significant (see below for a line-by-line comparison).[5] In a number of places religious references are added, as are references to slaves and to slavery (both references are noticeably absent in the original Constitution). Additionally, several economic reforms are adopted, such as proposals restricting protectionist policies, prohibiting government subsidies, and promoting free trade. Most notably however, is the formal defense of slavery made central in the Confederate Constitution itself. No free state is permitted to join the confederacy, nor, for all practical purposes, is any confederate state permitted to ever become a free state. In short, states who do not affirm the moral rightness of negro slavery had best look elsewhere.

The contrast between the two competing philosophies is found in two, very different approaches to governance, as articulated by President Thomas Jefferson and President Jefferson Davis:

"I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education. This is the true corrective of abuses of constitutional power." – Thomas Jefferson

"The condition of slavery with us is, in a word, Mr. President, nothing but the form of civil government instituted for a class of people not fit to govern themselves. It is exactly what in every State exists in some form or other. It is just that kind of control which is extended in every northern State over its convicts, its lunatics, its minors, its apprentices. It is but a form of civil government for those who by their nature are not fit to govern themselves." – Jefferson Davis

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[1] Ratification by the five states needed for it to be put into immediate effect would take only 15 days, ending with the ratification of Mississippi on March 26th.

[2] On April 12th 1861, Fort Sumter was fired upon, and on April 15th President Lincoln called forth the militia of the United States to suppress the confederacy.

[3] The Avalon Project: Constitution of the Confederate States of America.

[4] Romans 10:2 – "For I bear them witness that they have a zeal for God, but not according to knowledge."

Matthew 7:24-27 – "Everyone then who hears these words of mine and does them will be like a wise man who built his house on the rock. And the rain fell, and the floods came, and the winds blew and beat on that house, but it did not fall, because it had been founded on the rock. And everyone who hears these words of mine and does not do them will be like a foolish man who built his house on the sand. And the rain fell, and the floods came, and the winds blew and beat against that house, and it fell, and great was the fall of it."

5 Visit "The Constitution of the Confederate States of America" for a line-by-line comparison of the US and CSA Constitutions.

Farewell Address to the Senate by Jefferson Davis

January 21, 1861

I rise, Mr. President, for the purpose of announcing to the Senate that I have satisfactory evidence that the State of Mississippi, by a solemn ordinance of her people in convention assembled, has declared her separation from the United States. Under these circumstances, of course my functions are terminated here. It has seemed to me proper, however, that I should appear in the Senate to announce that fact to my associates, and I will say but very little more. The occasion does not invite me to go into argument; and my physical condition would not permit me to do so if it were otherwise; and yet it seems to become me to say something on the part of the State I here represent, on an occasion so solemn as this.

It is known to Senators who have served with me here, that I have for many years advocated, as an essential attribute of State sovereignty, the right of a State to secede from the Union. Therefore, if I had not believed there was justifiable cause; if I had thought that Mississippi was acting without sufficient provocation, or without an existing necessity, I should still, under my theory of the Government, because of my allegiance to the State of which I am a citizen, have been bound by her action. I, however, may be permitted to say that I do think she has justifiable cause, and I approve of her act. I conferred with her people before that act was taken, counseled them then that if the state of things which they apprehended should exist when the convention met, they should take the action which they have now adopted.

I hope none who hear me will confound this expression of mine with the advocacy of the right of a State to remain in the Union, and to disregard its constitutional obligations by the nullification of the law. Such is not my theory. Nullification and secession, so often confounded, are indeed

antagonistic principles. Nullification is a remedy which it is sought to apply within the Union, and against the agent of the States. It is only to be justified when the agent has violated his constitutional obligation, and a State, assuming to judge for itself, denies the right of the agent thus to act, and appeals to the other States of the Union for a decision; but when the States themselves, and when the people of the States, have so acted as to convince us that they will not regard our constitutional rights, then, and then for the first time, arises the doctrine of secession in its practical application.

A great man who now reposes with his fathers, and who has been often arraigned for a want of fealty to the Union, advocated the doctrine of nullification, because it preserved the Union. It was because of his deep-seated attachment to the Union, his determination to find some remedy for existing ills short of a severance of the ties which bound South Carolina to the other States, that Mr. Calhoun advocated the doctrine of nullification, which he proclaimed to be peaceful, to be within the limits of State power, not to disturb the Union, but only to be a means of bringing the agent before the tribunal of the States for their judgment.

Secession belongs to a different class of remedies. It is to be justified upon the basis that the States are sovereign. There was a time when none denied it. I hope the time may come again, when a better comprehension of the theory of our Government, and the inalienable rights of the people of the States, will prevent any one from denying that each State is a sovereign, and thus may reclaim the grants which it has made to any agent whomsoever.

I therefore say I concur in the action of the people of Mississippi, believing it to be necessary and proper, and should have been bound by their action if my belief had been otherwise; and this brings me to the important point which I wish on this last occasion to present to the Senate. It is by this confounding of nullification and secession that the name of a great man, whose ashes now mingle with his mother earth, has been invoked to justify coercion against a seceded State. The phrase “to execute the laws,” was an expression which General Jackson applied to the case of a State refusing to obey the laws while yet a member of the Union. That is not the case which is now presented. The laws are to be executed over the United States, and upon the people of the United States. They have no relation to any foreign country. It is a perversion of terms, at least it is a great misapprehension of the case, which cites that expression for application to a State which has withdrawn from the Union. You may make war on a foreign State. If it be the purpose of gentlemen, they may make war against a State which has withdrawn from the Union; but there are no laws of the United States to be executed within the limits of a seceded State. A State finding herself in the condition in which Mississippi has judged she is, in which her safety requires that she should provide for the maintenance of her rights out of the Union, surrenders all the benefits, (and they are known to be many,) deprives herself of the advantages, (they are known to be great,) severs all the ties of affection, (and they are close and enduring,) which have bound her to the Union; and thus divesting herself of every benefit, taking upon herself every burden, she claims to be exempt from any power to execute the laws of the United States within her limits.

I well remember an occasion when Massachusetts was arraigned before the bar of the Senate, and when then the doctrine of coercion was rife and to be applied against her because of the rescue of a fugitive slave in Boston. My opinion then was the same that it is now. Not in a spirit

of egotism, but to show that I am not influenced in my opinion because the case is my own, I refer to that time and that occasion as containing the opinion which I then entertained, and on which my present conduct is based. I then said, if Massachusetts, following her through a stated line of conduct, chooses to take the last step which separates her from the Union, it is her right to go, and I will neither vote one dollar nor one man to coerce her back; but will say to her, God speed, in memory of the kind associations which once existed between her and the other States.

It has been a conviction of pressing necessity, it has been a belief that we are to be deprived in the Union of the rights which our fathers bequeathed to us, which has brought Mississippi into her present decision. She has heard proclaimed the theory that all men are created free and equal, and this made the basis of an attack upon her social institutions; and the sacred Declaration of Independence has been invoked to maintain the position of the equality of the races. That Declaration of Independence is to be construed by the circumstances and purposes for which it was made. The communities were declaring their independence; the people of those communities were asserting that no man was born—to use the language of Mr. Jefferson—booted and spurred to ride over the rest of mankind; that men were created equal—meaning the men of the political community; that there was no divine right to rule; that no man inherited the right to govern; that there were no classes by which power and place descended to families, but that all stations were equally within the grasp of each member of the body-politic. These were the great principles they announced; these were the purposes for which they made their declaration; these were the ends to which their enunciation was directed. They have no reference to the slave; else, how happened it that among the items of arraignment made against George III was that he endeavored to do just what the North has been endeavoring of late to do—to stir up insurrection among our slaves? Had the Declaration announced that the negroes were free and equal, how was the Prince to be arraigned for stirring up insurrection among them? And how was this to be enumerated among the high crimes which caused the colonies to sever their connection with the mother country? When our Constitution was formed, the same idea was rendered more palpable, for there we find provision made for that very class of persons as property; they were not put upon the footing of equality with white men—not even upon that of paupers and convicts; but, so far as representation was concerned, were discriminated against as a lower caste, only to be represented in the numerical proportion of three fifths.

Then, Senators, we recur to the compact which binds us together; we recur to the principles upon which our Government was founded; and when you deny them, and when you deny to us the right to withdraw from a Government which thus perverted threatens to be destructive of our rights, we but tread in the path of our fathers when we proclaim our independence, and take the hazard. This is done not in hostility to others, not to injure any section of the country, not even for our own pecuniary benefit; but from the high and solemn motive of defending and protecting the rights we inherited, and which it is our sacred duty to transmit unshorn to our children.

I find in myself, perhaps, a type of the general feeling of my constituents towards yours. I am sure I feel no hostility to you, Senators from the North. I am sure there is not one of you, whatever sharp discussion there may have been between us, to whom I cannot now say, in the presence of my God, I wish you well; and such, I am sure, is the feeling of the people whom I represent towards those whom you represent. I therefore feel that I but express their desire when I say I hope, and they hope, for peaceful relations with you, though we must part. They may be

mutually beneficial to us in the future, as they have been in the past, if you so will it. The reverse may bring disaster on every portion of the country; and if you will have it thus, we will invoke the God of our fathers, who delivered them from the power of the lion, to protect us from the ravages of the bear; and thus, putting our trust in God and in our own firm hearts and strong arms, we will vindicate the right as best we may.

In the course of my service here, associated at different times with a great variety of Senators, I see now around me some with whom I have served long; there have been points of collision; but whatever of offense there has been to me, I leave here; I carry with me no hostile remembrance. Whatever offense I have given which has not been redressed, or for which satisfaction has not been demanded, I have, Senators, in this hour of our parting, to offer you my apology for any pain which, in heat of discussion, I have inflicted. I go hence unencumbered of the remembrance of any injury received, and having discharged the duty of making the only reparation in my power for any injury offered.

Mr. President, and Senators, having made the announcement which the occasion seemed to me to require, it only remains to me to bid you a final adieu.

1. Jefferson Davis, "Farewell Address," January 21, 1861, in Lynda L. Crist et al., eds., *The Papers of Jefferson Davis,* Vol. 7 (Baton Rouge: Louisiana State University Press, 1971–present), 18–22.

Monday, May 20, 2013 – Essay #66 -Farewell Address to the Senate by Jefferson Davis – Guest Essayist: Professor Joerg Knipprath, Professor of Law at Southwestern Law School

In 1830, at a dinner on the anniversary of Jefferson's birthday, an exchange of toasts occurred between President Andrew Jackson and Vice-President John Calhoun. Jackson's challenge, "Our Federal Union—it *must* be preserved!" was returned with another from Calhoun, "The Union—next to our liberty, the most dear." The rhetorical volleys crystallized the fundamentally different views of the combatants during the later secession crisis, not only on the nature of the Union, but on the very values each thought paramount.

The triumvirate of interposition (the right of a state immediately to interpose its authority between its people and unconstitutional action of the general government), nullification (the process of voiding such unconstitutional action of the general government), and secession (the state's "nuclear option" of leaving the Union) were not new. The Virginia and Kentucky Resolves of 1798, authored by Madison and Jefferson, respectively, declared that usurpations of power by Congress, as occurred in the Sedition Act, could be met by means of redress each state determined necessary. For Virginia, that included interposition of state authority. Unlike future flare-ups, this controversy was not directly traceable to economic burdens, but to a clash over individual rights of speech and immigration.

The Hartford Convention of New England states in 1814 was precipitated by the real economic costs from the Embargo Acts of the second Jefferson term and from the British blockades during the War of 1812. The radical faction led by Federalist Party dead-enders supported the drafting of a new Constitution, with specific protections for New England commercial interests. If that project was not agreeable to the other states, there would be secession and a separate peace. The moderate majority in the Convention rejected that approach—at least for the time being. They proposed constitutional amendments to protect New England commerce and interposition to federal authority, as had Virginia earlier. The final article was the call for another convention if these proposals were not favorably received, with the veiled threat of reviving secession.

But the most immediate antecedent of the debates over the Union in 1860 was the "Tariff Crisis" of the 1820s and 1830s, which provided the stage for the oratorical clashes of Senatorial giants Daniel Webster of Massachusetts, Henry Clay of Kentucky, and John C. Calhoun of South Carolina. Due to the vast expanse of the United States, Americans and immigrants could readily gain a livelihood by squatting on cheap Western land. This produced a shortage of workers and increased the cost of labor. To protect the profits of Northern manufacturers from competition by cheaper European labor, a series of tariff laws was enacted. Those laws, along with other economic circumstances, hurt the South by depressing the price the planters received for their cotton while also increasing the cost of needed finished goods. The "40-bale theory" asserted that the 1828 "Tariff of Abominations" artificially transferred into the pockets of Northern manufacturers the value of 40 out of every 100 bales of cotton produced by Southern planters. This tariff, and its successor in 1832, sharply exacerbated the growing sectional divide between North and South and led the British statesman and free-trader William Huskisson to predict that the tariff, if not lowered, would "expedite an event inevitable, I think, at no distant period—the separation of the Southern States."

Calhoun was the intellectual force behind the movement to protect Southern rights and liberty. He was not an eager secessionist and preferred nullification, for which he constructed an elaborate constitutional framework. Because he was vice-president of the United States at the time, his foundational efforts were presented anonymously, as with the Exposition of 1828, or by stand-ins, such as Senator Robert Hayne speaking Calhoun's words during the Hayne-Webster debates in the Senate while the author himself was watching as presiding officer of that chamber.

Calhoun was devoted to protecting minority rights through his theory of "concurrent majorities," which held that a law passed by the general government that was directed at, or lay particularly hard on, a particular state or region was not consistent with the principles of the Union unless it was also supported by those burdened by it. The people of that state, acting in convention, could vote to nullify that law. Since such action called into question the basic constitutional arrangement, it could not be undertaken by a mere state legislature, but had to come from that most direct expression of popular sovereignty, the people's convention. But a single state could not bind the entire Union. Therefore, if a state convention voted to nullify, Congress could call a federal convention under Article V of the Constitution. That convention would submit the nullification resolution to the states. If ¾ of them agreed, the federal law was void. If the requisite number of states did not agree with the nullification by the original state, that state would have to yield its objection or secede.

Much of Calhoun's thinking is reflected in Jefferson Davis's speech, although Davis tries to draw a sharp distinction between nullification and secession. Davis, too, was a reluctant secessionist who counseled against rash action. As did Calhoun, Davis relies on the premise that the Union was the result of a compact among the people of the several states. But he views nullification as an action within the Union to preserve the Union, whereas secession is the ultimate act of the people of a state to undo in convention what the people of that state did in convention nearly 75 years earlier when they approved the Constitution. To Calhoun, secession is the final step the people might take after nullification failed to protect their rights. To Davis, nullification is an unjustifiable challenge to the binding obligation owed to the constitutional order to which the people still profess allegiance and whose benefits they still enjoy. Secession is the unrestricted right to leave, for whatever reason the people choose, but also as a consequence requires that state to forego any further benefit of union.

There are a few other notable points about the speech. For many Southerners, their cause was a "Second American War for Independence," triggered by similar economic pressures, violations of ancient liberties and the inherited constitutional order, and oppressive actions intended to make them submit. Like the Revolutionary War polemicists, Davis speaks of the ancient rights bequeathed to them by their fathers (an allusion to the institution of slavery) and assaulted by the Union. He justifies separation by likening the North to George III ("he endeavored to do just what the North has been endeavoring of late to do—to stir up insurrection among our slaves"). He directly invokes the history of the Revolutionary War to warn the North against acts of force: "[We] will invoke the God of our fathers, who delivered them from the power of the [British] lion, to protect us from the ravages of the bear." It was 1776 again, four-score-and-five years later.

A famous Confederate marching song captures the Southern grievances that underlie Calhoun's philosophy and Davis's speech:

We are a band of brothers

And native to the soil,

Fighting for our liberty,

With treasure, blood, and toil;

And when our rights were threatened,

The cry rose near and far—

"Hurrah for the Bonnie Blue Flag

That bears a single star!"

As long as the Union

Was faithful to her trust,

Like friends and like brethren

Kind were we, and just;

But now, when Northern treachery

Attempts our rights to mar,

We hoist on high the Bonnie Blue Flag

That bears a single star.

An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

First Inaugural Address by Abraham Lincoln

March 4, 1861

Fellow citizens of the United States:

In compliance with a custom as old as the government itself, I appear before you to address you briefly, and to take, in your presence, the oath prescribed by the Constitution of the United States, to be taken by the President "before he enters on the execution of his office."

I do not consider it necessary, at present for me to discuss those matters of administration about which there is no special anxiety, or excitement.

Apprehension seems to exist among the people of the Southern States, that by the accession of a Republican Administration, their property, and their peace, and personal security, are to be endangered. There has never been any reasonable cause for such apprehension. Indeed, the most ample evidence to the contrary has all the while existed, and been open to their inspection. It is found in nearly all the published speeches of him who now addresses you. I do but quote from one of those speeches when I declare that "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so." Those who nominated and elected me did so with full knowledge that I had made this, and many similar declarations, and had never recanted them.

And more than this, they placed in the platform, for my acceptance, and as a law to themselves, and to me, the clear and emphatic resolution which I now read:

"Resolved, That the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend; and we denounce the lawless invasion by armed force of the soil of any State or Territory, no matter under what pretext, as among the gravest of crimes."

I now reiterate these sentiments: and in doing so, I only press upon the public attention the most conclusive evidence of which the case is susceptible, that the property, peace and security of no section are to be in anywise endangered by the now incoming Administration. I add too, that all the protection which, consistently with the Constitution and the laws, can be given, will be cheerfully given to all the States when lawfully demanded, for whatever cause—as cheerfully to one section, as to another.

There is much controversy about the delivering up of fugitives from service or labor. The clause I now read is as plainly written in the Constitution as any other of its provisions:

"No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

It is scarcely questioned that this provision was intended by those who made it, for the reclaiming of what we call fugitive slaves; and the intention of the law-giver is the law. All members of Congress swear their support to the whole Constitution—to this provision as much as to any other. To the proposition, then, that slaves whose cases come within the terms of this clause, "shall be delivered up," their oaths are unanimous. Now, if they would make the effort in good temper, could they not, with nearly equal unanimity, frame and pass a law, by means of which to keep good that unanimous oath?

There is some difference of opinion whether this clause should be enforced by national or by state authority; but surely that difference is not a very material one. If the slave is to be surrendered, it can be of but little consequence to him, or to others, by which authority it is done. And should any one, in any case, be content that his oath shall go unkept, on a merely unsubstantial controversy as to *how* it shall be kept?

Again, in any law upon this subject, ought not all the safeguards of liberty known in civilized and humane jurisprudence to be introduced, so that a free man be not, in any case, surrendered as a slave? And might it not be well, at the same time, to provide by law for the enforcement of that clause in the Constitution which guarantees that "The citizens of each State shall be entitled to all previleges and immunities of citizens in the several States?"

I take the official oath today, with no mental reservations, and with no purpose to construe the Constitution or laws, by any hypercritical rules. And while I do not choose now to specify particular acts of Congress as proper to be enforced, I do suggest, that it will be much safer for

all, both in official and private stations, to conform to, and abide by, all those acts which stand unrepealed, than to violate any of them, trusting to find impunity in having them held to be unconstitutional.

It is seventy-two years since the first inauguration of a President under our national Constitution. During that period fifteen different and greatly distinguished citizens, have, in succession, administered the executive branch of the government. They have conducted it through many perils; and, generally, with great success. Yet, with all this scope for precedent, I now enter upon the same task for the brief constitutional term of four years, under great and peculiar difficulty. A disruption of the Federal Union heretofore only menaced, is now formidably attempted.

I hold, that in contemplation of universal law, and of the Constitution, the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper, ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our national Constitution, and the Union will endure forever—it being impossible to destroy it, except by some action not provided for in the instrument itself.

Again, if the United States be not a government proper, but an association of States in the nature of contract merely, can it, as a contract, be peaceably unmade, by less than all the parties who made it? One party to a contract may violate it—break it, so to speak; but does it not require all to lawfully rescind it?

Descending from these general principles, we find the proposition that, in legal contemplation, the Union is perpetual, confirmed by the history of the Union itself. The Union is much older than the Constitution. It was formed in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured and the faith of all the then thirteen States expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. And finally, in 1787, one of the declared objects for ordaining and establishing the Constitution, was *"to form a more perfect union."*

But if destruction of the Union, by one, or by a part only, of the States, be lawfully possible, the Union is less perfect than before the Constitution, having lost the vital element of perpetuity.

It follows from these views that no State, upon its own mere motion, can lawfully get out of the Union,—that *resolves* and *ordinances* to that effect are legally void; and that acts of violence, within any State or States, against the authority of the United States, are insurrectionary or revolutionary, according to circumstances.

I therefore consider that, in view of the Constitution and the laws, the Union is unbroken; and, to the extent of my ability, I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States. Doing this I deem to be only a simple duty on my part; and I shall perform it, so far as practicable, unless my rightful masters, the American people, shall withhold the requisite means, or, in some authoritative manner, direct the contrary. I trust this will not be regarded as a menace, but only as the declared purpose of the Union that it*will* constitutionally defend, and maintain itself.

In doing this there needs to be no bloodshed or violence; and there shall be none, unless it be forced upon the national authority. The power confided to me, will be used to hold, occupy, and possess the property, and places belonging to the government, and to collect the duties and imposts; but beyond what may be necessary for these objects, there will be no invasion— no using of force against, or among the people anywhere. Where hostility to the United States, in any interior locality, shall be so great and so universal, as to prevent competent resident citizens from holding the Federal offices, there will be no attempt to force obnoxious strangers among the people for that object. While the strict legal right may exist in the government to enforce the exercise of these offices, the attempt to do so would be so irritating, and so nearly impracticable with all, that I deem it better to forego, for the time, the uses of such offices.

The mails, unless repelled, will continue to be furnished in all parts of the Union. So far as possible, the people everywhere shall have that sense of perfect security which is most favorable to calm thought and reflection. The course here indicated will be followed, unless current events, and experience, shall show a modification, or change, to be proper; and in every case and exigency, my best discretion will be exercised, according to circumstances actually existing, and with a view and a hope of a peaceful solution of the national troubles, and the restoration of fraternal sympathies and affections.

That there are persons in one section, or another who seek to destroy the Union at all events, and are glad of any pretext to do it, I will neither affirm or deny; but if there be such, I need address no word to them. To those, however, who really love the Union, may I not speak?

Before entering upon so grave a matter as the destruction of our national fabric, with all its benefits, its memories, and its hopes, would it not be wise to ascertain precisely why we do it? Will you hazard so desperate a step, while there is any possibility that any portion of the ills you fly from, have no real existence? Will you, while the certain ills you fly to, are greater than all the real ones you fly from? Will you risk the commission of so fearful a mistake?

All profess to be content in the Union, if all constitutional rights can be maintained. Is it true, then, that any right, plainly written in the Constitution, has been denied? I think not. Happily the human mind is so constituted, that no party can reach to the audacity of doing this. Think, if you can, of a single instance in which a plainly written provision of the Constitution has ever been denied. If, by the mere force of numbers, a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution—certainly would, if such right were a vital one. But such is not our case. All the vital rights of minorities, and of individuals, are so plainly assured to them, by affirmations and negations, guarranties and prohibitions, in the Constitution, that controversies never arise concerning them. But no organic law can ever be framed with a provision specifically applicable to every question which may occur in practical administration. No foresight can anticipate, nor any document of reasonable length contain express provisions for all possible questions. Shall fugitives from labor be surrendered by national or by State authority? The Constitution does not expressly say. *May* Congress prohibit slavery in the territories? The Constitution does not expressly say. *Must* Congress protect slavery in the territories? The Constitution does not expressly say.

From questions of this class spring all our constitutional controversies, and we divide upon them

into majorities and minorities. If the minority will not acquiesce, the majority must, or the government must cease. There is no other alternative; for continuing the government, is acquiescence on one side or the other. If a minority, in such case, will secede rather than acquiesce, they make a precedent which, in turn, will divide and ruin them; for a minority of their own will secede from them, whenever a majority refuses to be controlled by such minority. For instance, why may not any portion of a new confederacy, a year or two hence, arbitrarily secede again, precisely as portions of the present Union now claim to secede from it. All who cherish disunion sentiments, are now being educated to the exact temper of doing this. Is there such perfect identity of interests among the States to compose a new Union, as to produce harmony only, and prevent renewed secession?

Plainly, the central idea of secession, is the essence of anarchy. A majority, held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it, does, of necessity, fly to anarchy or to despotism. Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy, or despotism in some form, is all that is left.

I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration, in all parallel cases, by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal. Nor is there, in this view, any assault upon the court, or the judges. It is a duty, from which they may not shrink, to decide cases properly brought before them; and it is no fault of theirs, if others seek to turn their decisions to political purposes.

One section of our country believes slavery is *right,* and ought to be extended, while the other believes it is *wrong,* and ought not to be extended. This is the only substantial dispute. The fugitive slave clause of the Constitution, and the law for the suppression of the foreign slave trade, are each as well enforced, perhaps, as any law can ever be in a community where the moral sense of the people imperfectly supports the law itself. The great body of the people abide by the dry legal obligation in both cases, and a few break over in each. This, I think, cannot be perfectly cured; and it would be worse in both cases *after* the separation of the sections, than before. The foreign slave trade, now imperfectly suppressed, would be ultimately revived without restriction, in one section; while fugitive slaves, now only partially surrendered, would not be surrendered at all, by the other.

Physically speaking, we cannot separate. We cannot remove our respective sections from each

other, nor build an impassable wall between them. A husband and wife may be divorced, and go out of the presence, and beyond the reach of each other; but the different parts of our country cannot do this. They cannot but remain face to face; and intercourse, either amicable or hostile, must continue between them. Is it possible then to make that intercourse more advantageous, or more satisfactory, *after*separation than *before?* Can aliens make treaties easier than friends can make laws? Can treaties be more faithfully enforced between aliens, than laws can among friends? Suppose you go to war, you cannot fight always; and when, after much loss on both sides, and no gain on either, you cease fighting, the identical old questions, as to terms of intercourse, are again upon you.

This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their *constitutional* right of amending it, or their *revolutionary* right to dismember, or overthrow it. I can not be ignorant of the fact that many worthy, and patriotic citizens are desirous of having the national constitution amended. While I make no recommendation of amendments, I fully recognize the rightful authority of the people over the whole subject, to be exercised in either of the modes prescribed in the instrument itself; and I should, under existing circumstances, favor, rather than oppose, a fair opportunity being afforded the people to act upon it.

I will venture to add that, to me, the convention mode seems preferable, in that it allows amendments to originate with the people themselves, instead of only permitting them to take, or reject, propositions, originated by others, not especially chosen for the purpose, and which might not be precisely such, as they would wish to either accept or refuse. I understand a proposed amendment to the Constitution—which amendment, however, I have not seen, has passed Congress, to the effect that the federal government, shall never interfere with the domestic institutions of the States, including that of persons held to service. To avoid misconstruction of what I have said, I depart from my purpose not to speak of particular amendments, so far as to say that, holding such a provision to now be implied constitutional law, I have no objection to its being made express, and irrevocable.

The Chief Magistrate derives all his authority from the people, and they have referred none upon him to fix terms for the separation of the States. The people themselves can do this also if they choose; but the executive, as such, has nothing to do with it. His duty is to administer the present government, as it came to his hands, and to transmit it, unimpaired by him, to his successor.

Why should there not be a patient confidence in the ultimate justice of the people? Is there any better, or equal hope, in the world? In our present differences, is either party without faith of being in the right? If the Almighty Ruler of nations, with his eternal truth and justice, be on your side of the North, or on yours of the South, that truth, and that justice, will surely prevail, by the judgment of this great tribunal, the American people.

By the frame of the government under which we live, this same people have wisely given their public servants but little power for mischief; and have, with equal wisdom, provided for the return of that little to their own hands at very short intervals.

While the people retain their virtue, and vigilance, no administration, by any extreme of

wickedness or folly, can very seriously injure the government, in the short space of four years.

My countrymen, one and all, think calmly and *well,* upon this whole subject. Nothing valuable can be lost by taking time. If there be an object to*hurry* any of you, in hot haste, to a step which you would never take*deliberately,* that object will be frustrated by taking time; but no good object can be frustrated by it. Such of you as are now dissatisfied, still have the old Constitution unimpaired, and, on the sensitive point, the laws of your own framing under it; while the new administration will have no immediate power, if it would, to change either. If it were admitted that you who are dissatisfied, hold the right side in the dispute, there still is no single good reason for precipitate action. Intelligence, patriotism, Christianity, and a firm reliance on Him, who has never yet forsaken this favored land, are still competent to adjust, in the best way, all our present difficulty.

In *your* hands, my dissatisfied fellow countrymen, and not in *mine,* is the momentous issue of civil war. The government will not assail you. You can have no conflict, without being yourselves the aggressors. *You* have no oath registered in Heaven to destroy the government, while *I* shall have the most solemn one to "preserve, protect and defend it."

I am loath to close. We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory, stretching from every battle-field, and patriot grave, to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.

1. Abraham Lincoln, "First Inaugural Address—Final Text," March 4, 1861, in Roy P. Basler, ed., *The Collected Works of Abraham Lincoln,* Vol. 4 (New Brunswick, NJ: Rutgers University Press, 1953), 262–71. Reprinted with the permission of the Abraham Lincoln Association, Springfield, IL.

Tuesday, May 21, 2013 – Essay #67 – Lincoln's First Inaugural Address – Guest Essayist: Professor Will Morrisey, William and Patricia LaMothe Chair in the United States Constitution at Hillsdale College

Abraham Lincoln won the presidency in the election of 1860, defeating three other candidates, including two Democrats, with nearly forty percent of the popular vote and an absolute majority in the Electoral College. Democrats had split into two factions. Northern Democrats, headed by Illinois Senator Stephen Douglas (who had defeated Lincoln in the Senate election two years earlier) held that the question of admitting slavery into the western territories should be answered by referendum in each territory. Southern Democrats, headed by Senator John J. Breckinridge of Kentucky, upheld the claim most famously enunciated decades earlier by Senator John C. Calhoun of South Carolina—namely, that property in slaves is an unalienable right, that slavery was "a positive good" for both white masters and black slaves, and that slave owners therefore

could keep their slaves wherever in the territories they pleased. Popular sovereignty might not protect, and surely did not posit a natural or absolute legal right to slave property, and could never satisfy the slave owners. Although Douglas won the nomination of the regular Democratic organization, he won only a single state in the national election: Missouri. The southern Democrats (who had `seceded' from the party's convention before the final vote was taken) won ten states, all of them by overwhelming margins.

Upon learning of these results, the southern Democrats attempted to secede from the Union itself, with South Carolina leading the way on Christmas Eve. By the time Lincoln took the oath of office on March 4, 1861, seven southern states had passed secession resolutions and had founded the Confederate States of America. South Carolina's argument for secession was typical: many northern states had failed to comply with the Fugitive Slave Clause of the Constitution; ergo, the terms and conditions of the Union had been violated and secession was a justifiable response. Although South Carolina wouldn't fire on the federal garrison at Fort Sumter until the following month, other federal properties had been seized by the secessionists. "The house divided" that Lincoln had described two years earlier had reached its crisis.

Crucial to understanding the speech is seeing that Lincoln begins with custom and ends with nature. He moves his audience from thinking about custom—conventions made by human beings—to thinking about human nature, endowed by God. "In compliance with a custom as old as the government itself," he begins, "I appear before you to address you briefly, and to take, in your presence, the oath prescribed by the Constitution of the United States, to be taken by the President `before he enters on the execution of his office.'" The oath of office amounts to a promise to uphold a humanly-constructed law, the Constitution; the customary speech that follows the oath ordinarily outlines policies of the new president, policies he takes to be consistent with that oath and that Constitution. Much more famously, Lincoln closes the speech averring that "The mystic chords of memory, stretching from every battle-field, and patriot grave, to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature." Entwined with but distinct from the sentiments about mystic chords, patriotism, and angels, at the end nature is Lincoln's final word.

Why? What is he doing, or attempting to do?

By putting custom, convention, and law front and center, Lincoln assured the slave-owning states that he had no intention of interfering with slavery in those states; in this he followed the Republican Party platform itself. On the question of enforcing the Fugitive Slave Clause, he affirmed it as part of the Constitution he had just sworn to obey, saying only that in enforcing the law "all the safeguards of liberty known in civilized and humane jurisprudence" ensuring "that a free man be not, in any case, surrendered as a slave" ought to prevail.

But he also observed that the oath to preserve, protect and defend the Constitution required him to uphold the federal union that pre-dated that constitution. The union was a convention or custom formally acknowledged by the American colonies in 1774 in the Articles of Association enacted by the first Continental Congress—two years before those colonies declared their independence. The framers of the 1787 Constitution intended to perfect that Constitution and

that union—a union that had already been called "perpetual" in the Articles of Confederation of 1778. The constitutional union of the American states is a contract; absent some contractual clause to the contrary, no party to a contract can rescind it unilaterally, without the consent of the other parties to the contract. This holds whether the parties are individual citizens or sovereign states. But this was what the secessionists were attempting. Lincoln's first argument against secession thus amounts to a logical demonstration based upon the character of a conventional agreement or contract that takes the form of a man-made law—which also happens to be the supreme human law of the land.

As seen in South Carolina's declaration of independence, some Southerners claimed that the contract had already been violated by those northern states which had passed the "personal liberty laws' making it tougher to extradite African-Americans in free states who were accused of being runaway slaves. That argument hinged upon whether secession was a just or proportional response to laws that set a high bar for extradition. Because secession seems both a drastic and an ineffective response to such laws (why would secession make it easier to recover runaway slaves?), the main argument of the slaveholders continued to be that slavery was a positive good and that slaveholders were entitled to bring slaves into federal territories—the argument to which Lincoln next turns.

Lincoln's next argument against secession edges away from convention in the direction of nature. It is an observation about political rule in a republican regime. In republics the people rule through their elected representatives, who commit themselves to the supreme law of the land upon taking office. With respect to the principal issue dividing the house in 1860—Congressional authority to protect or prohibit slavery in the federal territories—"the Constitution does not expressly say" what must be done. This relegates the issue of slavery in the territories to the realm of a political question—that is, to majority rule. The presidential candidate of the Republican Party had just won a majority of votes in the Constitutionally-ordained Electoral College. "If a minority, in such case, will secede rather than acquiesce" to majority rule, "they make a precedent which, in turn, will divide and ruin them; for a minority of their own will secede from them, whenever a majority refuses to be controlled by such minority." With no legal or even rational limit to such division down to the body of each individual, "the central idea of secession is the essence of anarchy." Only a majority can function as "the true sovereign of a free people.

"One section of our country believes slavery is *right*, and ought to be extended, while the other believes it is *wrong*, and ought not to be extended." Slavery, not states' rights, lies at the foundation of the house divided. Only constitutional majorities can repair this division if Americans would adhere to the political principles of the Founders, which were the principles of republicanism. "This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their *constitutional* right of amending it"—and in 1860 neither side had the votes for that—"or their *revolutionary* right to dismember, or overthrow it." Lincoln offered his support for a Constitutional amendment to pledge the federal government never to interfere with "the domestic institutions of the States, including that of persons held to service." But as a constitutional officer of the United States pledge to preserve, protect, and defend the Constitution, he would not countenance a revolutionary right to overthrow that government. What is more, even if Lincoln

walked away from his Constitutional duty to defend the Union, the fundamental problem would not end because the United States of America and the Confederate States of America would "remain face to face," governed at most by treaties rather than a shared constitution. Why would a treaty on runaway slaves be better enforced than a constitutional law on runaway slaves? Why would two federal governments keep the peace between the sections better than one?

In a speech in Cincinnati delivered in the previous year, Lincoln had warned of the outcome of a sectional war, remarking that Northerners outnumbered Southerners, and were no less valorous. The Southerners thought otherwise, and fought. Lincoln next-to-last argument in the First Inaugural, an argument from prudence, an argument based on practical reasoning, tactfully does not go so far as he had done in Cincinnati. He instead speaks more generally: "Intelligence, patriotism, Christianity, and a firm reliance on Him, who has never yet forsaken this favored land, are still competent to adjust, in the best way, all our present difficulty." Prudence, sentiment, and religion having taken decidedly different forms in the slave-owner ruled states, the war came, and Lincoln's final argument, or really allusion, to the better angels of our nature fell unheard. The better angels of our nature adhere to the laws of nature and of nature's God, but the slave-owners, beginning with Senator Calhoun, had rejected the truths that the Founders had held to be self-evident. Without that standard—that all men are created equal—which Lincoln elsewhere calls the standard maxim of a free society, no other arguments for the conduct of a self-governing citizenry can prevail and the citizenry will depart from self-government and go to war with itself. And that is exactly what happened.

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Message to Congress in Special Session by Abraham Lincoln

July 4, 1861

Fellow-citizens of the Senate and House of Representatives:

Having been convened on an extraordinary occasion, as authorized by the Constitution, your attention is not called to any ordinary subject of legislation.

At the beginning of the present Presidential term, four months ago, the functions of the Federal Government were found to be generally suspended within the several States of South Carolina, Georgia, Alabama, Mississippi, Louisiana, and Florida, excepting only those of the Post Office Department.

Within these States, all the Forts, Arsenals, Dock-yards, Custom-houses, and the like, including the movable and stationary property in, and about them, had been seized, and were held in open hostility to this Government, excepting only Forts Pickens, Taylor, and Jefferson, on, and near

the Florida coast, and Fort Sumter, in Charleston harbor, South Carolina. The Forts thus seized had been put in improved condition; new ones had been built; and armed forces had been organized, and were organizing, all avowedly with the same hostile purpose.

The Forts remaining in the possession of the Federal government, in, and near, these States, were either besieged or menaced by warlike preparations; and especially Fort Sumter was nearly surrounded by well-protected hostile batteries, with guns equal in quality to the best of its own, and outnumbering the latter as perhaps ten to one. A disproportionate share, of the Federal muskets and rifles, had somehow found their way into these States, and had been seized, to be used against the government. Accumulations of the public revenue, lying within them, had been seized for the same object. The Navy was scattered in distant seas; leaving but a very small part of it within the immediate reach of the government. Officers of the Federal Army and Navy, had resigned in great numbers; and, of those resigning, a large proportion had taken up arms against the government. Simultaneously, and in connection, with all this, the purpose to sever the Federal Union, was openly avowed. In accordance with this purpose, an ordinance had been adopted in each of these States, declaring the States, respectively, to be separated from the National Union. A formula for instituting a combined government of these states had been promulgated; and this illegal organization, in the character of confederate States was already invoking recognition, aid, and intervention, from Foreign Powers.

Finding this condition of things, and believing it to be an imperative duty upon the incoming Executive, to prevent, if possible, the consummation of such attempt to destroy the Federal Union, a choice of means to that end became indispensable. This choice was made; and was declared in the Inaugural address. The policy chosen looked to the exhaustion of all peaceful measures, before a resort to any stronger ones. It sought only to hold the public places and property, not already wrested from the Government, and to collect the revenue; relying for the rest, on time, discussion, and the ballot-box. It promised a continuance of the mails, at government expense, to the very people who were resisting the government; and it gave repeated pledges against any disturbance to any of the people, or any of their rights. Of all that which a president might constitutionally, and justifiably, do in such a case, everything was foreborne, without which, it was believed possible to keep the government on foot.

On the 5th of March, (the present incumbent's first full day in office) a letter of Major Anderson, commanding at Fort Sumter, written on the 28th of February, and received at the War Department on the 4th of March, was, by that Department, placed in his hands. This letter expressed the professional opinion of the writer, that re-inforcements could not be thrown into that Fort within the time for his relief, rendered necessary by the limited supply of provisions, and with a view of holding possession of the same, with a force of less than twenty thousand good, and well-disciplined men. This opinion was concurred in by all the officers of his command; and their *memoranda* on the subject, were made enclosures of Major Anderson's letter. The whole was immediately laid before Lieutenant General Scott, who at once concurred with Major Anderson in opinion. On reflection, however, he took full time, consulting with other officers, both of the Army and the Navy; and, at the end of four days, came reluctantly, but decidedly, to the same conclusion as before. He also stated at the same time that no such sufficient force was then at the control of the Government, or could be raised, and brought to the ground, within the time when the provisions in the Fort would be exhausted. In a purely military

point of view, this reduced the duty of the administration, in the case, to the mere matter of getting the garrison safely out of the Fort.

It was believed, however, that to so abandon that position, under the circumstances, would be utterly ruinous; that the *necessity* under which it was to be done, would not be fully understood—that, by many, it would be construed as a part of a *voluntary* policy—that, at home, it would discourage the friends of the Union, embolden its adversaries, and go far to insure to the latter, a recognition abroad—that, in fact, it would be our national destruction consummated. This could not be allowed. Starvation was not yet upon the garrison; and ere it would be reached, *Fort Pickens*might be reinforced. This last, would be a clear indication of *policy,* and would better enable the country to accept the evacuation of Fort Sumter, as a military *necessity.* An order was at once directed to be sent for the landing of the troops from the Steamship Brooklyn, into Fort Pickens. This order could not go by land, but must take the longer, and slower route by sea. The first return news from the order was received just one week before the fall of Fort Sumter. The news itself was, that the officer commanding the Sabine, to which vessel the troops had been transferred from the Brooklyn, acting upon some *quasi* armistice of the late administration, (and of the existence of which, the present administration, up to the time the order was despatched, had only too vague and uncertain rumors, to fix attention) had refused to land the troops. To now re-inforce Fort Pickens, before a crisis would be reached at Fort Sumter was impossible—rendered so by the near exhaustion of provisions in the latter-named Fort. In precaution against such a conjuncture, the government had, a few days before, commenced preparing an expedition, as well adapted as might be, to relieve Fort Sumter, which expedition was intended to be ultimately used, or not, according to circumstances. The strongest anticipated case, for using it, was now presented; and it was resolved to send it forward. As had been intended, in this contingency, it was also resolved to notify the Governor of South Carolina, that he might expect an attempt would be made to provision the Fort; and that, if the attempt should not be resisted, there would be no effort to throw in men, arms, or ammunition, without further notice, or in case of an attack upon the Fort. This notice was accordingly given; whereupon the Fort was attacked, and bombarded to its fall, without even awaiting the arrival of the provisioning expedition.

It is thus seen that the assault upon, and reduction of, Fort Sumter, was, in no sense, a matter of self-defense on the part of the assailants. They well knew that the garrison in the Fort could, by no possibility, commit aggression upon them. They knew—they were expressly notified—that the giving of bread to the few brave and hungry men of the garrison, was all which would on that occasion be attempted, unless themselves, by resisting so much, should provoke more. They knew that this Government desired to keep the garrison in the Fort, not to assail them, but merely to maintain visible possession, and thus to preserve the Union from actual, and immediate dissolution—trusting, as herein-before stated, to time, discussion, and the ballot-box, for final adjustment; and they assailed, and reduced the Fort, for precisely the reverse object—to drive out the visible authority of the Federal Union, and thus force it to immediate dissolution.

That this was their object, the Executive well understood; and having said to them in the inaugural address, “You can have no conflict without being yourselves the aggressors,” he took pains, not only to keep this declaration good, but also to keep the case so free from the power of ingenious sophistry, as that the world should not be able to misunderstand it. By the affair at Fort

Sumter, with its surrounding circumstances, that point was reached. Then, and thereby, the assailants of the Government, began the conflict of arms, without a gun in sight, or in expectancy, to return their fire, save only the few in the Fort, sent to that harbor, years before, for their own protection, and still ready to give that protection, in whatever was lawful. In this act, discarding all else, they have forced upon the country, the distinct issue: "Immediate dissolution, or blood."

And this issue embraces more than the fate of these United States. It presents to the whole family of man, the question, whether a constitutional republic, or a democracy—a government of the people, by the same people—can, or cannot, maintain its territorial integrity, against its own domestic foes. It presents the question, whether discontented individuals, too few in numbers to control administration, according to organic law, in any case, can always, upon the pretences made in this case, or on any other pretences, or arbitrarily, without any pretence, break up their Government, and thus practically put an end to free government upon the earth. It forces us to ask: "Is there, in all republics, this inherent, and fatal weakness?" "Must a government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?"

So viewing the issue, no choice was left but to call out the war power of the Government; and so to resist force, employed for its destruction, by force, for its preservation.

The call was made; and the response of the country was most gratifying; surpassing, in unanimity and spirit, the most sanguine expectation. Yet none of the States commonly called Slave-states, except Delaware, gave a Regiment through regular State organization. A few regiments have been organized within some others of those states, by individual enterprise, and received into the government service. Of course the seceded States, so called, (and to which Texas had been joined about the time of the inauguration), gave no troops to the cause of the Union. The border States, so called, were not uniform in their actions; some of them being almost *for*the Union, while in others—as Virginia, North Carolina, Tennessee, and Arkansas—the Union sentiment was nearly repressed, and silenced. The course taken in Virginia was the most remarkable—perhaps the most important. A convention, elected by the people of that State, to consider this very question of disrupting the Federal Union, was in session at the capital of Virginia when Fort Sumter fell. To this body the people had chosen a large majority of *professed* Union men. Almost immediately after the fall of Sumter, many members of that majority went over to the original disunion minority, and, with them, adopted an ordinance for withdrawing the State from the Union. Whether this change was wrought by their great approval of the assault upon Sumter, or their great resentment at the government's resistance to that assault, is not definitely known. Although they submitted the ordinance, for ratification, to a vote of the people, to be taken on a day then somewhat more than a month distant, the convention, and the Legislature, (which was also in session at the same time and place) with leading men of the State, not members of either, immediately commenced acting, as if the State were already out of the Union. They pushed military preparations vigorously forward all over the state. They seized the United States Armory at Harper's Ferry, and the Navy-yard at Gosport, near Norfolk. They received—perhaps invited— into their state, large bodies of troops, with their warlike appointments, from the so-called seceded States. They formally entered into a treaty of temporary alliance, and co-operation with the so-called "Confederate States," and sent members

to their Congress at Montgomery. And, finally, they permitted the insurrectionary government to be transferred to their capital at Richmond.

The people of Virginia have thus allowed this giant insurrection to make its nest within her borders; and this government has no choice left but to deal with it, *where* it finds it. And it has the less regret, as the loyal citizens have, in due form, claimed its protection. Those loyal citizens, this government is bound to recognize, and protect, as being Virginia.

In the border States, so called—in fact, the middle states—there are those who favor a policy which they call "armed neutrality"—that is, an arming of those states to prevent the Union forces passing one way, or the disunion, the other, over their soil. This would be disunion completed. Figuratively speaking, it would be the building of an impassable wall along the line of separation. And yet, not quite an impassable one; for, under the guise of neutrality, it would tie the hands of the Union men, and freely pass supplies from among them, to the insurrectionists, which it could not do as an open enemy. At a stroke, it would take all the trouble off the hands of secession, except only what proceeds from the external blockade. It would do for the disunionists that which, of all things, they most desire—feed them well, and give them disunion without a struggle of their own. It recognizes no fidelity to the Constitution, no obligation to maintain the Union; and while very many who have favored it are, doubtless, loyal citizens, it is, nevertheless, treason in effect.

Recurring to the action of the government, it may be stated that, at first, a call was made for seventy-five thousand militia; and rapidly following this, a proclamation was issued for closing the ports of the insurrectionary districts by proceedings in the nature of Blockade. So far all was believed to be strictly legal. At this point the insurrectionists announced their purpose to enter upon the practice of privateering.

Other calls were made for volunteers, to serve three years, unless sooner discharged; and also for large additions to the regular Army and Navy. These measures, whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity; trusting, then as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress.

Soon after the first call for militia, it was considered a duty to authorize the Commanding General, in proper cases, according to his discretion, to suspend the privilege of the writ of habeas corpus; or, in other words, to arrest, and detain, without resort to the ordinary processes and forms of law, such individuals as he might deem dangerous to the public safety. This authority has purposely been exercised but very sparingly. Nevertheless, the legality and propriety of what has been done under it, are questioned; and the attention of the country has been called to the proposition that one who is sworn to "take care that the laws be faithfully executed," should not himself violate them. Of course some consideration was given to the questions of power, and propriety, before this matter was acted upon. The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty,

than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, *but one,* to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it? But it was not believed that this question was presented. It was not believed that any law was violated. The provision of the Constitution that "The privilege of the writ of habeas corpus, shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it," is equivalent to a provision—is a provision—that such privilege may be suspended when, in cases of rebellion, or invasion, the public safety *does* require it. It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now it is insisted that Congress, and not the Executive, is vested with this power. But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.

No more extended argument is now offered; as an opinion, at some length, will probably be presented by the Attorney General. Whether there shall be any legislation upon the subject, and if any, what, is submitted entirely to the better judgment of Congress.

The forbearance of this government had been so extraordinary, and so long continued, as to lead some foreign nations to shape their action as if they supposed the early destruction of our national Union was probable. While this, on discovery, gave the Executive some concern, he is now happy to say that the sovereignty, and rights of the United States, are now everywhere practically respected by foreign powers; and a general sympathy with the country is manifested throughout the world.

The reports of the Secretaries of the Treasury, War, and the Navy, will give the information in detail deemed necessary, and convenient for your deliberation, and action; while the Executive, and all the Departments, will stand ready to supply omissions, or to communicate new facts, considered important for you to know.

It is now recommended that you give the legal means for making this contest a short, and a decisive one; that you place at the control of the government, for the work, at least four hundred thousand men, and four hundred millions of dollars. That number of men is about one tenth of those of proper ages within the regions where, apparently, *all* are willing to engage; and the sum is less than a twenty-third part of the money value owned by the men who seem ready to devote the whole. A debt of six hundred millions of dollars now, is a less sum per head, than was the debt of our revolution, when we came out of that struggle; and the money value in the country, now bears even a greater proportion to what it was *then,* than does the population. Surely each man has as strong a motive *now,* to *preserve* our liberties, as each had *then,* to *establish* them.

A right result, at this time, will be worth more to the world, than ten times the men, and ten times the money. The evidence reaching us from the country, leaves no doubt, that the material for the work is abundant; and that it needs only the hand of legislation to give it legal sanction, and the

hand of the Executive to give it practical shape and efficiency. One of the greatest perplexities of the government, is to avoid receiving troops faster than it can provide for them. In a word, the people will save their government, if the government itself, will do its part, only indifferently well.

It might seem, at first thought, to be of little difference whether the present movement at the South be called "secession" or "rebellion." The movers, however, well understand the difference. At the beginning, they knew they could never raise their treason to any respectable magnitude, by any name which implies *violation* of law. They knew their people possessed as much of moral sense, as much of devotion to law and order, and as much pride in, and reverence for, the history, and government, of their common country, as any other civilized, and patriotic people. They knew they could make no advancement directly in the teeth of these strong and noble sentiments. Accordingly they commenced by an insidious debauching of the public mind. They invented an ingenious sophism, which, if conceded, was followed by perfectly logical steps, through all the incidents, to the complete destruction of the Union. The sophism itself is, that any state of the Union may, *consistently* with the national Constitution, and therefore*lawfully,* and *peacefully,* withdraw from the Union, without the consent of the Union, or of any other state. The little disguise that the supposed right is to be exercised only for just cause, themselves to be the sole judge of its justice, is too thin to merit any notice.

With rebellion thus sugar-coated, they have been drugging the public mind of their section for more than thirty years; and, until at length, they have brought many good men to a willingness to take up arms against the government the day *after* some assemblage of men have enacted the farcical pretence of taking their State out of the Union, who could have been brought to no such thing the day *before.*

This sophism derives much—perhaps the whole—of its currency, from the assumption, that there is some omnipotent, and sacred supremacy, pertaining to a *State*—to each State of our Federal Union. Our States have neither more, nor less power, than that reserved to them, in the Union, by the Constitution—no one of them ever having been a State *out* of the Union. The original ones passed into the Union even *before* they cast off their British colonial dependence; and the new ones each came into the Union directly from a condition of dependence, excepting Texas. And even Texas, in its temporary independence, was never designated a State. The new ones only took the designation of States, on coming into the Union, while that name was first adopted for the old ones, in, and by, the Declaration of Independence. Therein the "United Colonies" were declared to be "Free and Independent States"; but, even then, the object plainly was not to declare their independence of *one another,* or of the *Union;* but directly the contrary, as their mutual pledge, and their mutual action, before, at the time, and afterwards, abundantly show. The express plighting of faith, by each and all of the original thirteen, in the Articles of Confederation, two years later, that the Union shall be perpetual, is most conclusive. Having never been States, either in substance, or in name,*outside* of the Union, whence this magical omnipotence of "State rights," asserting a claim of power to lawfully destroy the Union itself? Much is said about the "sovereignty" of the States; but the word, even, is not in the national Constitution; nor, as is believed, in any of the State constitutions. What is a "sovereignty," in the political sense of the term? Would it be far wrong to define it "A political community, without a political superior"? Tested by this, no one of our States, except Texas,

ever was a sovereignty.And even Texas gave up the character on coming into the Union; by which act, she acknowledged the Constitution of the United States, and the laws and treaties of the United States made in pursuance of the Constitution, to be, for her, the supreme law of the land. The States have their *status* in the Union, and they have no other *legal status.* If they break from this, they can only do so against law, and by revolution. The Union, and not themselves separately, procured their independence, and their liberty. By conquest, or purchase, the Union gave each of them, whatever of independence, and liberty, it has. The Union is older than any of the States; and, in fact, it created them as States. Originally, some dependent colonies made the Union; and, in turn, the Union threw off their old dependence, for them, and made them States, such as they are. Not one of them ever had a State constitution, independent of the Union. Of course, it is not forgotten that all the new States framed their constitutions, before they entered the Union; nevertheless, dependent upon, and preparatory to, coming into the Union.

Unquestionably the States have the powers, and rights, reserved to them in, and by the National Constitution; but among these, surely, are not included all conceivable powers, however mischievous, or destructive; but, at most, such only, as were known in the world, at the time, as governmental powers; and certainly, a power to destroy the government itself, had never been known as a governmental—as a merely administrative power. This relative matter of National power, and State rights, as a principle, is no other than the principle of *generality,* and *locality.* Whatever concerns the whole, should be confided to the whole—to the general government; while, whatever concerns *only* the State, should be left exclusively, to the State. This is all there is of original principle about it. Whether the National Constitution, in defining boundaries between the two, has applied the principle with exact accuracy, is not to be questioned. We are all bound by that defining, without question.

What is now combatted, is the position that secession is *consistent* with the Constitution—is *lawful,* and *peaceful.* It is not contended that there is any express law for it; and nothing should ever be implied as law, which leads to unjust, or absurd consequences. The nation purchased, with money, the countries out of which several of these States were formed. Is it just that they shall go off without leave, and without refunding? The nation paid very large sums, (in the aggregate, I believe, nearly a hundred millions) to relieve Florida of the aboriginal tribes. Is it just that she shall now be off without consent, or without making any return? The nation is now in debt for money applied to the benefit of these so-called seceding States, in common with the rest. Is it just, either that creditors shall go unpaid, or the remaining States pay the whole? A part of the present national debt was contracted to pay the old debts of Texas. Is it just that she shall leave, and pay no part of this herself?

Again, if one State may secede, so may another; and when all shall have seceded, none is left to pay the debts. Is this quite just to creditors? Did we notify them of this sage view of ours, when we borrowed their money? If we now recognize this doctrine, by allowing the seceders to go in peace, it is difficult to see what we can do, if others choose to go, or to extort terms upon which they will promise to remain.

The seceders insist that our Constitution admits of secession. They have assumed to make a National Constitution of their own, in which, of necessity, they have either *discarded,* or *retained,* the right of secession, as they insist, it exists in ours. If they have

discarded it, they thereby admit that, on principle, it ought not to be in ours. If they have retained, it by their own construction of ours they show that to be consistent they must secede from one another, whenever they shall find it the easiest way of settling their debts, or effecting any other selfish, or unjust object. The principle itself is one of disintegration, and upon which no government can possibly endure.

If all the States, save one, should assert the power to *drive* that one out of the Union, it is presumed the whole class of seceder politicians would at once deny the power, and denounce the act as the greatest outrage upon State rights. But suppose that precisely the same act, instead of being called "driving the one out," should be called "the seceding of the others from that one," it would be exactly what the seceders claim to do; unless, indeed, they make the point, that the one, because it is a minority, may rightfully do, what the others, because they are a majority, may not rightfully do.These politicians are subtle, and profound, on the rights of minorities. They are not partial to that power which made the Constitution, and speaks from the preamble, calling itself "We, the People."

It may well be questioned whether there is, today, a majority of the legally qualified voters of any State, except perhaps South Carolina, in favor of disunion. There is much reason to believe that the Union men are the majority in many, if not in every other one, of the so-called seceded States. The contrary has not been demonstrated in any one of them. It is ventured to affirm this, even of Virginia and Tennessee; for the result of an election, held in military camps, where the bayonets are all on one side of the question voted upon, can scarcely be considered as demonstrating popular sentiment. At such an election, all that large class who are, at once, *for* the Union, and *against* coercion, would be coerced to vote against the Union.

It may be affirmed, without extravagance, that the free institutions we enjoy, have developed the powers, and improved the condition, of our whole people, beyond any example in the world. Of this we now have a striking, and an impressive illustration. So large an army as the government has now on foot, was never before known, without a soldier in it, but who had taken his place there, of his own free choice. But more than this: there are many single Regiments whose members, one and another, possess full practical knowledge of all the arts, sciences, professions, and whatever else, whether useful or elegant, is known in the world; and there is scarcely one, from which there could not be selected, a President, a Cabinet, a Congress, and perhaps a Court, abundantly competent to administer the government itself. Nor do I say this is not true, also, in the army of our late friends, now adversaries, in this contest; but if it is, so much better the reason why the government, which has conferred such benefits on both them and us, should not be broken up. Whoever, in any section, proposes to abandon such a government, would do well to consider, in deference to what principle it is, that he does it—what better he is likely to get in its stead—whether the substitute will give, or be intended to give, so much of good to the people. There are some foreshadowings on this subject. Our adversaries have adopted some Declarations of Independence, in which, unlike the good old one, penned by Jefferson, they omit the words "all men are created equal." Why? They have adopted a temporary national constitution, in the preamble of which, unlike our good old one, signed by Washington, they omit "We, the People," and substitute "We, the deputies of the sovereign and independent States." Why? Why this deliberate pressing out of view, the rights of men, and the authority of the people?

This is essentially a People's contest. On the side of the Union, it is a struggle for maintaining in the world, that form, and substance of government, whose leading object is, to elevate the condition of men—to lift artificial weights from all shoulders—to clear the paths of laudable pursuit for all—to afford all, an unfettered start, and a fair chance, in the race of life. Yielding to partial, and temporary departures, from necessity, this is the leading object of the government for whose existence we contend.

I am most happy to believe that the plain people understand, and appreciate this. It is worthy of note, that while in this, the government's hour of trial, large numbers of those in the Army and Navy, who have been favored with the offices, have resigned, and proved false to the hand which had pampered them, not one common soldier, or common sailor is known to have deserted his flag.

Great honor is due to those officers who remain true, despite the example of their treacherous associates; but the greatest honor, and most important fact of all, is the unanimous firmness of the common soldiers, and common sailors. To the last man, so far as known, they have successfully resisted the traitorous efforts of those, whose commands, but an hour before, they obeyed as absolute law. This is the patriotic instinct of the plain people. They understand, without an argument, that destroying the government, which was made by Washington, means no good to them.

Our popular government has often been called an experiment. Two points in it, our people have already settled—the successful *establishing,* and the successful *administering* of it. One still remains—its successful*maintenance* against a formidable internal attempt to overthrow it. It is now for them to demonstrate to the world, that those who can fairly carry an election, can also suppress a rebellion—that ballots are the rightful, and peaceful, successors of bullets; and that when ballots have fairly, and constitutionally, decided, there can be no successful appeal, back to bullets; that there can be no successful appeal, except to ballots themselves, at succeeding elections. Such will be a great lesson of peace; teaching men that what they cannot take by an election, neither can they take it by a war—teaching all, the folly of being the beginners of a war.

Lest there be some uneasiness in the minds of candid men, as to what is to be the course of the government, towards the Southern States, *after* the rebellion shall have been suppressed, the Executive deems it proper to say, it will be his purpose then, as ever, to be guided by the Constitution, and the laws; and that he probably will have no different understanding of the powers, and duties of the Federal government, relatively to the rights of the States, and the people, under the Constitution, than that expressed in the inaugural address.

He desires to preserve the government, that it may be administered for all, as it was administered by the men who made it. Loyal citizens everywhere, have the right to claim this of their government; and the government has no right to withhold, or neglect it. It is not perceived that, in giving it, there is any coercion, any conquest, or any subjugation, in any just sense of those terms.

The Constitution provides, and all the States have accepted the provision, that "The United States shall guarantee to every State in this Union a republican form of government." But, if a State

may lawfully go out of the Union, having done so, it may also discard the republican form of government; so that to prevent its going out, is an indispensable *means,* to the *end,* of maintaining the guaranty mentioned; and when an end is lawful and obligatory, the indispensable means to it, are also lawful, and obligatory.

It was with the deepest regret that the Executive found the duty of employing the war-power, in defense of the government, forced upon him. He could but perform this duty, or surrender the existence of the government. No compromise, by public servants, could, in this case, be a cure; not that compromises are not often proper, but that no popular government can long survive a marked precedent, that those who carry an election, can only save the government from immediate destruction, by giving up the main point, upon which the people gave the election. The people themselves, and not their servants, can safely reverse their own deliberate decisions. As a private citizen, the Executive could not have consented that these institutions shall perish; much less could he, in betrayal of so vast, and so sacred a trust, as these free people had confided to him. He felt that he had no moral right to shrink; nor even to count the chances of his own life, in what might follow. In full view of his great responsibility, he has, so far, done what he has deemed his duty. You will now, according to your own judgment, perform yours. He sincerely hopes that your views, and your action, may so accord with his, as to assure all faithful citizens, who have been disturbed in their rights, of a certain, and speedy restoration to them, under the Constitution, and the laws.

And having thus chosen our course, without guile, and with pure purpose, let us renew our trust in God, and go forward without fear, and with manly hearts.

1. Abraham Lincoln, "Message to Congress in Special Session," July 4, 1861, in Roy P. Basler, ed., *The Collected Works of Abraham Lincoln,* Vol. 4 (New Brunswick, NJ: Rutgers University Press, 1953), 421-41. Reprinted with the permission of the Abraham Lincoln Association, Springfield, IL.

Wednesday, May 22, 2013 – Essay #68 – Abraham Lincoln's Message to Congress in Special Session – Guest Essayist: Horace Cooper, legal commentator, contributor with Constituting America and adjunct fellow with the National Center for Public Policy Research

There has been much discussion about the reach and scope of executive power. While certainly Presidents Washington and Jefferson provide good lessons about what would be accepted practice from an executive, perhaps no other President besides Lincoln gives as extensive a model of executive authority.

To start, President Lincoln responded to the April attack on Ft Sumter and the growing secessionist movement by putting executive power front and center. The Civil War started during the Congressional recess and President Lincoln would prosecute the North's response for

nearly 3 months before calling Congress into special session. Note the Civil War would be the most significant challenge facing the United States since the War of 1812 with Britain.

In Lincoln's Congressional address he makes his case for the actions he's taking by listing to Congress how the situation ultimately had come about. Even after nearly 3 months at war, he feels it necessary to recount his interest in reconciling the "confederates" through dialogue and patient counseling.

"The policy chosen looked to the exhaustion of all peaceful measures, before a resort to any stronger ones. It sought only to hold the public places and property, not already wrested from the Government, and to collect the revenue; relying for the rest, on time, discussion, and the ballot-box. It promised a continuance of the mails, at government expense, to the very people who were resisting the government; and it gave repeated pledges against any disturbance to any of the people, or any of their rights. Of all that which a president might constitutionally, and justifiably, do in such a case, everything was foreborne, without which, it was believed possible to keep the government on foot."

Lincoln also explained that even as things escalated to armed conflict, he had sought to minimize provocation.

"As had been intended, in this contingency, it was also resolved to notify the Governor of South Carolina, that he might expect an attempt would be made to provision the Fort; and that, if the attempt should not be resisted, there would be no effort to throw in men, arms, or ammunition, without further notice, or in case of an attack upon the Fort. This notice was accordingly given; whereupon the Fort was attacked, and bombarded to its fall, without even awaiting the arrival of the provisioning expedition."

Lincoln explains that this conflict that was taking place was not because the Union provoked action – precisely the opposite. Nor was it because the Union was unwilling to negotiate and use democratic persuasion. It was because the "confederates" had no desire to do so.

"It is thus seen that the assault upon, and reduction of, Fort Sumter, was, in no sense, a matter of self-defense on the part of the assailants. They well knew that the garrison in the Fort could, by no possibility, commit aggression upon them. They knew—they were expressly notified—that the giving of bread to the few brave and hungry men of the garrison, was all which would on that occasion be attempted, unless themselves, by resisting so much, should provoke more….. trusting, as herein-before stated, to time, discussion, and the ballot-box, for final adjustment; and they assailed, and reduced the Fort, for precisely the reverse object—to drive out the visible authority of the Federal Union, and thus force it to immediate dissolution."

Lincoln then turns to perhaps the most important issue involving the Civil War, whether the secessionist movement was legal. He explains that in a republic – a democracy that operates under rules of law – those in the minority are not supposed to be able to dissolve the government merely because they don't approve of its actions.

"And this issue embraces more than the fate of these United States. It presents to the whole

family of man, the question, whether a constitutional republic, or a democracy—a government of the people, by the same people—can, or cannot, maintain its territorial integrity, against its own domestic foes. It presents the question, whether discontented individuals, too few in numbers to control administration, according to organic law, in any case, can always, upon the pretences made in this case, or on any other pretences, or arbitrarily, without any pretence, break up their Government, and thus practically put an end to free government upon the earth."

Presumably the republic is accountable to the whole of the people. And if a majority of the people were to decide the government needed changing or evening dissolving, they certainly could. But in this case, Lincoln says there is a disaffected minority. Lincoln asks how any republic could operate if at any time a minority could dissolve either the whole government or seize sizable territorial parts and simply announce they were no longer part of the whole. One can imagine a situation where a resident of New York or Rhode Island owns a factory in Georgia. If Georgia suddenly became a foreign country over the objections of the majority of the population – how would the Rhode Islander's rights be protected?

In fact wouldn't every citizen's rights be jeopardized if their divorce, lawsuit, claim on property, campaign for political office or any other right and privilege of citizenship could be stripped if a minority could simply declare the sovereign government has come to an end or if that minority could seize valuable land and assets and declare them now part of a new foreign government.

By the way, if that principle were to hold, why not allow this minority to transfer the assets into the hands of an actual enemy? Why couldn't the secessionists claim that they were returning the land and assets to England?

This then leads Lincoln to his conclusion. War.

So viewing the issue, no choice was left but to call out the war power of the Government; and so to resist force, employed for its destruction, by force, for its preservation.

After making his case to Congress that war was inevitable, Lincoln takes time to give a very particularized detailing of the actions he's taken to ensure that the war effort would be successful. It is here that many of the executive actions can be seen which demonstrate the scope and extent of executive authority. Lincoln called for volunteers in the militia and sought to dramatically increase the size of the army and navy saying that "Congress would readily ratify" these decisions when they came back from recess.

Along with issuing an order allowing the military to imprison insurrectionists and those aiding them at will (suspending the writ of habeas corpus).

Next Lincoln turns back to the motives of what he calls the "rebellion." Lincoln calls the argument that any state has the right to withdraw from the Union a "sophism."

"They invented an ingenious sophism, which, if conceded, was followed by perfectly logical steps, through all the incidents, to the complete destruction of the Union. The sophism itself is, that any state of the Union may, consistently with the national Constitution, and

thereforelawfully, and peacefully, withdraw from the Union, without the consent of the Union, or of any other state. The little disguise that the supposed right is to be exercised only for ***just cause, themselves to be the sole judge of its justice****, is too thin to merit any notice."*

In other words, instead of the litany of reasons the Founders presented to Britain regarding the revolution – imprisoning foes, dismissing their duly elected legislature, confiscating unpopular newspapers, restricting access to firearms even from colonists in dangerous locations, and taxing the colonies without providing them representation – the rebellion essentially had one complaint. Too many Americans opposed slavery on moral grounds and now after the elections that was represented in the executive branch. Moreover, this view might one day become a supermajority in the legislative branch. That super-majority might pass a constitutional amendment that might ban slavery.

In Lincoln's mind this one policy difference was not tyranny and surely didn't justify the dissolution of the union or the loss of any of the Union's territory. This was an issue that should be resolved by political discourse. From a practical perspective, there were inherent problems with the notion that any state could secede at any point for any reason.

"Again, if one State may secede, so may another; and when all shall have seceded, none is left to pay the debts. Is this quite just to creditors? Did we notify them of this sage view of ours, when we borrowed their money?"

And Lincoln also explains that even if this principle were accepted, what does one do about the fact that it was likely that a majority of the voters in the seceded states opposed secession?

"It may well be questioned whether there is, today, a majority of the legally qualified voters of any State, except perhaps South Carolina, in favor of disunion. There is much reason to believe that the Union men are the majority in many, if not in every other one, of the so-called seceded States. The contrary has not been demonstrated in any one of them. It is ventured to affirm this, even of Virginia and Tennessee; for the result of an election, held in military camps, where the bayonets are all on one side of the question voted upon, can scarcely be considered as demonstrating popular sentiment. At such an election, all that large class who are, at once, for the Union, and against coercion, would be coerced to vote against the Union."

Lincoln closes his address with a strong proclamation for the U.S. Constitution and the need to defend the American union.

The Constitution provides, and all the States have accepted the provision, that "The United States shall guarantee to every State in this Union a republican form of government." Lincoln explains:

But, if a State may lawfully go out of the Union, having done so, it may also discard the republican form of government; so that to prevent its going out, is an indispensable means, to the end, of maintaining the guaranty mentioned; and when an end is lawful and obligatory, the indispensable means to it, are also lawful, and obligatory.

Finally, Lincoln explains that the "confederates" threaten the whole notion of self-government

through a republic if the minority can simply leave or insist that the majority reverse a course it is legally entitled to take.

" .....no popular government can long survive a marked precedent, that those who carry an election, can only save the government from immediate destruction, by giving up the main point, upon which the people gave the election. "

Horace Cooper is a legal commentator, a contributor with Constituting American and adjunct fellow with the National Center for Public Policy Research.

The Emancipation Proclamation by Abraham Lincoln

January 1, 1863

By the President of the United States of America:

A Proclamation.

Whereas, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and sixty-two, a proclamation was issued by the President of the United States, containing, among other things, the following, to wit:

"That on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, all persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free; and the Executive Government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom.

"That the Executive will, on the first day of January aforesaid, by proclamation, designate the States and parts of States, if any, in which the people thereof, respectively, shall then be in rebellion against the United States; and the fact that any State, or the people thereof, shall on that day be, in good faith, represented in the Congress of the United States by members chosen thereto at elections wherein a majority of the qualified voters of such State shall have participated, shall, in the absence of strong countervailing testimony, be deemed conclusive evidence that such State, and the people thereof, are not then in rebellion against the United States."

Now, therefore I, Abraham Lincoln, President of the United States, by virtue of the power in me vested as Commander-in-Chief, of the Army and Navy of the United States in time of actual armed rebellion against authority and government of the United States, and as a fit and necessary war measure for suppressing said rebellion, do, on this first day of January, in the year of our Lord one thousand eight hundred and sixty-three, and in accordance with my purpose so to do

publicly proclaimed for the full period of one hundred days, from the day first above mentioned, order and designate as the States and parts of States wherein the people thereof respectively, are this day in rebellion against the United States, the following, to wit:

Arkansas, Texas, Louisiana, (except the Parishes of St. Bernard, Plaquemines, Jefferson, St. Johns, St. Charles, St. James, Ascension, Assumption, Terrebonne, Lafourche, St. Mary, St. Martin, and Orleans, including the City of New Orleans) Mississippi, Alabama, Florida, Georgia, South-Carolina, North-Carolina, and Virginia, (except the forty-eight counties designated as West Virginia, and also the counties of Berkley, Accomac, Northampton, Elizabeth-City, York, Princess Ann, and Norfolk, including the cities of Norfolk and Portsmouth); and which excepted parts are, for the present, left precisely as if this proclamation were not issued.

And by virtue of the power, and for the purpose aforesaid, I do order and declare that all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free; and that the Executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons.

And I hereby enjoin upon the people so declared to be free to abstain from all violence, unless in necessary self-defense; and I recommend to them that, in all cases when allowed, they labor faithfully for reasonable wages.

And I further declare and make known, that such persons of suitable condition, will be received into the armed service of the United States to garrison forts, positions, stations, and other places, and to man vessels of all sorts in said service.

And upon this act, sincerely believed to be an act of justice, warranted by the Constitution, upon military necessity, I invoke the considerate judgment of mankind, and the gracious favor of Almighty God.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington, this first day of January, in the year of our Lord one thousand eight hundred and sixty-three, and of the Independence of the United States of America the eighty-seventh.

By the President:

Abraham Lincoln

William H. Seward, *Secretary of State.*

1. Abraham Lincoln, "Emancipation Proclamation," January 1, 1863, in Roy P. Basler, ed., *The Collected Works of Abraham Lincoln,* Vol. 6 (New Brunswick, NJ: Rutgers University Press, 1953), 28–30. Reprinted with the permission of the Abraham Lincoln Association,

Springfield, IL.

Thursday, May 23, 2013 – Essay #69 – The Emancipation Proclamation – Scot Faulkner, Former Chief Administrative Officer of the U.S. House of Representatives and currently President of Friends of Harpers Ferry National Historical Park

On January 1, 1863, President Abraham Lincoln's right hand was trembling. He had spent the morning shaking hundreds of hands as part of the traditional New Year's Day greetings at the White House. He remarked to Secretary of State, William Seward, that, "if my signature wavers they will say I was afraid to sign it." He then took up his pen and wrote his name firmly on the Emancipation Proclamation. As Seward co-signed the document, Lincoln mused, "Seward, if I am to be remembered in history at all, it will probably be in connection with this piece of paper". [1]

The Emancipation Proclamation was a masterful document in that it accomplished so much while preserving strict constitutional principles. Lincoln was first and foremost an attorney. He understood the need for government to act based upon the Constitution, which he had sworn to uphold, "I have never understood that the Presidency conferred upon me an unrestricted right to act officially upon this judgment and feeling [that slavery is wrong]…I understood…that in ordinary course of civil administration this oath even forbade me to practically indulge my primary abstract judgment on the moral question of slavery." [2]

The reason the Emancipation Proclamation intentionally has, "all the moral grandeur of a bill of lading" is that it is a, "narrowly justified executive action taken by the commander-in-chief of the armed services of the United States under the power granted him only in wartime, doing something he absolutely could not have done in peacetime, or merely on the basis of his own opinion." [3]

Lincoln's act was bold and reflected his keen understanding of the Emancipation Proclamation as a pivotal moment in the evolution of public policy regarding slavery and its abolition.

In the mid-1850s, the Republican Party brought together diverse factions from the splintering Democratic Party and the imploding Whig Party. While the "radicals" wanted immediate and universal abolition of slavery everywhere, the centrist position focused on controlling or preventing the expansion of slavery into new territories. Gerrit Smith, one of the financial backers of John Brown's paramilitary activities on behalf of abolition in both Kansas and at Harpers Ferry[4], derisively declared, "The Republican party refuses to oppose slavery where it is, and opposes it only where it is not." [5]

The Republican platforms of 1856 and 1860 assertively opposed expansion of slavery into the territories, but remained silent on outright abolition within existing states. At his 1861 Inauguration, Lincoln confronted seven southern states that had already seceded and the possible secession of eight more, which included the four key Border States. Nearly a third of his

Inaugural Address was spent assuring these states that he swore an oath to defend the Constitution and the Constitution allowed slavery in existing states, "I add, too, that all the protection which, consistently with the Constitution and the laws, can be given will be cheerfully given to all the States when lawfully demanded, for whatever cause—as cheerfully to one section as to another." He went onto to provide assurances that, "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so." [6]

Lincoln's assurances were designed to "buy time" for his administration to form. They also reflected the political reality that few in the North wanted a war based solely on emancipating slaves. [7]

Political realities were quickly overwhelmed by military ones. The moment Union forces occupied southern territory, slaves flocked to them in the hopes of gaining immediate freedom. The first such action occurred at Fort Monroe in Virginia on May 24, 1861. General Benjamin Butler established the concept of "contraband" whereby escaped slaves would be welcomed into Northern armies and used as workers, "as I would for any other property of a private citizen which the exigencies of the service seemed to require." As a lawyer, Butler further invoked the concept that property used in a crime (in this case an illegal rebellion) can "be confiscated as "contraband" by legal authorities." [8]

Butler's precedent setting action led to a rapid evolution of Northern policy on freeing slaves. On August 6, 1861, Lincoln signed the First Confiscation Act, which authorized the confiscation of any Confederate property by Union forces ("property" included slaves). This meant that all slaves that fought or worked for the Confederate military were freed whenever they were "confiscated" by Union troops.

In October 1861, Secretary of War, Simon Cameron, expanded upon Congressional policy in his annual report, "Those who make war against the Government justly forfeit all rights of property…It is clearly a right of the Government to arm slaves, when it may become necessary, as it is to use gun-powder taken from the enemy." [9]

Northern politicians were uniting around the concept that slavery was the life blood of the Confederate war effort. On January 14, 1862, Rep. George Julian (R-Indiana) asserted, "When I say that this rebellion has its source and life in slavery, I only repeat a truism. [The four million slaves] cannot be neutral. As laborers, if not soldiers, they will be the allies of the rebels, or of the Union." [10] This sentiment inspired seven partial emancipation bills and the Second Confiscation Act. [11]

By the summer of 1862, the Second Confiscation Act was passed. It stated that any Confederate official, military or civilian, who did not surrender within sixty days of the act's passage, would have their slaves freed. While this was only applicable to Confederate areas that were already occupied by the Union Army, it did state that all slaves who took refuge in Union areas were "captives of war" and would be set free.

Emboldened by Congressional and Presidential policies, Union field commanders pushed the

boundaries of interpretation as they moved deeper into Southern territory. On May 9, 1862, General David Hunter issued, "a sweeping declaration of martial law abolishing slavery in all three states constituting his "Department of the South." [12] Lincoln quickly reversed this unilateral act, but added that while Hunter's order might, "become a necessity indispensible to the maintenance of the [Union] government," it was a decision "I reserve to myself". [13]

Emancipation was being viewed as a means to victory. Lincoln began to also view it as an end. His efforts to cajole Border State politicians were going no where. Military reality was making his accommodation less and less necessary. On July 13, 1862 the Border State leaders issued a manifesto rejecting Lincoln's last proposal. On that same day, Lincoln privately told Seward and Gideon Welles, his Secretary of the Navy, that he was ready to issue the Emancipation Proclamation. [14]

Geopolitics was also entering the equation. Lincoln had kept his public pronouncements on slavery to a minimum over concern for Border State loyalty. European nations viewed Lincoln's tepid pronouncements as a license to trade with the Confederacy under international law. British and French neutrality was skirted by highly creative Confederate agents and European sympathizers. As long as America's civil war was officially about opposing Southern independence, many British liberal and business interests rallied to the Southern cause. As the war wore on, top European political leaders wished to rebuild their economies, which were being damaged by the conflict. Recognition of the Confederacy, and mediating a peace, were actively debated within the government of British Prime Minister Lord Henry Palmerston. [15]

Lincoln and Seward realized emancipating the slaves would not only alter the dynamic of the war in America, but also end European support for recognition and intervention. England had abolished slavery throughout its empire in 1833 and would not side with a slave nation if the goal of war became emancipation. Lincoln was well aware of this geopolitical chess board, "Emancipation would weaken the rebels by drawing off their laborers and would help us in Europe, and convince them that we are incited by something more than ambition". [16]

On July 22, 1862, Lincoln called a Cabinet meeting to announce his intention to issue the Emancipation Proclamation. It was framed as an imperative of war, [17] "by virtue of the power in me vested as Commander-in-Chief, of the Army and Navy of the United States in time of actual armed rebellion against the authority and government of the United States, and as a fit and necessary war measure for suppressing said rebellion." Lincoln also justified, "upon this act, sincerely believed to be an act of justice, warranted by the Constitution, upon military necessity…" Another significant military aspect of the Emancipation opened the door for a multi-racial army and society, "And I further declare and make known, that such persons of suitable condition, will be received into the armed service of the United States to garrison forts, positions, stations, and other places, and to man vessels of all sorts in said service."

Seward raised concerns over the timing of the Proclamation; citing recent Confederate victories might make its issuance look like an act of desperation, "our last shriek, on the retreat." [18] It was decided to wait for a Northern victory so that the Emancipation could be issued from a position of strength.

Striving for a game-changing victory became the priority for both sides. The summer of 1862 witnessed a series of brilliant Confederate victories. British Prime Minister Palmerston agreed to finally hold a Cabinet meeting to formally decide on recognition and mediation. [19] General Lee wished to tip the scales further by engineering a Confederate victory on northern soil. In essence, he wanted a victory similar to the 1777 Battle of Saratoga that brought French recognition and aid to America. [20]

The race was on, turning the siege of Harpers Ferry (September 12-15, 1862), the Battle of South Mountain (September 14, 1862), and Antietam (September 17, 1862) into the only battles of the war that had global impact. The final battle of Antietam forced Lee and his army back into Virginia. This was enough for Lincoln to issue his Preliminary Emancipation Proclamation, five days after battle on September 22, 1862. When news of the Confederate retreat reached England, support for recognition collapsed, extinguishing, "the last prospect of European intervention." [21] News of the Emancipation Proclamation launched "Emancipation Meetings" throughout England. Support for a Union victory rippled through even pacifist Anti-Slavery groups who asserted abolition, "was possible only in a united America." [22]

Lincoln accomplished an historic Trifecta. He revolutionized the Union war effort by bringing 200,000 blacks into the Union army. He isolated the Confederacy from Europe, making Union victory inevitable. He also strategically shifted public policy within the parameters of constitutional government and laid the ground work for the immediate and universal abolition of slavery everywhere in America by amending the Constitution. For this masterful strategy of removing slavery strictly within the bounds of law Lincoln has been declared America's "last Enlightenment politician". [23]

Scot Faulkner served as the first Chief Administrative Officer of the U.S. House of Representatives and is currently President of Friends of Harpers Ferry National Historical Park. You may read his columns at http://citizenoversight.blogspot.com

NOTES

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Gettysburg Address by Abraham Lincoln

November 19, 1863

Four score and seven years ago our fathers brought forth, on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.

Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived, and so dedicated, can long endure. We are met on a great battle-field of that war. We have come to dedicate a portion of that field, as a final resting-place for those who here gave their lives, that that nation might live. It is altogether fitting and proper that we should do this.

But, in a larger sense, we can not dedicate—we can not consecrate—we can not hallow—this ground. The brave men, living and dead, who struggled here, have consecrated it far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here. It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they here gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.

1. Abraham Lincoln, "Gettysburg Address," November 19, 1863, in Roy P. Basler, ed., *The Collected Works of Abraham Lincoln,* Vol. 7 (New Brunswick, NJ: Rutgers University Press, 1953), 23. Reprinted with the permission of the Abraham Lincoln Association, Springfield, IL.

Friday, May 24, 2013 – Essay #70 – The Gettysburg Address by Abraham Lincoln – Guest Essayist: Professor Will Morrisey, William and Patricia LaMothe Chair in the United States Constitution at Hillsdale College

What Is the "New Birth of Freedom"?

Lincoln came to the Gettysburg field of the dead and spoke of "a new birth of freedom." What did he mean by it?

A lot of men killed a lot of other men at Gettysburg during those three days in July of 1863. But that happened more than once in the Civil War: at Antietam, in the Wilderness, at Cold Harbor, and many other places. People remember those places and those battles, too, but not the way they remember Gettysburg.

Maybe because this was *the* battle? The one in which the Confederate States of America lost not just a battle but began to lose the war? But why did they lose this battle and that war?

They lost militarily, and also lost the *way of life* they were defending because General Lee miscalculated. He didn't get his arithmetic right. As we'd put it today, in his heart he wanted to stop `playing defense' and `go on offense.' But he didn't have the numbers of troops he needed to go on offense. His heart overbore his head. Cemetery Ridge became the graveyard of the Southern regime, the Southern way of life.

General Sherman did his arithmetic right later on, when he made Georgia howl, breaking the Southern regime by destroying the plantations that had animated it. Before the fighting started, Sherman had tried to tell the Confederates that they had their arithmetic wrong. In Louisiana in 1860 he told Southerners that war is not as glorious as you think; it's not an aristocratic idyll of knights in shining armor. A year before the presidential election of 1860, speaking in Cincinnati, Lincoln had said that, too: the Northern states have the Southern states outnumbered, and Northerners will fight no less valiantly than Southerners will do, if it comes to fighting.

Southerners didn't believe it. At Gettysburg they began to believe Yankee arithmetic.

Great military commanders show us something about ourselves, as they make their calculations. They show us that to win a war you must do a uniquely human thing: counting. You must exhibit your humanity while simultaneously treating men, your fellow human beings, like ciphers in the cruelest of equations. You must deploy the most distinctively human capacity endowed by God, reason, in sending your men, for whom you bear moral responsibility, to slaughter other men as if they were animals, and to risk their being slaughtered by those they intend to kill.

And as the commander of such commanders, as the Commander in Chief of such calculating men, *You*, Abraham Lincoln, and *You*, Jefferson Davis, must give a human—that is to say a rational—justification for this military arithmetic, which is amoral in itself. We remember Gettysburg because there it was that Lincoln gave to his fellow citizens exactly such a justification in the greatest American speech ever, in defense of the purpose for which the speaker commanded men to fight the greatest American battle of the greatest American war. America, the country that declared its independence in a logical syllogism, a rational argument whose premise was that all men are subject to God's arithmetic, that all men are created equal and thus may need to kill in order to defend their right to life and their right to a way of life that is fully human: America and the reason for America were defended by this great action, which Lincoln then vindicated in his great speech.

To understand what Lincoln meant by a new birth of freedom we first need to know what Lincoln meant by self-government. Lincoln once said that self-government "lies at the bottom of all my ideas of just government, from beginning to end." In some of his earliest public statements, Lincoln defined republican or representative government in America as consisting of "a political edifice of liberty and equal rights" secured by the consent of the governed—a security that rests on the "duty" of any would-be representative of the people to "make known" to "the people whom [he] propose[s] to represent" his "sentiments with regard to human affairs." Self-government rests on that natural right of the people to justice, but also on the need for

government by popular consent in order that justice be done, and on the consequent obligation of the people's would-be governors to disclose the opinions that will guide them when in office.

But if popular consent and natural right conflict? Is there not a tension in the Declaration of Independence between unalienable right and government by the consent of the governed? Theoretically, one can solve this problem by defining `consent' as `*rational* assent.' Genuine consent must be rational; it must be founded upon the self-evident truth that all men are created equal. But this theoretical solution scarcely solves the practical, political problem of squaring consent with justice, a problem that will endure so long as self-government exists. Government of the people by the people—popular self-government—might not work out as government *for* the people, or at least not for all of them, if the majority enslaves the minority.

One of the Founders set down his thoughts on this dilemma in its most dangerous American manifestation. As he prepared a series of essays for publication in 1791, Congressman James Madison wrote a note to himself. "In proportion as slavery prevails in a State, the Government, however democratic in name, must be aristocratic in fact. The power lies in a part [of the people] instead of the whole, in the hands of property, not of numbers." He drew a telling conclusion: "The Southern States of America," very much including his native Virginia, "are on the same principle aristocracies." As an architect of the new Constitution, Madison knew that Article IV, Section 4 says, "The United States shall guarantee to every State in this Union a Republican Form of Government." He knew, therefore, that the regime of the American Union contained a self-contradiction—the potential for disunion. With most Americans of his generation, he hoped that the eventual removal of slavery would remove this potentially fatal flaw. In fact many states did put slavery on the road to extinction in that first, founding generation. But his "Southern States" did not.

Slavery denied self-government to a substantial portion of the people living in America. The crisis over slavery threw into hazard republican government itself by raising in practice an old philosophic controversy: to secure natural rights, must government overawe the people, lest they break out into anarchy or coalesce into majority tyranny? Or is a very powerful government itself a greater danger to natural rights than the anarchy and popular tyranny it prevents? In Lincoln's words, "Is there, in all republics, this inherent, fatal weakness? Must a government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?" No parchment enumeration of civil rights can eliminate that problem.

Lincoln came to the battlefield cemetery at Gettysburg to say in public what Madison in his prudence could only write to himself. Lincoln again raised the question of popular self-government in speech only after American soldiers, in a demonstration of military arithmetic, had answered it by their actions. He came to the cemetery to talk about the beginning of American political life. In declaring their independence, their self-government, in 1776, "our fathers," the founders, "brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal." Conceived, brought forth: this is the language of childbirth. It is a paradoxical childbirth, associated with fathers, not mothers. Somehow the signers of the Declaration of Independence were fathers *and* mothers.

"Conceived" and "brought forth" are from Numbers 11, the King James Version. Moses asks his

angry God, “Was it I who conceived this people? Was it I who brought them forth, that thou shouldest say to me, `Carry them in thy bosom as a nursing father beareth the suckling child, unto the land which thou swearest unto their fathers?” Americans, the new Israelites, were brought forth from Egypt—the British Empire—and from the tyranny of Pharaoh—George III. Moses or Washington could not bear this burden alone. God tells Moses to gather the elders, and say to the people, “Consecrate yourselves for tomorrow, and you shall eat meat, for you have wept in the ears of the Lord….” The Lord’s Spirit will be upon not Moses alone, but upon the elders. Moses wishes that the Spirit of prophecy were upon the whole people. In America, the elders were of course the founders; Lincoln, like Washington before him, wished that the spirit of independence, of liberty and equality, were upon the whole people.

The Declaration calls the Americans a *people*—a people who, like the Israelites, existed before and after their independence. Lincoln described the bringing for of a new *nation*; a nation therefore must mean an independent people. This independent people was conceived in liberty. Long before independence, before George III and parliament designed to reduce them to slavery, Americans had enjoyed *civil* liberty—limited self-government over their own `internal affairs.’ The new nation was “dedicated to the proposition that all men were created equal.” In part because Britain had required some colonies to permit slavery and, as recently as 1769, had vetoed a colonial enactment to suppress the slave trade, Americans had not secured the God-endowed unalienable rights inherent in human equality; the slaves obviously had not secured those rights, *but neither had the free.* My violation of your natural equality potentially threatens mine (even if mine seems secure) because in permitting the violation of your natural equality I have in practice contradicted the *principle of* natural equality. That principle applies to me as well as to you, as a creature of the same species, the same natural rank. By asserting their full, political self-government on the foundation of the principle of natural equality, Americans rejected the principle of slavery even as they tolerated its practice, and for Lincoln as for the founders this was crucial.

The self-evident truth of human equality enunciated in the Declaration has become a *proposition* in Lincoln’s formulation. He means not a mere statement but the premise of a syllogism or an axiom of a geometric proof; “the principles of Jefferson are the definitions and axioms of a free society,” he wrote. The nursing fathers of the Declaration held the truth of human equality to be self-evident. But Americans since then, like the Israelites, had disregarded the laws of nature and of Nature’s God. “When we were the political slaves of King George, and wanted to be free, we called the maxim, `all men are created equal,’ a self-evident truth; but now when we are grown fat, and have lost all dread of being slaves ourselves, we have become so greedy to be *masters* that we call the same maxim `a self-evident lie’”—as one antebellum pro-slavery politician indeed had done. The proposition, maxim, or axiom of the Declaration is no less self-evident now, Lincoln maintains, but it is so to fewer people, as too many are blinded by passion, like little King Georges. The loss of the dread of tyrants leads a selfish people to insufferable pride. What they’ve really lost is their fear of God, who created men and endowed them with unalienable rights, and who allows tyrants to serve as the scourge of the wicked. Americans were losing their self-mastery in their chase for mastery over others. To correct them, the war in its action and Lincoln in his speech must show how cruel the axioms of moral geometry can be, when violated and when defended against their violators.

The Civil War—the judgment of God upon the new Israelites—tested "whether that nation, or any nation so conceived and so dedicated can long endure." Israel old and new are particular nations with universal significance. A republic, a nation dedicated to the protection of equal natural rights, requires popular sovereignty. Constitutional union founded upon popular rights cannot survive an appeal from lawful ballots—the election of Lincoln in accordance with the Constitution—to unlawful bullets, if those bullets go unanswered in deeds and in words. Even as labor is prior to capital, the people are prior to government; only a government that oppresses its people, attacks the people's own laws, can justly be overthrown by force. The people of Israel escaped Egypt, the tyrannical rule of Pharaoh, but did not thereby release themselves from the law of God. The people of America escaped the British Empire, the tyrannical rule of George III, but not release themselves from the law of God. Just the contrary: to survive as a republic they had to bind themselves all the more closely to the life-giving, rights-endowing God; for, Lincoln explains, "the sheep and the wolf are not agreed upon the definition of liberty." What is self-evident to the sheep is not self-evident to the wolf, which would use the lives of the sheep for himself and, in human clothing, destroy political liberty on the same principle. As the duly elected shepherd, Lincoln must speak and act to prevent the sheep from beginning to think like the wolf, for in doing so they unwittingly collaborate in their own eventual destruction.

The consecration of the Gettysburg cemetery by the people—the consecrating of themselves, for tomorrow, when the war will be over—reaffirmed the people's dedication to the `old' birth of freedom, to "the unfinished work" of the nursing fathers who brought them forth from Egypt but did not live to see them enter the Promised Land. Such dedication meant that the Spirit of the Lord—for the new Israelites, the once-again self-evident truths of the Declaration—will be upon not only the nursing fathers but upon all the people. The *new* birth of freedom, witnessed at the Gettysburg field of the dead, meant the emancipation of the slaves—one-eighth of the American population—and the *full* emancipation of freemen, including the former slave masters, who had contradicted their own right to rule by claiming a universal truth as if it were a narrow, particular entitlement.

Will Morrisey holds the William and Patricia LaMothe Chair in the United States Constitution at Hillsdale College; his books include Self-Government, The American Theme: Presidents of the Founding and Civil War and The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government.

Second Inaugural Address by Abraham Lincoln

March 4, 1865

Fellow Countrymen:

At this second appearing to take the oath of the presidential office, there is less occasion for an extended address than there was at the first. Then a statement, somewhat in detail, of a course to be pursued, seemed fitting and proper. Now, at the expiration of four years, during which public declarations have been constantly called forth on every point and phase of the great contest which still absorbs the attention, and engrosses the energies of the nation, little that is new could be

presented. The progress of our arms, upon which all else chiefly depends, is as well known to the public as to myself; and it is, I trust, reasonably satisfactory and encouraging to all. With high hope for the future, no prediction in regard to it is ventured.

On the occasion corresponding to this four years ago, all thoughts were anxiously directed to an impending civil-war. All dreaded it—all sought to avert it. While the inaugural address was being delivered from this place, devoted altogether to *saving* the Union without war, insurgent agents were in the city seeking to *destroy* it without war—seeking to dissolve the Union, and divide effects, by negotiation. Both parties deprecated war; but one of them would *make* war rather than let the nation survive; and the other would *accept* war rather than let it perish. And the war came.

One eighth of the whole population were colored slaves, not distributed generally over the Union, but localized in the Southern part of it. These slaves constituted a peculiar and powerful interest. All knew that this interest was, somehow, the cause of the war. To strengthen, perpetuate, and extend this interest was the object for which the insurgents would rend the Union, even by war; while the government claimed no right to do more than to restrict the territorial enlargement of it. Neither party expected for the war, the magnitude, or the duration, which it has already attained. Neither anticipated that the *cause* of the conflict might cease with, or even before, the conflict itself should cease. Each looked for an easier triumph, and a result less fundamental and astounding. Both read the same Bible, and pray to the same God; and each invokes His aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces; but let us judge not that we be not judged. The prayers of both could not be answered; that of neither has been answered fully. The Almighty has His own purposes."Woe unto the world because of offenses! for it must needs be that offenses come; but woe to that man by whom the offense cometh!" If we shall suppose that American Slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South, this terrible war, as the woe due to those by whom the offense came, shall we discern therein any departure from those divine attributes which the believers in a Living God always ascribe to Him?Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue, until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said "the judgments of the Lord, are true and righteous altogether."

With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation's wounds; to care for him who shall have borne the battle, and for his widow, and his orphan—to do all which may achieve and cherish a just, and a lasting peace, among ourselves, and with all nations.

1. Abraham Lincoln, "Second Inaugural Address," March 4, 1865, in Roy P. Basler, ed., *The Collected Works of Abraham Lincoln,* Vol. 8 (New Brunswick, NJ: Rutgers University Press, 1953), 332–33. Reprinted with the permission of the Abraham Lincoln Association, Springfield, IL.

Monday, May 27, 2013 – Essay #71 – Abraham Lincoln's Second Inaugural Address – Guest Essayist: James Legee, Graduate, Master of Arts in Political Science at Villanova University and Graduate Fellow at the Matthew J. Ryan Center for the study of Free Institutions and the Public Good

From the vantage point on March 4, 1865, President Lincoln saw the approaching end of the war, a most terrible war that exacted a toll on America never before seen and not seen since. Lincoln's Second Inaugural address, delivered shortly before the war's end and his assassination, is a brief summation of the events and looks forward to rebuilding the nation and healing her wounds. It is a speech, which is perhaps unique to its era, but not solely in the events it addresses or its length. Rather, can you imagine a modern President speaking in such a way today- making recurring references to the bible and God? Perhaps even more alien to our modern ears, a leader conceiving that our current predicaments are a result of a turn from what is unequivocally and immutably right and towards what is inherently wrong? Concurrently, justice also finds its way into the discourse of the speech.

Lincoln claimed that the Civil War was a trial of the United States, for her sins in allowing and enabling slavery to exist. In 1854, at Peoria, Lincoln noted America's "Republican robe is soiled and trailed in the dust. Let us purify it. Let us turn and wash it white in the spirit if not the blood of the Revolution. Let us turn slavery from its claims of moral right…" Lincoln believed a return to the Founders, who declared that "all men are created equal" and believed that the new Union had placed slavery on a course of ultimate destruction. Of course, that "peculiar institution" was not so easily expunged from the Republic. After the war had come, and the destruction wrought, a somber Lincoln believed it was a judgment from God: "He gives to both North and South, this terrible war, as the woe due to those by whom the offense came… Yet if God wills that it continue until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword…" The Civil War was for Lincoln a punishment, for two hundred fifty years of violating the natural rights of those held in bondage.

Lincoln of course approached this from a Christian perspective, but acknowledgement of the rights of men does not necessitate membership in an Abrahamic faith. Indeed, the great tension is over slavery and whether it is true that "all men are created equal," or whether it is the right of one to own another. The embrace of slavery is a turn from God, though we need not understand this in strictly religious terms; this is about a turn from a self-evidently true and right principle, the equality of men, towards an idea that you can own and govern another man without his consent. Slavery, underpinned by the idea that a group of men can be selected as unfit to govern themselves, not only undermines republican self-government, but is an idea that reason, "as God gives us to see the right," tells us is evil.

Justice is a recurring theme in Lincoln's writing and speeches. He questions the south's invocation of God in their cause, when he says, "it may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces…" In his first debate with Stephen E. Douglas at Ottawa in 1858 Lincoln said something similar,"[a slave]…is not my equal in many respects-certainly not in color, perhaps not in moral or intellectual endowment. But in the right to eat the bread, without the leave of anybody else,

which his own hand earns, he is my equal and the equal of Judge Douglas, and the equal of every living man." There is a grave injustice in forcibly taking the profits of the labor of another. Slavery is not just a question of recognizing the equality of men, but of a moral economic system where men keep the profits of their labor.

With this belief in the equality of men and unyielding commitment to justice, Lincoln ended a morose speech with an eye to the future. "With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right…to bind up the nation's wounds…" are the phrases most associated with the second inaugural address. We cannot know how the process of reconstruction would have progressed with Lincoln in the White House, but the Great Emancipator was able to steer the nation through its greatest trial, to begin to right the wrong of slavery, and rededicate the American experiment towards the Founders vision.

James Legee recently completed his Master of Arts in Political Science at Villanova University, where he was a Graduate Fellow at the Matthew J. Ryan Center for the study of Free Institutions and the Public Good. You can find him on twitter @JamesLegee.

Liberalism and Social Action by John Dewey (1859-1952)

1935

1. The History of Liberalism

…The natural beginning of the inquiry in which we are engaged is consideration of the origin and past development of liberalism. It is to this topic that the present chapter is devoted. The conclusion reached from a brief survey of history, namely, that liberalism has had a checkered career, and that it has meant in practice things so different as to be opposed to one another, might perhaps have been anticipated without prolonged examination of its past. But location and description of the ambiguities that cling to the career of liberalism will be of assistance in the attempt to determine its significance for today and tomorrow.

The use of the words liberal and liberalism to denote a particular social philosophy does not appear to occur earlier than the first decade of the nineteenth century. But the thing to which the words are applied is older. It might be traced back to Greek thought; some of its ideas, especially as to the importance of the free play of intelligence, may be found notably expressed in the funeral oration attributed to Pericles. But for the present purpose it is not necessary to go back of John Locke, the philosopher of the "glorious revolution" of 1688. The outstanding points of Locke's version of liberalism are that governments are instituted to protect the rights that belong to individuals prior to political organization of social relations. These rights are those summed up a century later in the American Declaration of Independence: the rights of life, liberty and the pursuit of happiness. Among the "natural" rights especially emphasized by Locke is that of property, originating, according to him, in the fact that an individual has "mixed" himself, through his labor, with some natural hitherto unappropriated object. This view was directed against levies on property made by rulers without authorization from the representatives of the

people.The theory culminated in justifying the right of revolution. Since governments are instituted to protect the natural rights of individuals, they lose claim to obedience when they invade and destroy these rights instead of safeguarding them: a doctrine that well served the aims of our forefathers in their revolt against British rule, and that also found an extended application in the French Revolution of 1789.

The impact of this earlier liberalism is evidently political. Yet one of Locke's greatest interests was to uphold toleration in an age when intolerance was rife, persecution of dissenters in faith almost the rule, and when wars, civil and between nations, had a religious color. In serving the immediate needs of England—and then those of other countries in which it was desired to substitute representative for arbitrary government—it bequeathed to later social thought a rigid doctrine of natural rights inherent in individuals independent of social organization. It gave a directly practical import to the older semi-theological and semi-metaphysical conception of natural law as supreme over positive law and gave a new version of the old idea that natural law is the counterpart of reason, being disclosed by the natural light with which man is endowed.

The whole temper of this philosophy is individualistic in the sense in which individualism is opposed to organized social action. It held to the primacy of the individual over the state not only in time but in moral authority. It defined the individual in terms of liberties of thought and action already possessed by him in some mysterious ready-made fashion, and which it was the sole business of the state to safeguard. Reason was also made an inherent endowment of the individual, expressed in men's moral relations to one another, but not sustained and developed because of these relations. It followed that the great enemy of individual liberty was thought to be government because of its tendency to encroach upon the innate liberties of individuals. Later liberalism inherited this conception of a natural antagonism between ruler and ruled, interpreted as a natural opposition between the individual and organized society. There still lingers in the minds of some the notion that there are two different "spheres" of action and of rightful claims; that of political society and that of the individual, and that in the interest of the latter the former must be as contracted as possible.Not till the second half of the nineteenth century did the idea arise that government might and should be an instrument for securing and extending the liberties of individuals. This later aspect of liberalism is perhaps foreshadowed in the clauses of our Constitution that confer upon Congress power to provide for "public welfare" as well as for public safety.

What has already been said indicates that with Locke the inclusion of the economic factor, property, among natural rights had a political animus. However, Locke at times goes so far as to designate as property everything that is included in "life, liberties and estates"; the individual has property in himself and in his life and activities; property in this broad sense is that which political society should protect. The importance attached to the right of property within the political area was without doubt an influence in the later definitely economic formulation of liberalism. But Locke was interested in property already possessed. A century later industry and commerce were sufficiently advanced in Great Britain so that interest centered in *production* of wealth, rather than in its possession. The conception of labor as the source of right in property was employed not so much to protect property from confiscation by the ruler (that right was practically secure in England) as to urge and justify freedom in the use and investment of capital and the right of laborers to move about and seek new modes of employment—claims denied by

the common law that came down from semi-feudal conditions. The earlier economic conception may fairly be called static; it was concerned with possessions and estates. The newer economic conception was dynamic. It was concerned with release of productivity and exchange from a cumbrous complex of restrictions that had the force of law. The enemy was no longer the arbitrary special action of rulers. It was the whole system of common law and judicial practice in its adverse bearing upon freedom of labor, investment and exchange.

The transformation of earlier liberalism that took place because of this new interest is so tremendous that its story must be told in some detail. The concern for liberty and for the individual, which was the basis of Lockeian liberalism, persisted; otherwise the newer theory would not have been liberalism. But liberty was given a very different practical meaning. In the end, the effect was to subordinate political to economic activity; to connect natural laws with the laws of production and exchange, and to give a radically new significance to the earlier conception of reason. The name of Adam Smith is indissolubly connected with initiation of this transformation. Although he was far from being an unqualified adherent of the idea of*laissez faire,* he held that the activity of individuals, freed as far as possible from political restriction, is the chief source of social welfare and the ultimate spring of social progress. He held that there is a "natural" or native tendency in every individual to better each his own estate through putting forth effort (labor) to satisfy his natural wants. Social welfare is promoted because the cumulative, but undesigned and unplanned, effect of the convergence of a multitude of individual efforts is to increase the commodities and services put at the disposal of men collectively, of society.This increase of goods and services creates new wants and leads to putting forth new modes of productive energy. There is not only a native impulse to exchange, to "truck," but individuals are released by the processes of exchange from the necessity for labor in order to satisfy all of the individual's own wants; through division of labor, productivity is enormously increased. Free economic processes thus bring about an endless spiral of ever increasing change, and through the guidance of an "invisible hand" (the equivalent of the doctrine of preestablished harmony so dear to the eighteenth century) the efforts of individuals for personal advancement and personal gain accrue to the benefit of society, and create a continuously closer knit interdependence of interests.

The ideas and ideals of the new political economy were congruous with the increase of industrial activity that was marked in England even before the invention of the steam engine. They spread rapidly. Their power was furthered when the great industrial and commercial expansion of England ensued in the wake of the substitution of mechanical for human energy, first in textiles and then in other occupations. Under the influence of the industrial revolution the old argument against political action as a social agency assumed a new form. Such action was not only an invasion of individual liberty but it was in effect a conspiracy against the causes that bring about social progress. The Lockeian idea of natural laws took on a much more concrete, a more directly practical, meaning. Natural law was still regarded as something more fundamental than man-made law, which by comparison is artificial. But natural laws lost their remote moral meaning. They were identified with the laws of free industrial production and free commercial exchange….

Economists developed the principle of the free economic activity of individuals; since this freedom was identified with absence of governmental action, conceived as an interference with

natural liberty, the result was the formulation of *laissez faire* liberalism. Bentham carried the same conception, though from a different point of view, into a vigorous movement for reform of the common law and judicial procedure by means of legislative action. The Mills developed the psychological and logical foundation implicit in the theories of the economists and of Bentham….

According to Bentham, the criterion of all law and of every administrative effort is its effect upon the sum of happiness enjoyed by the greatest possible number. In calculating this sum, every individual is to count as one and only as one. The mere formulation of the doctrine was an attack upon every inequality of status that had the sanction of law. In effect, it made the well-being of the individual the norm of political action in every area in which it operates. In effect, though not wholly in Bentham's express apprehension, it transferred attention from the well-being already possessed by individuals to one they might attain if there were a radical change in social institutions. For existing institutions enabled a small number of individuals to enjoy their pleasures at the cost of the misery of a much greater number. While Bentham himself conceived that the changes to be made in legal and political institutions were mainly negative, such as abolition of abuses, corruptions and inequalities, nevertheless (as we shall see later) there was nothing in his fundamental doctrine that stood in the way of using the power of government to create, constructively and positively, new institutions if and when it should appear that the latter would contribute more effectively to the well-being of individuals….

Bentham's theory led him to the view that all organized action is to be judged by its consequences, consequences that take effect in the lives of individuals. His psychology was rather rudimentary. It made him conceive of consequences as being atomic units of pleasures and pains that can be algebraically summed up. It is to this aspect of his doctrines that later writers, especially moralists, have chiefly devoted their critical attention. But this particular aspect of his theory, if we view it in the perspective of history, is an adventitious accretion. His enduring idea is that customs, institutions, law, social arrangements are to be judged on the basis of their consequences as these come home to the individuals that compose society. Because of his emphasis upon consequences, he made short work of the tenets of both of the two schools that had dominated, before his day, English political thought. He brushed aside, almost contemptuously, the conservative school that found the source of social wisdom in the customs and precedents of the past. This school has its counterpart in those empiricists of the present day who attack every measure and policy that is new and innovating on the ground that it does not have the sanction of experience, when what they really mean by "experience" is patterns of mind that were formed in a past that no longer exists.

But Bentham was equally aggressive in assault upon that aspect of earlier liberalism which was based upon the conception of inherent natural rights—following in this respect a clue given by David Hume. Natural rights and natural liberties exist only in the kingdom of mythological social zoology. Men do not obey laws because they think these laws are in accord with a scheme of natural rights. They obey because they believe, rightly or wrongly, that the consequences of obeying are upon the whole better than the consequences of disobeying. If the consequences of existing rule become too intolerable, they revolt. An enlightened self-interest will induce a ruler not to push too far the patience of subjects. The enlightened self-interest of citizens will lead them to obtain by peaceful means, as far as possible, the changes that will effect a distribution of

political power and the publicity that will lead political authorities to work for rather than against the interests of the people—a situation which Bentham thought was realized by government that is representative and based upon popular suffrage. But in any case, not natural rights but consequences in the lives of individuals are the criterion and measure of policy and judgment.

Because the liberalism of the economists and the Benthamites was adapted to contemporary conditions in Great Britain, the influence of the liberalism of the school of Locke waned. By 1820 it was practically extinct. Its influence lasted much longer in the United States. We had no Bentham and it is doubtful whether he would have had much influence if he had appeared. Except for movements in codification of law, it is hard to find traces of the influence of Bentham in this country. As was intimated earlier, the philosophy of Locke bore much the same relation to the American revolt of the colonies that it had to the British revolution of almost a century earlier. Up to, say, the time of the Civil War, the United States were predominantly agrarian. As they became industrialized, the philosophy of liberty of individuals, expressed especially in freedom of contract, provided the doctrine needed by those who controlled the economic system. It was freely employed by the courts in declaring unconstitutional legislation that limited this freedom. The ideas of Locke embodied in the Declaration of Independence were congenial to our pioneer conditions that gave individuals the opportunity to carve their own careers. Political action was lightly thought of by those who lived in frontier conditions. A political career was very largely annexed as an adjunct to the action of individuals in carving their own careers. The gospel of self-help and private initiative was practiced so spontaneously that it needed no special intellectual support….

Thus from various sources and under various influences there developed an inner split in liberalism. This cleft is one cause of the ambiguity from which liberalism still suffers and which explains a growing impotency. These are still those who call themselves liberals who define liberalism in terms of the old opposition between the province of organized social action and the province of purely individual initiative and effort. In the name of liberalism they are jealous of every extension of governmental activity. They may grudgingly concede the need of special measures of protection and alleviation undertaken by the state at times of great social stress, but they are the confirmed enemies of social legislation (even prohibition of child labor), as standing measures of political policy. Wittingly or unwittingly, they still provide the intellectual system of apologetics for the existing economic régime, which they strangely, it would seem ironically, uphold as a régime of individual liberty for all.

But the majority who call themselves liberals today are committed to the principle that organized society must use its powers to establish the conditions under which the mass of individuals can possess actual as distinct from merely legal liberty. They define their liberalism in the concrete in terms of a program of measures moving toward this end. They believe that the conception of the state which limits the activities of the latter to keeping order as between individuals and to securing redress for one person when another person infringes the liberty existing law has given him, is in effect simply a justification of the brutalities and inequities of the existing order. Because of this internal division within liberalism its later history is wavering and confused. The inheritance of the past still causes many liberals, who believe in a generous use of the powers of organized society to change the terms on which human beings associate together, to stop short with merely protective and alleviatory measures—a fact that partly explains why

another school always refers to "reform" with scorn. It will be the object of the next chapter to portray the crisis in liberalism, the*impasse* in which it now almost finds itself, and through criticism of the deficiencies of earlier liberalism to suggest the way in which liberalism may resolve the crisis, and emerge as a compact, aggressive force.

2. The Crisis in Liberalism

The net effect of the struggle of early liberals to emancipate individuals from restriction imposed upon them by the inherited type of social organization was to pose a problem, that of a new social organization. The ideas of liberals set forth in the first third of the nineteenth century were potent in criticism and in analysis. They released forces that had been held in check. But analysis is not construction, and release of force does not of itself give direction to the force that is set free. Victorian optimism concealed for a time the crisis at which liberalism had arrived. But when that optimism vanished amid the conflict of nations, classes and races characteristic of the latter part of the nineteenth century—a conflict that has grown more intense with the passing years—the crisis could no longer be covered up. The beliefs and methods of earlier liberalism were ineffective when faced with the problems of social organization and integration. Their inadequacy is a large part of belief now so current that all liberalism is an outmoded doctrine. At the same time, insecurity and uncertainty in belief and purpose are powerful factors in generating dogmatic faiths that are profoundly hostile to everything to which liberalism in any possible formulation is devoted….

The earlier liberals lacked historic sense and interest. For a while this lack had an immediate pragmatic value. It gave liberals a powerful weapon in their fight with reactionaries. For it enabled them to undercut the appeal to origin, precedent and past history by which the opponents of social change gave sacrosanct quality to existing inequities and abuses. But disregard of history took its revenge. It blinded the eyes of liberals to the fact that their own special interpretations of liberty, individuality and intelligence were themselves historically conditioned, and were relevant only to their own time. They put forward their ideas as immutable truths good at all times and places; they had no idea of historic relativity, either in general or in its application to themselves.

When their ideas and plans were projected they were an attack upon the interests that were vested in established institutions and that had the sanction of custom. The new forces for which liberals sought an entrance were incipient; the *status quo* was arrayed against their release. By the middle of the nineteenth century the contemporary scene had radically altered. The economic and political changes for which they strove were so largely accomplished that they had become in turn the vested interest, and their doctrines, especially in the form of *laissez faire* liberalism, now provided the intellectual justification of the *status quo.* This creed is still powerful in this country. The earlier doctrine of "natural rights," superior to legislative action, has been given a definitely economic meaning by the courts, and used by judges to destroy social legislation passed in the interest of a real, instead of purely formal, liberty of contract. Under the caption of "rugged individualism" it inveighs against all new social policies.Beneficiaries of the established economic régime band themselves together in what they call Liberty Leagues to perpetuate the harsh regimentation of millions of their fellows. I do not imply that resistance to change would not have appeared if it had not been for the doctrines of earlier liberals. But had the early liberals

appreciated the historic relativity of their own interpretation of the meaning of liberty, the later resistance would certainly have been deprived of its chief intellectual and moral support. The tragedy is that although these liberals were the sworn foes of political absolutism, they were themselves absolutists in the social creed they formulated.

This statement does not mean, of course, that they were opposed to social change; the opposite is evidently the case. But it does mean they held that beneficial social change can come about in but one way, the way of private economic enterprise, socially undirected, based upon and resulting in the sanctity of private property—that is to say, freedom from social control. So today those who profess the earlier type of liberalism ascribe to this one factor all social betterment that has occurred; such as the increase in productivity and improved standards of living. The liberals did not try to prevent change, but they did try to limit its course to a single channel and to immobilize the channel.

If the early liberals had put forth their special interpretation of liberty as something subject to historic relativity they would not have frozen it into a doctrine to be applied at all times under all social circumstances. Specifically, they would have recognized that effective liberty is a function of the social conditions existing at any time. If they had done this, they would have known that as economic relations became dominantly controlling forces in setting the pattern of human relations, the necessity of liberty for individuals which they proclaimed will require social control of economic forces in the interest of the great mass of individuals. Because the liberals failed to make a distinction between purely formal or legal liberty and effective liberty of thought and action, the history of the last one hundred years is the history of non-fulfillment of their predictions….

The crisis in liberalism, as I said at the outset, proceeds from the fact that after early liberalism had done its work, society faced a new problem, that of social organization. Its work was to liberate a group of individuals, representing the new science and the new forces of productivity, from customs, ways of thinking, institutions, that were oppressive of the new modes of social action, however useful they may have been in their day. The instruments of analysis, of criticism, of dissolution, that were employed were effective for the work of release. But when it came to the problem of organizing the new forces and the individuals whose modes of life they radically altered into a coherent social organization, possessed of intellectual and moral directive power, liberalism was well-nigh impotent. The rise of national polities that pretend to represent the order, discipline and spiritual authority that will counteract social disintegration is a tragic comment upon the unpreparedness of older liberalism to deal with the new problem which its very success precipitated.

But the values of freed intelligence, of liberty, of opportunity for every individual to realize the potentialities of which he is possessed, are too precious to be sacrificed to a régime of despotism, especially when the régime is in such large measure merely the agent of a dominant economic class in its struggle to keep and extend the gains it has amassed at the expense of genuine social order, unity, and development. Liberalism has to gather itself together to formulate the ends to which it is devoted in terms of means that are relevant to the contemporary situation. The only form of enduring social organization that is now possible is one in which the new forces of productivity are cooperatively controlled and used in the interest of the effective liberty and the

cultural development of the individuals that constitute society. Such a social order cannot be established by an unplanned and external convergence of the actions of separate individuals, each of whom is bent on personal private advantage. This idea is the Achilles heel of early liberalism. The idea that liberalism cannot maintain its ends and at the same time reverse its conception of the means by which they are to be attained is folly. The ends can now be achieved *only* by reversal of the means to which early liberalism was committed. Organized social planning, put into effect for the creation of an order in which industry and finance are socially directed in behalf of institutions that provide the material basis for the cultural liberation and growth of individuals, is now the sole method of social action by which liberalism can realize its professed aims. Such planning demands in turn a new conception and logic of freed intelligence as a social force….

1. John Dewey, "Liberalism and Social Action," in Jo Ann Boydston, ed., *The Papers of John Dewey: The Later Works, 1925-1953,* Vol. 11 (Carbondale, IL: Southern Illinois University, 1987), 6–16, 21–23, 25–27, 39–40. Reproduced with permission of Southern Illinois University Press in the format Textbook via Copyright Clearance Center.

Tuesday, May 28, 2013 – Essay #72 – Liberalism and Social Action by John Dewey (1859-1952) – Guest Essayist: Tony Williams, Program Director for the Washington-Jefferson-Madison Institute in Charlottesville, VA

We're No Longer Lockeans Now: John Dewey & the Rise of Modern Liberalism, by Tony Williams

In his 1861 "Cornerstone" speech, Vice-President of the Confederacy, Alexander Stephens argued that Thomas Jefferson and the Founders really meant all humans, including blacks, were created equal in the Declaration of Independence. He just believed that they were wrong. John Dewey, in his "Liberalism and Social Action," does much the same thing. He largely summarizes the ideas of John Locke correctly and notes his influence on the Founding. Again, much like Stephens did, he rejects those ideas, this time because of his belief in the new liberalism of the modern Progressive administrative state.

John Dewey was an intelligent philosopher who gets Locke and his social compact theory right. Locke believed in natural rights of life, liberty, and property, Dewey notes, which were embodied in the Declaration of Independence. Government was instituted to protect those rights. If the government violated those rights, the people had a right of rebellion against tyranny. Man was a reasonable and moral being who lived under natural law. This theory, Dewey argues, "held to the primacy of the individual over the state." Dewey even states, as did James Madison in his 1792 essay "On Property," that individuals had a property in their rights by their natures that political society was bound to protect.

Next, Dewey gets Adam Smith right as well. The cumulative effect of individuals exchanging goods and services in a market economy guided by the invisible hand of supply and demand would promote social welfare and dynamic capitalist productive energies. Smith held "that the activities of individuals, freed as far as possible from political restriction, is the chief source of social welfare," Dewey writes.

These philosophies of individualism may have been good, Dewey concedes, for an older American pioneer society, but they were destructive ideas for the modern industrial age. He describes them as creating a system that was "outmoded" and "oppressive," promoted "harsh regimentation," was characterized by "political absolutism," and defended a "regime of despotism." Dewey instead esteems utilitarians Jeremy Bentham and John Stuart Mill as the philosophers appropriate to the new social realities. As Dewey writes, they supported a new philosophy of "radical change" that advocated the "power of government to create, constructively and positively, new institutions if and when it should appear that the latter would contribute more effectively to the well-being of individuals."

The "aggressive assault" on classical liberalism included the entire "conception of inherent natural rights." Individuals no longer had natural rights built into the fabric of their natures, but only the rights that society and the government defined. Next, modern liberals would impose equality of condition upon individuals because they were "committed to the principle that organized society must use its powers to establish the conditions under which the mass of individuals can possess actual as distinct from merely legal liberty."

This new Progressive liberalism would reach its apex (or nadir, from a conservative perspective) when socialism and a massive administrative state of experts in the executive branch of the federal government would plan society for the supposed benefit of all. "The only form of enduring social organization that is now possible is one in which the new forces of productivity are cooperatively controlled and used in the interest . . . of the individuals that constitute society," Dewey maintains. He continues, "Organized social planning, put into effect for the creation of an order in which industry and finance are socially directed in behalf of institutions that provide the material basis for the cultural liberation and growth of individuals, is now the sole method of social action by which liberalism can realize its professed aims." In other words, the natural rights republic and free enterprise system of the Founding was decisively rejected in favor of the modern administrative state of the Progressives and New Dealers.

Dewey wrote this in 1935, when the New Deal was seeking fundamental changes in American institutions. The "horse and buggy" Constitution, as FDR described it, was being replaced by a modern "Living Constitution" that could supposedly adapt to modern circumstances and provide for a virtually unlimited executive state that would establish that elusive social control and planning that Progressives had sought for decades. The New Dealers worked to reshape the individual's relationship to his rights and to the state. In short, they sought the Progressive perfectibility of society, the perfectibility of the state, and finally the perfectibility of man in their secular utopia.

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The American Conception of Liberty by Frank Goodnow (1859-1939)

1916

The end of the eighteenth century was marked by the formulation and general acceptance by thinking men in Europe of a political philosophy which laid great emphasis on individual private rights. Man was by this philosophy conceived of as endowed at the time of his birth with certain inalienable rights. Thus, Rousseau in his "Social Contract" treated man as primarily an individual and only secondarily as a member of human society. Society itself was regarded as based upon a contract made between the individuals by whose union it was formed. At the time of making this contract these individuals were deemed to have reserved certain rights spoken of as "natural" rights. These rights could neither be taken away nor be limited without the consent of the individual affected.

Such a theory, of course, had no historical justification. There was no record of the making of any such contract as was postulated. It was impossible to assert, as a matter of fact even, that man existed first as an individual and that later he became, as the result of any act of volition on his part, a member of human society. But at a time when truth was sought usually through speculation rather than observation, the absence of proof of the facts which lay at the basis of the theory did not seriously trouble those by whom it was formulated or accepted.

While there was no justification in fact for this social contract theory and this doctrine of natural rights, their acceptance by thinking men did nevertheless have an important influence upon the development of thought and in that way upon the actual conditions of human life. For these theories were not only a philosophical explanation of the organization of society; they were at the same time the result of the then existing social conditions, and like most such theories were also an attempt to justify a course of conduct which was believed to be expedient.

At the end of the eighteenth century a great change was beginning in Western Europe. The enlargement of the field of commercial transactions, due to the discovery and colonization of America and to the contact of Europe with Asia, particularly with India, had opened new spheres of activity to those minded for adventure. The invention of the steam engine and its application to manufacturing were rapidly changing industrial conditions. The factory system was in process of establishment and had already begun to displace domestic industry.

The new possibilities of reward for individual endeavor made men impatient of the restrictions on private initiative incident to an industrial and commercial system which was fast passing away. They therefore welcomed with eagerness a political philosophy which, owing to the emphasis it placed upon private rights, would if acted upon have the effect of freeing them from what they regarded as hampering limitations on individual initiative.

This political philosophy was incorporated into the celebrated Declaration of the Rights of Man and of the Citizen promulgated in France on the eve of the Revolution. A perusal of this remarkable document reveals the fact, however, that the reformers of France had not altogether emancipated themselves from the influences of their historical development. For almost every clause of the Declaration refers to rights under the law rather than to rights which were natural to and inherent in man.

The subsequent development in Europe of this private rights philosophy is along the lines thus marked out by the Declaration. The rights which men have been recognized as possessing have not been considered to be inherent rights, attaching to man at the time of his birth, so much as rights which find their origin in the law as adopted by that organ of government regarded as representative of the society of which the individual man is a member.

In a word, man is regarded now throughout Europe, contrary to the view expressed by Rousseau, as primarily a member of society and secondarily as an individual. The rights which he possesses are, it is believed, conferred upon him, not by his Creator, but rather by the society to which he belongs. What they are is to be determined by the legislative authority in view of the needs of that society. Social expediency, rather than natural right, is thus to determine the sphere of individual freedom of action.

The development of this private rights philosophy has been, however, somewhat different in the United States. The philosophy of Rousseau was accepted in this country probably with even greater enthusiasm than was the case in Europe. The social and economic conditions of the Western World were, in the first place, more favorable than in Europe for its acceptance. There was at the time no well-developed social organization in this country. America was the land of the pioneer, who had to rely for most of his success upon his strong right arm. Such communities as did exist were loosely organized and separated one from another. Roads worthy of the name hardly existed and communication was possible only by rivers which were imperfectly navigable or over a sea which, when account is taken of the vessels then in use, was tempestuous in character.

Furthermore, the religious and moral influences in this country, which owed much to the Protestant Reformation, all favored the development of an extreme individualism. They emphasized personal responsibility and the salvation of the individual soul. It was the fate of the individual rather than that of the social group which appealed to the preacher or aroused the anxiety of the theologian. It was individual rather than social morality which was emphasized by the ethical teacher and received attention in moral codes. Everything, in a word, favored the acceptance of the theory of individual natural rights.

The result was the adoption in this country of a doctrine of unadulterated individualism. Every one had rights. Social duties were hardly recognized, or if recognized little emphasis was laid upon them. It was apparently thought that every one was able and willing to protect his rights, and that as a result of the struggle between men for their rights and of the compromise of what appeared to be conflicting rights would arise an effective social organization.

The rights with which it was believed that man was endowed by his Creator were, as was the

case in France, set forth in bills of rights which formed an important part of American constitutions. The form in which they were stated in American bills of rights was subject to fewer qualifications than was the case in France. Their origin was found in nature rather than in the law. The development of these rights, further, has been quite different from the European development which has been noted.American courts, early in the history of the country, claimed and secured the general recognition of a power to declare unconstitutional and therefore void acts of legislation which, in their opinion, were not in conformity with these bills of rights. In their determination of these questions, American courts appear to have been largely influenced by the private rights conception of the prevalent political philosophy. The result has been that the private individual rights of American citizens have come to be formulated and defined, not by representative legislative bodies, as is now the rule in Europe, but by courts which have in the past been much under the influence of the political philosophy of the eighteenth century….

This general attitude towards private rights is, it seems to me, at the present time in process of modification. Whatever may have been formerly the advantages attaching to a private rights political philosophy—and that they were many I should be the last person to deny—this question of private rights has been reexamined with the idea of ascertaining whether, under the conditions of modern life, our traditional political philosophy should be retained.

The political philosophy of the eighteenth century was formulated before the announcement and acceptance of the theory of evolutionary development. The natural rights doctrine presupposed almost that society was static or stationary rather than dynamic or progressive in character. It was generally believed at the end of the eighteenth century that there was a social state which under all conditions and at all times would be absolutely ideal. The rights which man had were believed to come from his Creator. These rights consequently were the same then as they once had been and would always remain the same. Natural rights were in theory thus permanent and immutable. Natural rights being conceived of as eternal and immutable, the theory of natural rights did not permit of their amendment in view of a change in conditions.

The actual rights which at the close of the eighteenth century were recognized were, however, as a matter of fact influenced in large measure by the social and economic conditions of the time when the recognition was made. Those conditions have certainly been subjected to great modifications. The pioneer can no longer rely upon himself alone. Indeed with the increase of population and the conquest of the wilderness the pioneer has almost disappeared. The improvement in the means of communication, which has been one of the most marked changes that have occurred, has placed in close contact and relationship once separated and unrelated communities. The canal and the railway, the steamship and the locomotive, the telegraph and the telephone, we might add the motor car and the aeroplane, have all contributed to the formation of a social organization such as our forefathers never saw in their wildest dreams. The accumulation of capital, the concentration of industry with the accompanying increase in the size of the industrial unit and the loss of personal relations between employer and employed, have all brought about a constitution of society very different from that which was to be found a century and a quarter ago. Changed conditions, it has been thought, must bring in their train different conceptions of private rights if society is to be advantageously carried on. In other words, while insistence on individual rights may have been of great advantage at a time when the social organization was not highly developed, it may become a menace when social rather than

individual efficiency is the necessary prerequisite of progress. For social efficiency probably owes more to the common realization of social duties than to the general insistence on privileges based on individual private rights. As our conditions have changed, as the importance of the social group has been realized, as it has been perceived that social efficiency must be secured if we are to attain and retain our place in the field of national competition which is practically coterminous with the world, the attitude of our courts on the one hand towards private rights and on the other hand towards social duties has gradually been changing. The general theory remains the same. Man is still said to be possessed of inherent natural rights of which he may not be deprived without his consent. The courts still now and then hold unconstitutional acts of legislature which appear to encroach upon those rights. At the same time the sphere of governmental action is continually widening and the actual content of individual private rights is being increasingly narrowed….

We no longer believe as we once believed that a good social organization can be secured merely through stressing our rights. The emphasis is being laid more and more on social duties. The efficiency of the social group is taking on in our eyes a greater importance that it once had. We are not, it is true, taking the view that the individual man lives for the state of which he is a member and that state efficiency is in some mysterious way an admirable end in and of itself.

But we have come to the conclusion that man under modern conditions is primarily a member of society and that only as he recognizes his duties as a member of society can he secure the greatest opportunities as an individual.While we do not regard society as an end in itself we do consider it as one of the most important means through which man may come into his own.

You are probably asking yourselves: What is the purpose of saying these things in this place? What connection have they with a great educational institution? My answer to these questions is this. Those who are in charge of such an institution are under a very solemn obligation. They are in some measure at any rate responsible for the beliefs of the coming generation of thinkers and of molders of public opinion. We teachers perhaps take ourselves too seriously at times. That I am willing to admit. We may not have nearly the influence which we think we have. Changes in economic conditions for which we are in no way responsible bring in their train regardless of what we teach changes in beliefs and opinions. But if we are unable to exercise great influence in the institution of positive changes, we can by acquainting ourselves with the changes in conditions and by endeavoring to accommodate our teaching to those changes, certainly refrain from impeding progress. This may be an over-modest estimate of the function of a teacher. At the same time it is an ideal the realization of which is not to be despised. For many universities have in the past been the homes of conservatism. New ideas have often knocked for a long time on the gates of learning before they have been permitted to enter. Even after they have passed the portal they are sometimes the object of a suspicion which it has taken years to allay.

So I repeat we teachers are in a measure responsible for the thoughts of the coming generation. This being the case, if under the conditions of modern life it is the social group rather than the individual which is increasing in importance, if it is true that greater emphasis should be laid on social duties and less on individual rights, it is the duty of the University to call the attention of the student to this fact and it is the duty of the student when he goes out into the world to do what in him lies to bring this truth home to his fellows.

1. Frank Goodnow, *The American Conception of Liberty* (Providence, RI: Standard Printing Company, 1916), 9-13, 19-21, 29-31.

Wednesday, May 29, 2013 – Essay #73 – The American Conception of Liberty by Frank Goodnow – Guest Essayist: Professor Will Morrisey, William and Patricia LaMothe Chair in the United States Constitution at Hillsdale College

Liberty and the Administrative State: Goodnow's Gambit

Hillsdale's *Reader* on the U. S. Constitution begins with Thomas Jefferson and ends with Ronald Reagan. Of the many `contributors' to the anthology, none is less-remembered today than Frank Goodnow, who never won an election for public office, having spent his career almost entirely in academia. Unlike John Dewey, another professor, Goodnow wrote no books that have been widely read beyond his own generation. Yet he stands as an important figure in the Progressive movement, particularly with respect to his championing of Progressivism's most distinctive institutional feature, the administrative state.

Born in 1859 in Brooklyn, New York, Goodnow received his advanced degree not in history or political science but in law from Columbia University, which hired him to teach administrative law in 1882. "Political science" as an independent academic discipline barely existed in the United States at that time, but Goodnow and such like-minded academics as his colleague John W. Burgess at Columbia and Woodrow Wilson of Princeton established it as such in the last two decades of the nineteenth century, founding the national professional organization of political scientists, the American Political Science Association, in 1903. Goodnow was its first president. He ended his career as president of the Johns Hopkins University—the first American university to emulate the great German research universities not only in its emphasis on scholarly research and graduate studies as distinguished from the education of undergraduates but also in its promotion of German political philosophy in opposition to the principles of John Locke, Montesquieu, and the other philosophers whose ideas had animated the American founding. At this time university presidents enjoyed greater prominence in American public life than at any time before or since; Nicholas Murray Butler of Columbia was a well-known voice nationally, and of course Wilson vaulted from the presidency of Princeton to the governorship of New Jersey and the presidency of the United States in the space of about three years. Obscure today, Goodnow nonetheless exercised a decisive influence on American political history. If, as he writes in "The American Conception of Liberty," "we teachers are in a measure responsible for the thoughts of the coming generation," Goodnow helped to shape the thoughts of not only the next generation but of every generation of American citizens up to and including that of President Barack Obama. Universities are now conceived as engines of social and political progress, and many if not all American educators more or less self-consciously think as `progressives' of one sort or another.

Following their German preceptors, American progressives committed themselves to the rejection of the laws of nature and of nature's God as the source of moral and political right. Instead, they looked to `history'—defined as the course of all events, said to be unfolding rationally toward a culmination or `end of history.' Whether the end of history was understood to be a constitutional monarchy (as inHegel), worldwide communism (as in Marx), social democracy (as in Dewey), or the dominance of a `Caucasian master race' (as in Gobineau and the other `race theorists'), all past and present human thoughts and actions are judged good or bad, `progressive' or `reactionary,' insofar as they do or do not contribute to mankind's advance toward that end. What is more, the course of events or `history' was held to unfold in accordance with scientifically discernible *laws of development*—not unlike Darwin's laws of natural selection, which in fact had `historicized' natural science.

This explains why Goodnow's critique of the philosophy behind the American founding—natural rights, social contract—amounts to a critique of that philosophy from the standpoint of *historical accuracy.* The founders' ideas did not depict any real social condition; rather, the social and economic conditions of the founders' time in effect produced their ideas. For example, the founders' theoretical justification of property rights merely reflected the economic interests of men living under the conditions of early capitalism, under which governmental controls tended only to cramp individual initiative and the security of profits. Oddly, Goodnow associates the "extreme individualism" of the founders not with Locke—who did indeed defend property rights—but with Rousseau, whose moral commitment to such rights was considerably less decided. Be that as it may, Goodnow associates the founders with "a doctrine of unadulterated individualism" whereby "social duties were hardly recognized, or if recognized little emphasis was placed upon them." This doctrine had embedded itself even more in American courts than it did in our legislatures. At places like Columbia, the next generation of lawyers would learn differently.

Goodnow attributes two flaws to the Rousseauian-American doctrine of natural rights. First, it assumes an incorrect theory of nature, having been "formulated before the announcement and acceptance of the theory of evolutionary development." Since Darwin, nature itself has been `historicized.' We now speak not so much of nature as of `natural history.' In terms of human society this means that a `natural right' to property might be valid in the eighteenth century but increasingly invalid in the nineteenth and twentieth century, as human societies and perhaps even human beings themselves change, evolve, progress. With the disappearance of a frontier society founded upon agriculture and herding, with the rise of large-scale industry—"a social organization such as our forefathers never saw in their wildest dreams"—our rights also must evolve. "Changed conditions… must bring in their train different conceptions of private rights if society is to be advantageously carried on.

"This leads to the second flaw of the American doctrine: It is too individualistic. Given the new conditions of industrialism and urbanization, which put men and women in factories wherein their movements must be coordinated rather than independent of one another, the private rights of the individual person increasingly must give way to "social duties." Although Goodnow remained a liberal in the sense that he opposes any form of absolute statism—"We are not… taking the view that the individual man lives for the state of which he is a member"—he did expect vast improvement in *administration*—the institutional agent of well-coordinated social

duties. Just as modern business corporations require the administration of a vast array of persons and their actions, so too will the modern state need its administrators—if only to coordinate the activities of the corporations.

This is where the modern university comes in. As the president of one such institution, Goodnow deplores the fact that "many universities have in the past been the homes of conservatism," not progressivism. To keep up with the historical evolution of human societies, universities needed to take the lead, educating students who will become, among other things, administrators of the modern state. Quickened by the new *historical consciousness* that has replaced the old notion of natural rights, and by the new sense of *social duty* that now eclipses the old individualism, students would now learn the new form of government—scientific administration—which will replace or at least supplement the old regime of government by elected officials identified with political parties.

Under Progressivism, America would see a radical transformation of the foundation and purposes of its regime: natural right abandoned for historical right; social coordination preferred to individual effort; the politics of the courthouse and the party clubhouse replaced by the politics of bureaucracy and `administrative science.' For better or for worse, Frank Goodnow deserves to be better-remembered than he is.

Will Morrisey holds the William and Patricia LaMothe Chair in the United States Constitution at Hillsdale College; his books include Self-Government, The American Theme: Presidents of the Founding and Civil War and The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government.

What is Progress? by Woodrow Wilson (1856-1924)

1913

In that sage and veracious chronicle, "Alice Through the Looking-Glass," it is recounted how, on a noteworthy occasion, the little heroine is seized by the Red Chess Queen, who races her off at a terrific pace. They run until both of them are out of breath; then they stop, and Alice looks around her and says, "Why, we are just where we were when we started!" "Oh, yes," says the Red Queen; "you have to run twice as fast as that to get anywhere else."

That is a parable of progress. The laws of this country have not kept up with the change of economic circumstances in this country; they have not kept up with the change of political circumstances; and therefore we are not even where we were when we started. We shall have to run, not until we are out of breath, but until we have caught up with our own conditions, before we shall be where we were when we started; when we started this great experiment which has been the hope and the beacon of the world. And we should have to run twice as fast as any rational program I have seen in order to get anywhere else.

I am, therefore, forced to be a progressive, if for no other reason, because we have not kept up

with our changes of conditions, either in the economic field or in the political field. We have not kept up as well as other nations have. We have not kept our practices adjusted to the facts of the case, and until we do, and unless we do, the facts of the case will always have the better of the argument; because if you do not adjust your laws to the facts, so much the worse for the laws, not for the facts, because law trails along after the facts. Only that law is unsafe which runs ahead of the facts and beckons to it and makes it follow the will-o'-the-wisps of imaginative projects.

Business is in a situation in America which it was never in before; it is in a situation to which we have not adjusted our laws. Our laws are still meant for business done by individuals; they have not been satisfactorily adjusted to business done by great combinations, and we have got to adjust them. I do not say we may or may not; I say we must; there is no choice. If your laws do not fit your facts, the facts are not injured, the law is damaged; because the law, unless I have studied it amiss, is the expression of the facts in legal relationships. Laws have never altered the facts; laws have always necessarily expressed the facts; adjusted interests as they have arisen and have changed toward one another.

Politics in America is in a case which sadly requires attention. The system set up by our law and our usage doesn't work,—or at least it can't be depended on; it is made to work only by a most unreasonable expenditure of labor and pains. The government, which was designed for the people, has got into the hands of bosses and their employers, the special interests. An invisible empire has been set up above the forms of democracy.

There are serious things to do. Does any man doubt the great discontent in this country? Does any man doubt that there are grounds and justifications for discontent? Do we dare stand still? Within the past few months we have witnessed (along with other strange political phenomena, eloquently significant of popular uneasiness) on one side a doubling of the Socialist vote and on the other the posting on dead walls and hoardings all over the country of certain very attractive and diverting bills warning citizens that it was "better to be safe than sorry" and advising them to "let well enough alone." Apparently a good many citizens doubted whether the situation they were advised to let alone was really well enough, and concluded that they would take a chance of being sorry. To me, these counsels of do-nothingism, these counsels of sitting still for fear something would happen, these counsels addressed to the hopeful, energetic people of the United States, telling them that they are not wise enough to touch their own affairs without marring them, constitute the most extraordinary argument of fatuous ignorance I ever heard. Americans are not yet cowards. True, their self-reliance has been sapped by years of submission to the doctrine that prosperity is something that benevolent magnates provide for them with the aid of the government; their self-reliance has been weakened, but not so utterly destroyed that you can twit them about it. The American people are not naturally stand-patters. Progress is the word that charms their ears and stirs their hearts.

There are, of course, Americans who have not yet heard that anything is going on. The circus might come to town, have the big parade and go, without their catching a sight of the camels or a note of the calliope. There are people, even Americans, who never move themselves or know that anything else is moving.

A friend of mine who had heard of the Florida “cracker,” as they call a certain ne’er-do-well portion of the population down there, when passing through the State in a train, asked some one to point out a “cracker” to him. The man asked replied, “Well, if you see something off in the woods that looks brown, like a stump, you will know it is either a stump or a cracker; if it moves, it is a stump.”

Now, movement has no virtue in itself. Change is not worth while for its own sake. I am not one of those who love variety for its own sake. If a thing is good today, I should like to have it stay that way tomorrow. Most of our calculations in life are dependent upon things staying the way they are. For example, if, when you got up this morning, you had forgotten how to dress, if you had forgotten all about those ordinary things which you do almost automatically, which you can almost do half awake, you would have to find out what you did yesterday. I am told by the psychologists that if I did not remember who I was yesterday, I should not know who I am today, and that, therefore, my very identity depends upon my being able to tally today with yesterday. If they do not tally, then I am confused; I do not know who I am, and I have to go around and ask somebody to tell me my name and where I came from.

I am not one of those who wish to break connection with the past; I am not one of those who wish to change for the mere sake of variety. The only men who do that are the men who want to forget something, the men who filled yesterday with something they would rather not recollect today, and so go about seeking diversion, seeking abstraction in something that will blot out recollection, or seeking to put something into them which will blot out all recollection. Change is not worth while unless it is improvement. If I move out of my present house because I do not like it, then I have got to choose a better house, or build a better house, to justify the change.

It would seem a waste of time to point out that ancient distinction,—between mere change and improvement. Yet there is a class of mind that is prone to confuse them. We have had political leaders whose conception of greatness was to be forever frantically doing something,—it mattered little what; restless, vociferous men, without sense of the energy of concentration, knowing only the energy of succession. Now, life does not consist of eternally running to a fire. There is no virtue in going anywhere unless you will gain something by being there. The direction is just as important as the impetus of motion.

All progress depends on how fast you are going, and where you are going, and I fear there has been too much of this thing of knowing neither how fast we were going or where we were going. I have my private belief that we have been doing most of our progressiveness after the fashion of those things that in my boyhood days we called “treadmills,”—a treadmill being a moving platform, with cleats on it, on which some poor devil of a mule was forced to walk forever without getting anywhere. Elephants and even other animals have been known to turn treadmills, making a good deal of noise, and causing certain wheels to go round, and I daresay grinding out some sort of product for somebody, but without achieving much progress. Lately, in an effort to persuade the elephant to move, really, his friends tried dynamite. It moved,—in separate and scattered parts, but it moved.

A cynical but witty Englishman said, in a book, not long ago, that it was a mistake to say of a conspicuously successful man, eminent in his line of business, that you could not bribe a man

like that, because, he said, the point about such men is that they have been bribed—not in the ordinary meaning of that word, not in any gross, corrupt sense, but they have achieved their great success by means of the existing order of things and therefore they have been put under bonds to see that that existing order of things is not changed; they are bribed to maintain the *status quo.*

It was for that reason that I used to say, when I had to do with the administration of an educational institution, that I should like to make the young gentlemen of the rising generation as unlike their fathers as possible. Not because their fathers lacked character or intelligence or knowledge or patriotism, but because their fathers, by reason of their advancing years and their established position in society, had lost touch with the processes of life; they had forgotten what it was to begin; they had forgotten what it was to rise; they had forgotten what it was to be dominated by the circumstances of their life on their way up from the bottom to the top, and, therefore, they were out of sympathy with the creative, formative and progressive forces of society.

Progress! Did you ever reflect that that word is almost a new one? No word comes more often or more naturally to the lips of modern man, as if the thing it stands for were almost synonymous with life itself, and yet men through many thousand years never talked or thought of progress. They thought in the other direction. Their stories of heroisms and glory were tales of the past. The ancestor wore the heavier armor and carried the larger spear. "There were giants in those days." Now all that has altered. We think of the future, not the past, as the more glorious time in comparison with which the present is nothing. Progress, development,—those are modern words. The modern idea is to leave the past and press onward to something new.

But what is progress going to do with the past, and with the present? How is it going to treat them? With ignominy, or respect? Should it break with them altogether, or rise out of them, with its roots still deep in the older time? What attitude shall progressives take toward the existing order, toward those institutions of conservatism, the Constitution, the laws, and the courts?

Are those thoughtful men who fear that we are now about to disturb the ancient foundations of our institutions justified in their fear? If they are, we ought to go very slowly about the processes of change. If it is indeed true that we have grown tired of the institutions which we have so carefully and sedulously built up, then we ought to go very slowly and very carefully about the very dangerous task of altering them. We ought, therefore, to ask ourselves, first of all, whether thought in this country is tending to do anything by which we shall retrace our steps, or by which we shall change the whole direction of our development?

I believe, for one, that you cannot tear up ancient rootages and safely plant the tree of liberty in soil which is not native to it. I believe that the ancient traditions of a people are its ballast; you cannot make a *tabula rasa* upon which to write a political program. You cannot take a new sheet of paper and determine what your life shall be tomorrow. You must knit the new into the old. You cannot put a new patch on an old garment without ruining it; it must be not a patch, but something woven into the old fabric, of practically the same pattern, of the same texture and intention. If I did not believe that to be progressive was to preserve the essentials of our institutions, I for one could not be a progressive.

One of the chief benefits I used to derive from being president of a university was that I had the pleasure of entertaining thoughtful men from all over the world. I cannot tell you how much has dropped into my granary by their presence. I had been casting around in my mind for something by which to draw several parts of my political thought together when it was my good fortune to entertain a very interesting Scotsman who had been devoting himself to the philosophical thought of the seventeenth century. His talk was so engaging that it was delightful to hear him speak of anything, and presently there came out of the unexpected region of his thought the thing I had been waiting for. He called my attention to the fact that in every generation all sorts of speculation and thinking tend to fall under the formula of the dominant thought of the age. For example, after the Newtonian Theory of the universe had been developed, almost all thinking tended to express itself in the analogies of the Newtonian Theory, and since the Darwinian Theory has reigned amongst us, everybody is likely to express whatever he wishes to expound in terms of development and accommodation to environment.

Now, it came to me, as this interesting man talked, that the Constitution of the United States had been made under the dominion of the Newtonian Theory. You have only to read the papers of *The Federalist* to see that fact written on every page. They speak of the "checks and balances" of the Constitution, and use to express their idea the simile of the organization of the universe, and particularly of the solar system,—how by the attraction of gravitation the various parts are held in their orbits; and then they proceed to represent Congress, the Judiciary, and the President as a sort of imitation of the solar system.

They were only following the English Whigs, who gave Great Britain its modern constitution. Not that those Englishmen analyzed the matter, or had any theory about it; Englishmen care little for theories. It was a Frenchman, Montesquieu, who pointed out to them how faithfully they had copied Newton's description of the mechanism of the heavens.

The makers of our Federal Constitution read Montesquieu with true scientific enthusiasm. They were scientists in their way,—the best way of their age,—those fathers of the nation. Jefferson wrote of "the laws of Nature,"—and then by way of afterthought,—"and of Nature's God." And they constructed a government as they would have constructed an orrery,—to display the laws of nature. Politics in their thought was a variety of mechanics. The Constitution was founded on the law of gravitation. The government was to exist and move by virtue of the efficacy of "checks and balances."

The trouble with the theory is that government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton. It is modified by its environment, necessitated by its tasks, shaped to its functions by the sheer pressure of life. No living thing can have its organs offset against each other, as checks, and live. On the contrary, its life is dependent upon their quick cooperation, their ready response to the commands of instinct or intelligence, their amicable community of purpose.Government is not a body of blind forces; it is a body of men, with highly differentiated functions, no doubt, in our modern day, of specialization, with a common task and purpose. Their cooperation is indispensable, their warfare fatal. There can be no successful government without the intimate, instinctive coordination of the organs of life and action. This is not theory, but fact, and displays its force as fact, whatever theories may be thrown across its track. Living

political constitutions must be Darwinian in structure and in practice. Society is a living organism and must obey the laws of life, not of mechanics; it must develop.

All that progressives ask or desire is permission—in an era when "development," "evolution," is the scientific word—to interpret the Constitution according to the Darwinian principle; all they ask is recognition of the fact that a nation is a living thing and not a machine.

Some citizens of this country have never got beyond the Declaration of Independence, signed in Philadelphia, July 4th, 1776. Their bosoms swell against George III, but they have no consciousness of the war for freedom that is going on today.

The Declaration of Independence did not mention the questions of our day. It is of no consequence to us unless we can translate its general terms into examples of the present day and substitute them in some vital way for the examples it itself gives, so concrete, so intimately involved in the circumstances of the day in which it was conceived and written. It is an eminently practical document, meant for the use of practical men; not a thesis for philosophers, but a whip for tyrants; not a theory of government, but a program of action. Unless we can translate it into the questions of our own day, we are not worthy of it, we are not the sons of the sires who acted in response to its challenge.

What form does the contest between tyranny and freedom take today? What is the special form of tyranny we now fight? How does it endanger the rights of the people, and what do we mean to do in order to make our contest against it effectual? What are to be the items of our new declaration of independence?

By tyranny, as we now fight it, we mean control of the law, of legislation and adjudication, by organizations which do not represent the people, by means which are private and selfish. We mean, specifically, the conduct of our affairs and the shaping of our legislation in the interest of special bodies of capital and those who organize their use. We mean the alliance, for this purpose, of political machines with selfish business. We mean the exploitation of the people by legal and political means. We have seen many of our governments under these influences cease to be representative governments, cease to be governments representative of the people, and become governments representative of special interests, controlled by machines, which in their turn are not controlled by the people.

Sometimes, when I think of the growth of our economic system, it seems to me as if, leaving our law just about where it was before any of the modern inventions or developments took place, we had simply at haphazard extended the family residence, added an office here and a workroom there, and a new set of sleeping rooms there, built up higher on our foundations, and put out little lean-tos on the side, until we have a structure that has no character whatever. Now, the problem is to continue to live in the house and yet change it.

Well, we are architects in our time, and our architects are also engineers. We don't have to stop using a railroad terminal because a new station is being built. We don't have to stop any of the processes of our lives because we are rearranging the structures in which we conduct those processes.What we have to undertake is to systematize the foundations of the house, then to

thread all the old parts of the structure with the steel which will be laced together in modern fashion, accommodated to all the modern knowledge of structural strength and elasticity, and then slowly change the partitions, relay the walls, let in the light through new apertures, improve the ventilation; until finally, a generation or two from now, the scaffolding will be taken away, and there will be the family in a great building whose noble architecture will at last be disclosed, where men can live as a single community, cooperative as in a perfected, coordinated beehive, not afraid of any storm of nature, not afraid of any artificial storm, any imitation of thunder and lightning, knowing that the foundations go down to the bedrock of principle, and knowing that whenever they please they can change that plan again and accommodate it as they please to the altering necessities of their lives.

But there are a great many men who don't like the idea. Some wit recently said, in view of the fact that most of our American architects are trained in a certain *École* in Paris, that all American architecture in recent years was either bizarre or "Beaux Arts." I think that our economic architecture is decidedly bizarre; and I am afraid that there is a good deal to learn about matters other than architecture from the same source from which our architects have learned a great many things. I don't mean the School of Fine Arts at Paris, but the experience of France; for from the other side of the water men can now hold up against us the reproach that we have not adjusted our lives to modern conditions to the same extent that they have adjusted theirs. I was very much interested in some of the reasons given by our friends across the Canadian border for being very shy about the reciprocity arrangements. They said: "We are not sure whither these arrangements will lead, and we don't care to associate too closely with the economic conditions of the United States until those conditions are as modern as ours." And when I resented it, and asked for particulars, I had, in regard to many matters, to retire from the debate. Because I found that they had adjusted their regulations of economic development to conditions we had not yet found a way to meet in the United States.

Well, we have started now at all events. The procession is under way. The stand-patter doesn't know there is a procession. He is asleep in the back part of his house. He doesn't know that the road is resounding with the tramp of men going to the front. And when he wakes up, the country will be empty. He will be deserted, and he will wonder what has happened. Nothing has happened. The world has been going on. The world has a habit of going on. The world has a habit of leaving those behind who won't go with it. The world has always neglected stand-patters. And, therefore, the stand-patter does not excite my indignation; he excites my sympathy. He is going to be so lonely before it is all over. And we are good fellows, we are good company; why doesn't he come along? We are not going to do him any harm. We are going to show him a good time. We are going to climb the slow road until it reaches some upland where the air is fresher, where the whole talk of mere politicians is stilled, where men can look in each other's faces and see that there is nothing to conceal, that all they have to talk about they are willing to talk about in the open and talk about with each other; and whence, looking back over the road, we shall see at last that we have fulfilled our promise to mankind. We had said to all the world, "America was created to break every kind of monopoly, and to set men free, upon a footing of equality, upon a footing of opportunity, to match their brains and their energies." and now we have proved that we meant it.

1. Woodrow Wilson, "What is Progress?" in *The New Freedom* (New York: Doubleday, Page, and Company, 1913), 33-54.

Thursday, May 30, 2013 – Essay #74 – Woodrow Wilson's "What is Progress?" – Guest Essayist: Robert Clinton, Professor and Chair Emeritus, Department of Political Science, Southern Illinois University Carbondale

The elevation of Woodrow Wilson to the presidency of the United States is a defining moment in American history. It signaled the triumph of an ideology destined to transform the United States Constitution from an instrument of limited government to one of consolidation, much as had been feared by the Antifederalist Brutus more than a century before. That ideology is known as "progressivism," the essentials of which are laid out clearly and unapologetically in Wilson's "What Is Progress?" Included in these essentials are: belief in the perfectibility of human beings and human societies, demonization of the past and devaluation of time-honored traditions, and the worship of science and technology.

Many of the sentiments expressed in Wilson's essay are understandable. After all, the decades since the Civil War had given rise to unparalleled levels of corporate wealth and political corruption. The post-Civil War Reconstruction period and the industrial revolution had produced equally unparalleled dislocations in society. All of this led to strident calls for reform, much of which was, no doubt, needed, and some of which had been actually accomplished (more-or-less) through legislation and regulation.

Wilson's proposal, however, goes much farther than reform. His call is for revolutionary constitutional transformation, albeit couched in modest language. Like most modern progressives, Wilson swears fidelity to the Constitution. But it is not the Constitution of 1787 that claims his loyalty. For Wilson, the Constitution is–or should be–a malleable instrument that is subject to manipulation by "progressive" policy makers to achieve the social ends they desire. This is not the Constitution that the Founding Fathers wrote. It is an entirely different constitution, and it develops in an entirely different way.

The Founders' Constitution develops according to a carefully constructed constitutional amendment process that is designed to ensure a wide consensus in support of any proposed constitutional change. This process is spelled out in Article V, and requires extensive participation of both Houses of Congress as well as the legislatures or special conventions in the states. This means that the Founders regarded constitutional development as a profoundly democratic process.

The Founders' Constitution also established a balanced governmental framework in which no branch of government can claim ultimate authority to determine the constitutional power of another, a fact of which Wilson was keenly aware and greatly disapproved. In a book that Wilson wrote and published a few years before his presidential run, he acknowledged that the Framers "constructed the federal government upon a theory of checks and balances which was meant to

limit the operation of each part and allow to no single part or organ of it a dominating force." Then he concluded that "no government can be successfully conducted upon so mechanical a theory" (Wilson, Constitutional Government, 1908, p. 54). Adoption of Wilson's constitutional proposal would have the effect of circumventing both the Article V amendment process and the checks and balances system.

Wilson elaborates his proposal for constitutional transformation by contrasting the science of Isaac Newton with that of Charles Darwin. He views the Founders' Constitution as mechanical, based on the "Newtonian" physics of the seventeenth and eighteenth centuries. Conversely, Wilson's constitution is "Darwinian," based on the evolutionary biology that had become all the rage among intellectuals in the late nineteenth century. Wilson's metaphor is that of "organism," which he places in opposition to the Founders' "machine." Wilson consummates his proposal with the following statement: "All that progressives ask or desire is permission–in an era when 'development,' 'evolution,' is the scientific word–to interpret the Constitution according to the Darwinian principle; all they ask is recognition of the fact that a nation is a living thing and not a machine." Thus begins the career of the "living constitution."

Yet as always, the devil is in the details. The great question left unanswered here is almost too obvious to mention: Who are these progressives that are to be permitted to interpret the Constitution according to the Darwinian principle? As noted above, the Founders had given their answer by establishing a balanced governmental framework in which no branch can claim ultimate authority to determine the constitutional power of another. That means that each of the three main branches of government is responsible for interpreting the Constitution within its own sphere of authority, but is not permitted to invade the spheres of the other branches. Nor is any branch of government entitled to concede its own constitutional authority to another branch. In this way, the Framers raised a permanent barrier against efforts by one branch of government to enlarge its authority at the expense of another.

But this system is much to fragmented, cumbersome and inefficient for Wilson, who wants to enlarge executive power by unleashing an army of bureaucrats in the growing administrative state of his time, regulators who would be appointed by Wilson himself or his subordinates and who would operate behind the scenes essentially "unchecked" to build the great house described in the final portion of his essay. This great house (American society) is one "whose noble architecture will at last be disclosed, where men can live as a single community, cooperative as in a perfected, coordinated beehive." This utopian vision is the dream of progressives like Wilson, who believe that human beings and human societies are perfectible, that we can "all be one," if only we rid ourselves of the shackles of the past.

But the vision is distorted, as all dreams are. Constitutions should not be interpreted according to Darwinian principles because human societies are not "organisms" at all. Even if beehives and anthills are "organisms" in some sense, human beings are not like bees or ants. We have free will, and are therefore naturally self-governing. In the words of Rousseau, we are "forced to be free." The Founders' Constitution preserves self-government at the most basic level by invoking democratic processes at both state and national levels before amending the Constitution. It also protects the Constitution itself from unwarranted "informal" alteration by restricting the power of each major division of government from encroaching on the power of another. Conversely,

Wilson's "living constitution" would allow major constitutional change via "interpretations" handed down by largely unaccountable boards, commissions and courts staffed by elites who purport to know best what is good for the rest of us.

The progressives conceive their "living constitution" as something like the blueprint for a house, in which the house is built according to an original plan and can be modified, once the house is built, in whatever ways the owners of the house want. Once the blueprint leaves the hand of the architect and the house is built, the architect disappears forever and the owners are left to their own devices as to what to do. They may add on rooms, floors, tear down walls or put up new ones, and so on.

But the analogy doesn't really work. Even though subsequent owners of a house may be legally entitled to do pretty much anything they like once the house is theirs, there may be some bad consequences, because the blueprint does more than simply establish the original design for the house. It also establishes limits—some merely implicit—to what can be done once the house is built. The blueprint also establishes a structure that cannot be violated without consequences. If, for example, the structure will only support the weight of one story, the weight of an additional story could cause the house to collapse.

In other words, the Constitution is not merely a blueprint that launches the governmental and political processes and then disappears, leaving the institutions and officials in charge to do whatever they want. Rather, the Constitution establishes a structure, not of bricks and mortar, but of ideas and principles that cannot be violated without undermining the structure itself. According to James Madison's analysis in the Federalist, there are two fundamental general principles that comprise the main goal of the Constitution. First, it must allow for the government to control the governed. Second, it must force the government to control itself. If either of these principles is overstressed, then the other will be defeated, and the constitutional balance destroyed. If you inflate the power of government, then you deflate its limitations. Wilson's "living constitution" risks destruction of the delicate balance between powers and limits established by the Founders.

Unfortunately, since the time of Wilson, his distorted dream of living constitutionalism has largely become a reality. The rise of the administrative state has continued virtually unabated, its officials often operating essentially unchecked. At the same time, the Congress that is supposed to supervise administrative agencies in the name of the people appears less and less able (or willing) to do so. Indeed Congress has handed over much of its law making power to those very agencies through delegation. A final irony in the legacy of Wilson's living constitution is the rise of judicial supremacy, according to which the Constitution is thought to mean whatever the Supreme Court says it means. The Court itself said as much In Planned Parenthood of Southeastern Pennsylvania v. Casey (1992), declaring itself "invested with the authority to . . . speak before all others for their [our] constitutional ideals." In other words, we should look to the Court–not to the Constitution–to determine what our true constitutional values are!

No doubt limited government is frustrating at time, especially for presidents, bureaucrats and judges who are convinced that they know what is best for society–even if society doesn't know it. And such impatience with the Founders' Constitution is still alive and well in the White

House today. While an Illinois senator in 2001, Barack Obama expressed this impatience in a radio interview when he criticized the Warren Court for not breaking free "from the essential constraints that were placed by the founding fathers in the Constitution."

I think that the Founders, with their "outmoded" constitutional mechanics, are much better guides to good government than Woodrow Wilson or Barack Obama. It is interesting that little more than a year after Wilson's inauguration, as if to mock his inferiority complex in the face of what he regarded as European superiority due to its strong central governments that "keep up with the times," his role model–France–was plunged into the First World War, in which millions were needlessly slaughtered. In the end, France could only be saved by America, with its "outmoded" checks and balances and limited government. In the aftermath of that Great War, the political incompetence of those same European powers created an environment that led directly to the Second World War, to which America once again was forced to come to the rescue.

In my opinion, it is time to give up Woodrow Wilson's Eurocentric utopian constitutionalism and beat a fast retreat to the Founders, whose Constitution still stands waiting for our return, despite the beating it has taken from the progressives and their allies during the past century. The price of not doing so will be the continued erosion of American democracy, as unaccountable administrators and judges interpret away its foundations.

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Socialism and Democracy by Woodrow Wilson

August 22, 1887

Is it possible that in practical America we are becoming sentimentalists? To judge by much of our periodical literature, one would think so. All resolution about great affairs seems now "sicklied o'er with a pale cast of thought." Our magazine writers smile sadly at the old-time optimism of their country; are themselves full of forebodings; expend much force and enthusiasm and strong (as well as weak) English style in disclosing social evils and economic bugbears; are moved by a fine sympathy for the unfortunate and a fine anger against those who bring wrong upon their fellows: but where amidst all these themes for the conscience is there a theme for the courage of the reader? Where are the brave plans of reform which should follow such prologues?

No man with a heart can withhold sympathy from the laborer whose strength is wasted and whose hope is thwarted in the service of the heartless and close-fisted; but, then, no man with a head ought to speak that sympathy in the public prints unless he have some manly, thought-out ways of betterment to propose. One wearies easily, it must be confessed, of woeful-warnings; one sighs often for a little tonic of actual thinking grounded in sane, clear-sighted perception of what is possible to be done. Sentiment is not despicable—it may be elevating and noble, it may be inspiring, and in some mental fields it is self-sufficing—but when uttered concerning great social and political questions it needs the addition of practical, initiative sense to keep it sweet and to prevent its becoming insipid.

I point these remarks particularly at current discussions of socialism, and principally of 'state socialism,' which is almost the only form of socialism seriously discussed among us, outside the Anti-Poverty Society. Is there not a plentiful lack of nerve and purpose in what we read and hear nowadays on this momentous topic. One might be excused for taking and keeping the impression that there can be no great need for haste in the settlement of the questions mooted in connection with it, inasmuch as the debating of them has not yet passed beyond its rhetorical and pulpit stage. It is easy to make socialism, as theoretically developed by the greater and saner socialistic writers, intelligible not only, but even attractive, as a conception; it is easy also to render it a thing of fear to timorous minds, and to make many signs of the times bear menace of it; the only hard task is to give it validity and strength as a program in practical politics. Yet the whole interest of socialism for those whose thinking extends beyond the covers of books and the paragraphs of periodicals lies in what it will mean in practice. It is a question of practical politics, or else it is only a thesis for engaging discourse.

Even mere discoursers, one would think, would be attracted to treat of the practical means of realizing for society the principles of socialism, for much the most interesting and striking features of it emerge only when its actual applications to concrete affairs are examined. These actual applications of it are the part of it which is much the most worth talking about,—even for those whose only object is to talk effectively.

Roundly described, socialism is a proposition that every community, by means of whatever forms of organization may be most effective for the purpose, see to it for itself that each one of its members finds the employment for which he is best suited and is rewarded according to his diligence and merit, all proper surroundings of moral influence being secured to him by the public authority. 'State socialism' is willing to act through state authority as it is at present organized. It proposes that all idea of a limitation of public authority by individual rights be put out of view, and that the State consider itself bound to stop only at what is unwise or futile in its universal superintendence alike of individual and of public interests. The thesis of the state socialist is, that no line can be drawn between private and public affairs which the State may not cross at will; that omnipotence of legislation is the first postulate of all just political theory.

Applied in a democratic state, such doctrine sounds radical, but not revolutionary. It is only an acceptance of the extremest logical conclusions deducible from democratic principles long ago received as respectable. For it is very clear that in fundamental theory socialism and democracy are almost if not quite one and the same. They both rest at bottom upon the absolute right of the community to determine its own destiny and that of its members. Men as communities are

supreme over men as individuals. Limits of wisdom and convenience to the public control there may be: limits of principle there are, upon strict analysis, none.

It is of capital importance to note this substantial correspondence of fundamental conception as between socialism and democracy: a whole system of practical politics may be erected upon it without further foundation. The germinal conceptions of democracy are as free from all thought of a limitation of the public authority as are the corresponding conceptions of socialism; the individual rights which the democracy of our own century has actually observed, were suggested to it by a political philosophy radically individualistic, but not necessarily democratic. Democracy is bound by no principle of its own nature to say itself nay as to the exercise of any power. Here, then, lies the point. The difference between democracy and socialism is not an essential difference, but only a practical difference—is a difference of *organization* and *policy,* not a difference of primary motive. Democracy has not undertaken the tasks which socialists clamor to have undertaken; but it refrains from them, not for lack of adequate principles or suitable motives, but for lack of adequate organization and suitable hardihood: because it cannot see its way clear to accomplishing them with credit. Moreover it may be said that democrats of today hold off from such undertakings because they are of today, and not of the days, which history very well remembers, when government had the temerity to try everything. The best thought of modern time having recognized a difference between social and political questions, democratic government, like all other governments, seeks to confine itself to those political concerns which have, in the eyes of the judicious, approved themselves appropriate to the sphere and capacity of public authority.

The socialist does not disregard the obvious lessons of history concerning overwrought government: at least he thinks he does not. He denies that he is urging the resumption of tasks which have been repeatedly shown to be impossible. He points to the incontrovertible fact that the economic and social conditions of life in our century are not only superficially but radically different from those of any other time whatever. Many affairs of life which were once easily to be handled by individuals have now become so entangled amongst the complexities of international trade relations, so confused by the multiplicity of news-voices, or so hoisted into the winds of speculation that only powerful combinations of wealth and influence can compass them. Corporations grow on every hand, and on every hand not only swallow and overawe individuals but also compete with governments.The contest is no longer between government and individuals; it is now between government and dangerous combinations and individuals. Here is a monstrously changed aspect of the social world. In face of such circumstances, must not government lay aside all timid scruple and boldly make itself an agency for social reform as well as for political control?

‘Yes,’ says the democrat, ‘perhaps it must. You know it is my principle, no less than yours, that every man shall have an equal chance with every other man: if I saw my way to it as a practical politician, I should be willing to go farther and superintend every man’s use of his chance. But the means? The question with me is not whether the community has power to act as it may please in these matters, but how it can act with practical advantage—a question of *policy.’*

A question of policy primarily, but also a question of organization, that is to say of *administration.*

1. Woodrow Wilson, "Socialism and Democracy," August 22, 1887, in Arthur S. Link, ed., *The Papers of Woodrow Wilson,* Vol. 5 (Princeton, NJ: Princeton University Press, 1966-1993), 559-62.

Friday, May 31 – Essay #75 – Woodrow Wilson, "Socialism and Democracy" – Guest Essayist: Tony Williams, Program Director of the Washington-Jefferson-Madison Institute in Charlottesville, VA

Progressivism was a movement in the late nineteenth and early twentieth centuries. Whatever its different iterations, progressivism was rooted in the belief that the natural rights principles of the American founding were fine for an earlier age but no longer relevant in a mass, industrial society. The modern age, as the Progressives saw it, was characterized by great inequality and concentrations of wealth. The "interests" controlled the masses for their own self-interest rather than the public good.

In order to remedy social inequality and combat the interests, Progressives envisioned a stronger federal state that would regulate the use of property and wealth in the public interest rather than narrow individual self-interest. They implemented a series of reforms that created executive agencies that would fundamentally alter the relationship of the government to the people. These agencies would be part of a greatly expanded bureaucracy that would be administered by scientific experts guided by the ideals of efficiency and order. The Progressives rejected popular, consensual government of and by the people.

As the Hillsdale College Constitution Reader makes plain, the ideology of progressivism persisted throughout the twentieth century, but it reached its first high tide during the presidency of Woodrow Wilson. The hallmarks of the progressive Wilson administration were the creation of the Federal Reserve System, the Federal Trade Commission, and the Sixteenth Amendment that allowed a federal income tax (contrary to the Founders and the express prohibition in Article I, section 9 of the Constitution), among other reforms. Wilson also persuaded Congress to wage an idealistic, progressive war to "make the world safe for democracy." The ideas for these reforms were laid down clearly in Wilson's writings decades before when he was a graduate student and young professor in search of a permanent position.

In the 1880s, Woodrow Wilson was pursuing a quintessentially Progressive educational path. Attending graduate school based upon the German model, Wilson earned a Ph.D. in political science and history at Johns Hopkins University in 1886. Until he found a home at Princeton in 1890, he was a professor at Cornell, Bryn Mawr, and Wesleyan. Like any aspiring professor, he produced a number of publications. They unapologetically revealed his embrace of progressivism and a large administrative state.

Written in 1887, few of Wilson's writings more blatantly spell out his praise of a state with

virtually unlimited authority than "Socialism and Democracy." As he states, the new question that Progressives were asking was "not whether the community has power to act as it may please in these matters, but how it can act with practical advantage – a question of policy." The philosophical argument of limited constitutional government is swept aside by a triumphal progressivism that announces the victory of the federal state and simply decides the best reforms to pursue.

Wilson states that although some thinkers have attempted to turn the public mind against socialism, he is trying to render it not only intelligible but attractive and valid. He proudly supports the idea of unlimited government and public control. "It proposes," Wilson argues, "that all idea of a limitation of public authority by individual rights be put out of view, and that the State consider itself bound to stop only at what is unwise or futile in its universal superintendence alike of individual and of public interests." Could any statement more clearly illustrate how far the Progressives had come from American founding principles?

If anyone thought that Wilson was merely theoretically praising socialism, he then shockingly equated socialism with democracy on the grounds that both agree that there are no limits on government power. "It is very clear," he writes, "that in fundamental theory socialism and democracy are almost if not quite one and the same. They both rest upon the absolute right of the community to determine its own destiny and that of its members. Men as communities are supreme over men as individuals. Limits of wisdom and convenience to the public control there may be: limits of principle there are, upon strict analysis, none." As he states only a bit farther down in the essay: "The germinal conceptions of democracy are as free from all thought of a limitation of the public authority as are the corresponding conceptions of socialism."

In the founding conception of American constitutional government in the Declaration of Independence, a limited government was created for the express purpose of protecting God-given rights of individuals. The great fear of the Founders was that the government would violate those rights and become tyrannical. The sovereign people then had the right of rebellion when the government broke the terms of the social compact. But, according to Wilson, "The contest is no longer between government and individuals; it is now between government and dangerous combinations." In light of the circumstances of the modern industrial age, the government must "lay aside all timid scruple and boldly make itself an agency for social reform as well as for political control."

If the history of American government in the twentieth century shows anything, it reveals the startling success of Wilson's progressive view of the federal state. Only some of the proofs that the Wilsonian vision has became a reality in this century are a massive administrative state free of popular control and yet are ironically controlled by the very interests the Progressives originally sought to control, massive government taxation and spending (and debt), a government that reaches into nearly every aspect of American life, and politicians who routinely consider themselves above the law.

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http://www.thefederalistpapers.org/ebooks/jefferson-and-madisons-guide-to-the-constitution
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The President of the United States by Woodrow Wilson

1908

It is difficult to describe any single part of a great governmental system without describing the whole of it. Governments are living things and operate as organic wholes. Moreover, governments have their natural evolution and are one thing in one age, another in another. The makers of the Constitution constructed the federal government upon a theory of checks and balances which was meant to limit the operation of each part and allow to no single part or organ of it a dominating force; but no government can be successfully conducted upon so mechanical a theory.Leadership and control must be lodged somewhere; the whole art of statesmanship is the art of bringing the several parts of government into effective cooperation for the accomplishment of particular common objects,—and party objects at that. Our study of each part of our federal system, if we are to discover our real government as it lives, must be made to disclose to us its operative coordination as a whole: its places of leadership, its method of action, how it operates, what checks it, what gives it energy and effect. Governments are what politicians make them, and it is easier to write of the President than of the presidency….

Fortunately, the definitions and prescriptions of our constitutional law, though conceived in the Newtonian spirit and upon the Newtonian principle, are sufficiently broad and elastic to allow for the play of life and circumstance. Though they were Whig theorists, the men who framed the federal Constitution were also practical statesmen with an experienced eye for affairs and a quick practical sagacity in respect of the actual structure of government, and they have given us a thoroughly workable model. If it had in fact been a machine governed by mechanically automatic balances, it would have had no history; but it was not, and its history has been rich with the influences and personalities of the men who have conducted it and made it a living reality. The government of the United States has had a vital and normal organic growth and has proved itself eminently adapted to express the changing temper and purposes of the American people from age to age.

That is the reason why it is easier to write of the President than of the presidency. The presidency has been one thing at one time, another at another, varying with the man who occupied the office and with the circumstances that surrounded him….

Both men and circumstances have created these contrasts in the administration and influence of the office of President. We have all been disciples of Montesquieu, but we have also been practical politicians. Mr. Bagehot once remarked that it was no proof of the excellence of the Constitution of the United States that the Americans had operated it with conspicuous success because the Americans could run any constitution successfully; and, while the compliment is altogether acceptable, it is certainly true that our practical sense is more noticeable than our

theoretical consistency, and that, while we were once all constitutional lawyers, we are in these latter days apt to be very impatient of literal and dogmatic interpretations of constitutional principle.

The makers of the Constitution seem to have thought of the President as what the stricter Whig theorists wished the king to be: only the legal executive, the presiding and guiding authority in the application of law and the execution of policy. His veto upon legislation was only his 'check' on Congress,—was a power of restraint, not of guidance. He was empowered to prevent bad laws, but he was not to be given an opportunity to make good ones. As a matter of fact he has become very much more. He has become the leader of his party and the guide of the nation in political purpose, and therefore in legal action. The constitutional structure of the government has hampered and limited his action in these significant roles, but it has not prevented it. The influence of the President has varied with the men who have been Presidents and with the circumstances of their times, but the tendency has been unmistakably disclosed, and springs out of the very nature of government itself. It is merely the proof that our government is a living, organic thing, and must, like every other government, work out the close synthesis of active parts which can exist only when leadership is lodged in some one man or group of men. You cannot compound a successful government out of antagonisms. Greatly as the practice and influence of Presidents has varied, there can be no mistaking the fact that we have grown more and more inclined from generation to generation to look to the President as the unifying force in our complex system, the leader both of his party and of the nation. To do so is not inconsistent with the actual provisions of the Constitution; it is only inconsistent with a very mechanical theory of its meaning and intention.The Constitution contains no theories. It is as practical a document as Magna Carta….

As legal executive, his constitutional aspect, the President cannot be thought of alone. He cannot execute laws. Their actual daily execution must be taken care of by the several executive departments and by the now innumerable body of federal officials throughout the country. In respect of the strictly executive duties of his office the President may be said to administer the presidency in conjunction with the members of his cabinet, like the chairman of a commission. He is even of necessity much less active in the actual carrying out of the law than are his colleagues and advisers. It is therefore becoming more and more true, as the business of the government becomes more and more complex and extended, that the President is becoming more and more a political and less and less an executive officer. His executive powers are in commission, while his political powers more and more center and accumulate upon him and are in their very nature personal and inalienable.

Only the larger sort of executive questions are brought to him. Departments which run with easy routine and whose transactions bring few questions of general policy to the surface may proceed with their business for months and even years together without demanding his attention; and no department is in any sense under his direct charge. Cabinet meetings do not discuss detail: they are concerned only with the larger matters of policy or expediency which important business is constantly disclosing. There are no more hours in the President's day than in another man's. If he is indeed the executive, he must act almost entirely by delegation, and is in the hands of his colleagues. He is likely to be praised if things go well, and blamed if they go wrong; but his only real control is of the persons to whom he deputes the performance of executive duties. It is

through no fault or neglect of his that the duties apparently assigned to him by the Constitution have come to be his less conspicuous, less important duties, and that duties apparently not assigned to him at all chiefly occupy his time and energy. The one set of duties it has proved practically impossible for him to perform; the other it has proved impossible for him to escape.

He cannot escape being the leader of his party except by incapacity and lack of personal force, because he is at once the choice of the party and of the nation. He is the party nominee, and the only party nominee for whom the whole nation votes. Members of the House and Senate are representatives of localities, are voted for only by sections of voters, or by local bodies of electors like the members of the state legislatures. There is no national party choice except that of President. No one else represents the people as a whole, exercising a national choice; and inasmuch as his strictly executive duties are in fact subordinated, so far at any rate as all detail is concerned, the President represents not so much the party's governing efficiency as its controlling ideals and principles. He is not so much part of its organization as its vital link of connection with the thinking nation. He can dominate his party by being spokesman for the real sentiment and purpose of the country, by giving direction to opinion, by giving the country at once the information and the statements of policy which will enable it to form its judgments alike of parties and of men.

For he is also the political leader of the nation, or has it in his choice to be. The nation as a whole has chosen him, and is conscious that it has no other political spokesman. His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him.His position takes the imagination of the country. He is the representative of no constituency, but of the whole people. When he speaks in his true character, he speaks for no special interest. If he rightly interpret the national thought and boldly insist upon it, he is irresistible; and the country never feels the zest of action so much as when its President is of such insight and calibre. Its instinct is for unified action, and it craves a single leader. It is for this reason that it will often prefer to choose a man rather than a party. A President whom it trusts can not only lead it, but form it to his own views.

It is the extraordinary isolation imposed upon the President by our system that makes the character and opportunity of his office so extraordinary. In him are centered both opinion and party. He may stand, if he will, a little outside party and insist as if it were upon the general opinion. It is with the instinctive feeling that it is upon occasion such a man that the country wants that nominating conventions will often nominate men who are not their acknowledged leaders, but only such men as the country would like to see lead both its parties. The President may also, if he will, stand within the party counsels and use the advantage of his power and personal force to control its actual programs. He may be both the leader of his party and the leader of the nation, or he may be one or the other. If he lead the nation, his party can hardly resist him. His office is anything he has the sagacity and force to make it.

That is the reason why it has been one thing at one time, another at another. The Presidents who have not made themselves leaders have lived no more truly on that account in the spirit of the Constitution than those whose force has told in the determination of law and policy. No doubt Andrew Jackson overstepped the bounds meant to be set to the authority of his office. It was

certainly in direct contravention of the spirit of the Constitution that he should have refused to respect and execute decisions of the Supreme Court of the United States, and no serious student of our history can righteously condone what he did in such matters on the ground that his intentions were upright and his principles pure. But the Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age. Its prescriptions are clear and we know what they are; a written document makes lawyers of us all, and our duty as citizens should make us conscientious lawyers, reading the text of the Constitution without subtlety or sophistication; but life is always your last and most authoritative critic.

Some of our Presidents have deliberately held themselves off from using the full power they might legitimately have used, because of conscientious scruples, because they were more theorists than statesmen. They have held the strict literary theory of the Constitution, the Whig theory, the Newtonian theory, and have acted as if they thought that Pennsylvania Avenue should have been even longer than it is; that there should be no intimate communication of any kind between the Capitol and the White House; that the President as a man was no more at liberty to lead the houses of Congress by persuasion than he was at liberty as President to dominate them by authority,—supposing that he had, what he has not, authority enough to dominate them. But the makers of the Constitution were not enacting Whig theory, they were not making laws with the expectation that, not the laws themselves, but their opinions, known by future historians to lie back of them, should govern the constitutional action of the country. They were statesmen, not pedants, and their laws are sufficient to keep us to the paths they set us upon. The President is at liberty, both in law and conscience, to be as big a man as he can. His capacity will set the limit; and if Congress be overborne by him, it will be no fault of the makers of the Constitution,—it will be from no lack of constitutional powers on its part, but only because the President has the nation behind him, and Congress has not. He has no means of compelling Congress except through public opinion.

That I say he has no means of compelling Congress will show what I mean, and that my meaning has no touch of radicalism or iconoclasm in it. There are illegitimate means by which the President may influence the action of Congress. He may bargain with members, not only with regard to appointments, but also with regard to legislative measures. He may use his local patronage to assist members to get or retain their seats. He may interpose his powerful influence, in one covert way or another, in contests for places in the Senate. He may also overbear Congress by arbitrary acts which ignore the laws or virtually override them. He may even substitute his own orders for acts of Congress which he wants but cannot get. Such things are not only deeply immoral, they are destructive of the fundamental understandings of constitutional government and, therefore, of constitutional government itself. They are sure, moreover, in a country of free public opinion, to bring their own punishment, to destroy both the fame and the power of the man who dares to practise them. No honorable man includes such agencies in a sober exposition of the Constitution or allows himself to think of them when he speaks of the influences of "life" which govern each generation's use and interpretation of that great instrument, our sovereign guide and the object of our deepest reverence.Nothing in a system like ours can be constitutional which is immoral or which touches the good faith of those who have sworn to obey the fundamental law. The reprobation of all good men will always overwhelm such influences with shame and failure. But the personal force of the President is

perfectly constitutional to any extent to which he chooses to exercise it, and it is by the clear logic of our constitutional practice that he has become alike the leader of his party and the leader of the nation.

The political powers of the President are not quite so obvious in their scope and character when we consider his relations with Congress as when we consider his relations to his party and to the nation. They need, therefore, a somewhat more critical examination. Leadership in government naturally belongs to its executive officers, who are daily in contact with practical conditions and exigencies and whose reputations alike for good judgment and for fidelity are at stake much more than are those of the members of the legislative body at every turn of the law's application. The law-making part of the government ought certainly to be very hospitable to the suggestions of the planning and acting part of it. Those Presidents who have felt themselves bound to adhere to the strict literary theory of the Constitution have scrupulously refrained from attempting to determine either the subjects or the character of legislation, except so far as they were obliged to decide for themselves, after Congress had acted, whether they should acquiesce in it or not. And yet the Constitution explicitly authorizes the President to recommend to Congress "such measures as he shall deem necessary and expedient," and it is not necessary to the integrity of even the literary theory of the Constitution to insist that such recommendations should be merely perfunctory. Certainly General Washington did not so regard them, and he stood much nearer the Whig theory than we do. A President's messages to Congress have no more weight or authority than their intrinsic reasonableness and importance give them: but that is their only constitutional limitation. The Constitution certainly does not forbid the President to back them up, as General Washington did, with such personal force and influence as he may possess. Some of our Presidents have felt the need, which unquestionably exists in our system, for some spokesman of the nation as a whole, in matters of legislation no less than in other matters, and have tried to supply Congress with the leadership of suggestion, backed by argument and by iteration and by every legitimate appeal to public opinion. Cabinet officers are shut out from Congress; the President himself has, by custom, no access to its floor; many long-established barriers of precedent, though not of law, hinder him from exercising any direct influence upon its deliberations; and yet he is undoubtedly the only spokesman of the whole people. They have again and again, as often as they were afforded the opportunity, manifested their satisfaction when he has boldly accepted the role of leader, to which the peculiar origin and character of his authority entitle him. The Constitution bids him speak, and times of stress and change must more and more thrust upon him the attitude of originator of policies.

His is the vital place of action in the system, whether he accept it as such or not, and the office is the measure of the man,—of his wisdom as well as of his force. His veto abundantly equips him to stay the hand of Congress when he will. It is seldom possible to pass a measure over his veto, and no President has hesitated to use the veto when his own judgment of the public good was seriously at issue with that of the houses. The veto has never been suffered to fall into even temporary disuse with us. In England it has ceased to exist, with the change in the character of the executive. There has been no veto since Anne's day, because ever since the reign of Anne the laws of England have been originated either by ministers who spoke the king's own will or by ministers whom the king did not dare gainsay; and in our own time the ministers who formulate the laws are themselves the executive of the nation; a veto would be a negative upon their own power. If bills pass of which they disapprove, they resign and give place to the leaders of those

who approve them. The framers of the Constitution made in our President a more powerful, because a more isolated, king than the one they were imitating; and because the Constitution gave them their veto in such explicit terms, our Presidents have not hesitated to use it, even when it put their mere individual judgment against that of large majorities in both houses of Congress. And yet in the exercise of the power to suggest legislation, quite as explicitly conferred upon them by the Constitution, some of our Presidents have seemed to have a timid fear that they might offend some law of taste which had become a constitutional principle.

In one sense their messages to Congress have no more authority than the letters of any other citizen would have. Congress can heed or ignore them as it pleases; and there have been periods of our history when presidential messages were utterly without practical significance, perfunctory documents which few persons except the editors of newspapers took the trouble to read. But if the President has personal force and cares to exercise it, there is this tremendous difference between his messages and the views of any other citizen, either outside Congress or in it: that the whole country reads them and feels that the writer speaks with an authority and a responsibility which the people themselves have given him.

The history of our cabinets affords a striking illustration of the progress of the idea that the President is not merely the legal head but also the political leader of the nation. In the earlier days of the government it was customary for the President to fill his cabinet with the recognized leaders of his party. General Washington even tried the experiment which William of Orange tried at the very beginning of the era of cabinet government. He called to his aid the leaders of both political parties, associating Mr. Hamilton with Mr. Jefferson, on the theory that all views must be heard and considered in the conduct of the government. That was the day in which English precedent prevailed, and English cabinets were made up of the chief political characters of the day. But later years have witnessed a marked change in our practice, in this as in many other things. The old tradition was indeed slow in dying out. It persisted with considerable vitality at least until General Garfield's day, and may yet from time to time revive, for many functions of our cabinets justify it and make it desirable. But our later Presidents have apparently ceased to regard the cabinet as a council of party leaders such as the party they represent would have chosen. They look upon it rather as a body of personal advisers whom the President chooses from the ranks of those whom he personally trusts and prefers to look to for advice. Our recent Presidents have not sought their associates among those whom the fortunes of party contest have brought into prominence and influence, but have called their personal friends and business colleagues to cabinet positions, and men who have given proof of their efficiency in private, not in public, life,—bankers who had never had any place in the formal counsels of the party, eminent lawyers who had held aloof from politics, private secretaries who had shown an unusual sagacity and proficiency in handling public business; as if the President were himself alone the leader of his party, the members of his cabinet only his private advisers, at any rate advisers of his private choice. Mr. Cleveland may be said to have been the first President to make this conception of the cabinet prominent in his choices, and he did not do so until his second administration. Mr. Roosevelt has emphasized the idea.

Upon analysis it seems to mean this: the cabinet is an executive, not a political body. The President cannot himself be the actual executive; he must therefore find, to act in his stead, men of the best legal and business gifts, and depend upon them for the actual administration of the

government in all its daily activities. If he seeks political advice of his executive colleagues, he seeks it because he relies upon their natural good sense and experienced judgment, upon their knowledge of the country and its business and social conditions, upon their sagacity as representative citizens of more than usual observation and discretion; not because they are supposed to have had any very intimate contact with politics or to have made a profession of public affairs. He has chosen, not representative politicians, but eminent representative citizens, selecting them rather for their special fitness for the great business posts to which he has assigned them than for their political experience, and looking to them for advice in the actual conduct of the government rather than in the shaping of political policy. They are, in his view, not necessarily political officers at all.

It may with a great deal of plausibility be argued that the Constitution looks upon the President himself in the same way. It does not seem to make him a prime minister or the leader of the nation's counsels. Some Presidents are, therefore, and some are not. It depends upon the man and his gifts. He may be like his cabinet, or he may be more than his cabinet. His office is a mere vantage ground from which he may be sure that effective words of advice and timely efforts at reform will gain telling momentum. He has the ear of the nation as of course, and a great person may use such an advantage greatly. If he use the opportunity, he may take his cabinet into partnership or not, as he pleases; and so its character may vary with his. Self-reliant men will regard their cabinets as executive councils; men less self-reliant or more prudent will regard them as also political councils, and will wish to call into them men who have earned the confidence of their party. The character of the cabinet may be made a nice index of the theory of the presidential office, as well as of the President's theory of party government; but the one view is, so far as I can see, as constitutional as the other.

One of the greatest of the President's powers I have not yet spoken of at all: his control, which is very absolute, of the foreign relations of the nation. The initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely. The President cannot conclude a treaty with a foreign power without the consent of the Senate, but he may guide every step of diplomacy, and to guide diplomacy is to determine what treaties must be made, if the faith and prestige of the government are to be maintained. He need disclose no step of negotiation until it is complete, and when in any critical matter it is completed the government is virtually committed. Whatever its disinclination, the Senate may feel itself committed also.

I have not dwelt upon this power of the President, because it has been decisively influential in determining the character and influence of the office at only two periods in our history; at the very first, when the government was young and had so to use its incipient force as to win the respect of the nations into whose family it had thrust itself, and in our own day when the results of the Spanish War, the ownership of distant possessions, and many sharp struggles for foreign trade make it necessary that we should turn our best talents to the task of dealing firmly, wisely, and justly with political and commercial rivals. The President can never again be the mere domestic figure he has been throughout so large a part of our history. The nation has risen to the first rank in power and resources. The other nations of the world look askance upon her, half in envy, half in fear, and wonder with a deep anxiety what she will do with her vast strength. They receive the frank professions of men like Mr. John Hay, whom we wholly trusted, with a grain of

salt, and doubt what we were sure of, their truthfulness and sincerity, suspecting a hidden design under every utterance he makes. Our President must always, henceforth, be one of the great powers of the world, whether he act greatly and wisely or not, and the best statesmen we can produce will be needed to fill the office of Secretary of State. We have but begun to see the presidential office in this light; but it is the light which will more and more beat upon it, and more and more determine its character and its effect upon the politics of the nation. We can never hide our President again as a mere domestic officer. We can never again see him the mere executive he was in the thirties and forties. He must stand always at the front of our affairs, and the office will be as big and as influential as the man who occupies it.

How is it possible to sum up the duties and influence of such an office in such a system in comprehensive terms which will cover all its changeful aspects? In the view of the makers of the Constitution the President was to be legal executive; perhaps the leader of the nation; certainly not the leader of the party, at any rate while in office. But by the operation of forces inherent in the very nature of government he has become all three, and by inevitable consequence the most heavily burdened officer in the world. No other man's day is so full as his, so full of the responsibilities which tax mind and conscience alike and demand an inexhaustible vitality. The mere task of making appointments to office, which the Constitution imposes upon the President, has come near to breaking some of our Presidents down, because it is a never-ending task in a civil service not yet put upon a professional footing, confused with short terms of office, always forming and dissolving. And in proportion as the President ventures to use his opportunity to lead opinion and act as spokesman of the people in affairs the people stand ready to overwhelm him by running to him with every question, great and small. They are as eager to have him settle a literary question as a political; hear him as acquiescently with regard to matters of special expert knowledge as with regard to public affairs, and call upon him to quiet all troubles by his personal intervention. Men of ordinary physique and discretion cannot be Presidents and live, if the strain be not somehow relieved. We shall be obliged always to be picking our chief magistrates from among wise and prudent athletes,—a small class.

The future development of the presidency, therefore, must certainly, one would confidently predict, run along such lines as the President's later relations with his cabinet suggest. General Washington, partly out of unaffected modesty, no doubt, but also out of the sure practical instinct which he possessed in so unusual a degree, set an example which few of his successors seem to have followed in any systematic manner. He made constant and intimate use of his colleagues in every matter that he handled, seeking their assistance and advice by letter when they were at a distance and he could not obtain it in person. It is well known to all close students of our history that his greater state papers, even those which seem in some peculiar and intimate sense his personal utterances, are full of the ideas and the very phrases of the men about him whom he most trusted. His rough drafts came back to him from Mr. Hamilton and Mr. Madison in great part rephrased and rewritten, in many passages reconceived and given a new color. He thought and acted always by the light of counsel, with a will and definite choice of his own, but through the instrumentality of other minds as well as his own. The duties and responsibilities laid upon the President by the Constitution can be changed only by constitutional amendment,—a thing too difficult to attempt except upon some greater necessity than the relief of an overburdened office, even though that office be the greatest in the land; and it is to be doubted whether the deliberate opinion of the country would consent to make of the President a less powerful officer than he is.

He can secure his own relief without shirking any real responsibility. Appointments, for example, he can, if he will, make more and more upon the advice and choice of his executive colleagues; every matter of detail not only, but also every minor matter of counsel or of general policy, he can more and more depend upon his chosen advisers to determine; he need reserve for himself only the larger matters of counsel and that general oversight of the business of the government and of the persons who conduct it which is not possible without intimate daily consultations, indeed, but which is possible without attempting the intolerable burden of direct control. This is, no doubt, the idea of their functions which most Presidents have entertained and which most Presidents suppose themselves to have acted on; but we have reason to believe that most of our Presidents have taken their duties too literally and have attempted the impossible. But we can safely predict that as the multitude of the President's duties increases, as it must with the growth and widening activities of the nation itself, the incumbents of the great office will more and more come to feel that they are administering it in its truest purpose and with greatest effect by regarding themselves as less and less executive officers and more and more directors of affairs and leaders of the nation,—men of counsel and of the sort of action that makes for enlightenment.

1. Woodrow Wilson, "The President of the United States," in*Constitutional Government of the United States* (New York: Columbia University Press, 1908), 54, 57, 59-60, 66-81.

Monday, June 3 – Essay #76 – The President of the United States by Woodrow Wilson – Guest Essayist: Professor Joerg Knipprath, Professor of Law at Southwestern Law School

Thomas Woodrow Wilson was dour, humorless, and convinced of the fallen nature of all but the elect few and of the need for strong leaders with proper principles who would provide the discipline and vision for the moral guidance of the weak at home and abroad. Calvinist in appearance, outlook, and family background, he perfectly matched the caricature of a Puritan. Those traits also made him a perfect Progressive.

Wilson was strongly influenced by 19th century German intellectual thought, especially Hegel's views of the State as the evolutionary path of an Idea through history, and by contemporary adaptations of Darwinian theories to social science. He enthusiastically embraced the nascent ideology of the State. He characterized that entity as organic and contrasted his conception with the mechanical view of the 18th century framers of the Constitution. As he wrote in *Constitutional Government*, "The trouble with [the Framers' approach] is that government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton."

The "organic" State tied to the people in some mystical union must not, and perhaps cannot, be shackled by a fusty piece of parchment and a system of checks and balances of power. If

possible, an entirely new constitutional order must be created that would reflect the inevitable ascendancy of the State in human affairs. If that was not a realistic choice due to reactionary political forces or sentimental popular attachments, the parchment must be broadly amended. During Wilson's first presidential term, constitutional amendments to authorize a federal income tax and to elect Senators by popular vote were approved, though they had been proposed before he was elected.

Beyond formal amendment of the Constitution, the various components of the government had to be marshaled into the service of Progressivism. Thus, the Congress had to be called on to pass far-reaching laws that increased state power at the expense of individualism, along the path of predestined political evolution to collectivism. The result was a series of federal regulatory laws in union-management affairs, antitrust, child labor, tax, and—through the creation of the Federal Reserve system—banking. That activism was replicated in many states. The era of big government had begun.

As usual, the Supreme Court took longer. Though the Court upheld many particulars of Progressive legislation, the organic theory of the state was not embodied forthrightly in its decisions until the later New Deal years and the post-World War 2 emergence of the "Living Constitution" jurisprudence. Adherents to the Progressive deification of the State, then and now, have sought to remake judicial doctrine by untethering it from formal constitutional structure in order to increase the power of the collective at the expense of the individual. Their efforts have focused on an expansive interpretation of Congressional powers, disregard of the prohibition against excessive delegation of power to bureaucracies, and a transformation of the Equal Protection Clause into a source of "positive" equality achieved through affirmative action and entitlement to welfare and other financial support paid by unwilling taxpayers. On that last point, success has been slow in coming. But since every political entity necessarily has a constitution, the Progressive "organic state" necessarily requires a progressive "living" constitution.

That left the Presidency. Wilson's early works reflected his contempt for American separation of powers and urged constitutional change to a parliamentary-style Congress with centralized power and an expanding federal bureaucracy as the necessary prescription. Over the next two decades, his intellectual perceptions changed significantly. Wilson regarded the administrations of Grover Cleveland and Theodore Roosevelt as exemplary. His last major work, *Constitutional Government (1908)*, focused on the Presidency as the engine for change.

Wilson's views of the Presidency were thoroughly 20th century. He viewed the formal constitutional powers of the office as minor matters and regarded its occupant as increasingly burdened by obligations as party leader and as executor of the laws and administrator of Congressional policies. That burden had become impossible for a single man, a refrain frequently heard before and since. This fact of political life would only become more pressing as the inevitable—and welcome—evolution to a more powerful and controlling State progressed.

Therefore, a president will and must leave the performance of those duties increasingly in the hands of subordinates. The appointment of trusted officials is more important than the selection of wise men of different opinion to give him counsel, as George Washington did, or of leaders of prominent factions within the party coalition, as was the practice of, among others, Abraham

Lincoln. Instead, as Wilson wrote, presidents must become "directors of affairs and leaders of the nation,—men of counsel and of the sort of action that makes for enlightenment."

Theodore Roosevelt's "bully pulpit" construct of the Presidency was the new model. The traditional chief executive would deal with the congressional chieftains to influence policy as it emerged in response to the broadly-felt needs of the times. Instead, the modern president would bypass the ordinary channels of political power and appeal to the public to shape policy to his creative vision. Wilson wrote, "The President is at liberty, both in law and in conscience, to be as big a man as he can. His capacity will set the limit…." This Nietzschean conception of the Presidency as a vessel for its occupants to exercise their will to power is quintessentially fascistic, as Jonah Goldberg has amply developed in his book *Liberal Fascism*. The focus on the charismatic and messianic leader as the ideal of government and the vehicle for progress to a just society is a hallmark of American progressivism to this day and has also characterized the more virulent forms of collectivism. There are telling appellations: *Il Duce* Mussolini, *Der Fuehrer* Hitler, *Vozhd* Joe Stalin, *El Lider* Castro, and North Korea's Kims (Great Leader, Dear Leader, and Respected Leader). Personality cults inevitably follow Progressive-style leaders.

Such leaders set the political stage by their mobilization of the masses through speeches and personal appearances, but leave the formulation and administration of actual policy to others. Recent history continues to provide examples of what earlier Progressives, such as the Roosevelts and Wilson, practiced. Recent events also demonstrate that the lack of political accountability, which Wilson decried in the Constitution's formal separation of powers, is enabled more in his system where the president is "above the fray" while little-known and uncontrolled subordinates carry out all manner of critical policies without, allegedly, his awareness.

Wilson's descriptions of the Presidency and the reality of political practice have a core of truth, lest his prescriptions not be plausible. To get to those prescriptions, however, he sets ablaze many constitutional straw men. Though he pays lip service to the Constitution's framers' sagacity, he understates their practical appreciation of the office. They were not naïfs. Alexander Hamilton wrote several Federalist Papers that extolled the need for energy and accountability in the Presidency which he argued were furthered by the Constitution's structure of the unitary executive. Through his *Pacificus Letters*, Hamilton is also the foundational advocate of a theory of broad implied executive authority on which later presidents have relied. George Washington shaped the contours of the Executive Branch by his actions within the purposely ambiguous contours of presidential powers under the Constitution. There were serious debates in the Washington administration about the nature of the president's cabinet and the constitutional relationship between the president and the officers, debates that were generally resolved in favor of presidential control over those officers.

However, Wilson's adulation of presidential leadership and power with few if any structural restraints is a call for a plebiscitary-style Presidency through popular votes and polling results. Eliminating structural barriers to presidential governance may to some degree enhance the speed and depth of political change. But it also removes a potent source of opposition to executive excess. As Madison wrote in Federalist 51, "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary

precautions." A century on, with the legacy of Wilsonian Progressivism still extant, and the bill increasingly steep, the need may be for stronger, not weaker, "auxiliary precautions."

A couple of asides remain. Professor Wilson's complained that presidents have been too reticent about fully exercising their constitutional powers and gave as an example their failure to shape national policy through their power (and duty) to deliver a "state of the union" speech to Congress. That practice was abandoned by Thomas Jefferson. President Wilson reinstated it.

Professor Wilson lauded the president's constitutional and real dominance in foreign affairs. He declared that, despite any misgivings they might have, Senators are hard-pressed to oppose treaties made by the president. Yet, perhaps the greatest political failure of President Wilson was his inability to get his signature foreign relations efforts, the League of Nations Treaty, through the Senate.

An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

The Presidency: Making an Old Party Progressive by Theodore Roosevelt (1858-1919)

1913

…The most important factor in getting the right spirit in my Administration, next to the insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers. My view was that every executive officer, and above all every executive officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power, but I did greatly broaden the use of executive power. In other words, I acted for the public welfare, I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition. I did not care a rap for the mere form

and show of power; I cared immensely for the use that could be made of the substance….

In internal affairs I cannot say that I entered the Presidency with any deliberately planned and far-reaching scheme of social betterment. I had, however, certain strong convictions; and I was on the lookout for every opportunity of realizing those convictions. I was bent upon making the Government the most efficient possible instrument in helping the people of the United States to better themselves in every way, politically, socially, and industrially. I believed with all my heart in real and thoroughgoing democracy, and I wished to make this democracy industrial as well as political, although I had only partially formulated the methods I believed we should follow. I believed in the people's rights, and therefore in National rights and States' rights just exactly to the degree in which they severally secured popular rights. I believed in invoking the National power with absolute freedom for every National need; and I believed that the Constitution should be treated as the greatest document ever devised by the wit of man to aid a people in exercising every power necessary for its own betterment, and not as a straitjacket cunningly fashioned to strangle growth.As for the particular methods of realizing these various beliefs, I was content to wait and see what method might be necessary in each given case as it arose; and I was certain that the cases would arise fast enough….

1. Theodore Roosevelt, "The Presidency: Making an Old Party Progressive," in *The Rough Riders, An Autobiography* (New York: The Macmillan Company, 1913), 614-15, 643

Tuesday, June 4, 2013 – Essay #77 – The Presidency: Making an Old Party Progressive by Theodore Roosevelt – Guest Essayist: James Legee Graduate, Master of Arts in Political Science at Villanova University, Graduate Fellow at the Matthew J. Ryan Center for the study of Free Institutions and the Public Good

Theodore Roosevelt was one of the most colorful presidents to serve the Republic. He was a rancher in the North Dakota Badlands, led the Rough Riders up San Juan Hill and received a Medal of Honor for his gallantry, the only President with such a distinction. While climbing a Mountain in the Adirondacks of New York in 1901, word reached Vice President Theodore Roosevelt that the condition of President McKinley had rapidly deteriorated after an assassination attempt a week earlier. The next day, McKinley was dead, and Roosevelt was sworn into office as president. Roosevelt brought an ideology to the Office of the President that was a refutation of the American Founding, Progressivism. This ideology included a dramatic expansion of power vested in one person, the president.

The brilliance of the American Founding lay in the delegation of sovereignty to representatives selected by the people. Unlike most regimes of the day- indeed many regimes today- the American government was created so that the power of the government was laid out in an explicit fashion. The power of the President is specifically laid out in Article 2 of the

Constitution, with the Tenth Amendment reserving rights not enumerated to the federal government, to the states and people, respectively. Madison best summarizes this in *Federalist 45*, where he wrote "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."

The progressive constitutional theory Roosevelt brought to the Presidency turned Madison's enumeration of powers on its head. Roosevelt believed "that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional Powers." Presidential power, here, is no longer defined by what it is allowed to do. Instead, executive power is unlimited, with the exception of specific constraints; the President could "do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or the laws."

Outside of breaking with the doctrine of enumerated powers that Madison and the Founders envisioned, Theodore Roosevelt claims that his theory of executive power is justified as addressing a national need or crisis. Roosevelt, "acted for the public welfare, [he] acted for the common well-being of all people, whenever and in whatever manner was necessary…" Later in the selection, he wrote, "I believed in invoking the National power with absolute freedom for every National need…" The problem with the "public welfare," "common well-being," and "National need," is that these things do not form a principal upon which to act. They are inconsistent and undefined. What constitutes the "common well-being?" Is this not subjective at best, and at its most dangerous, an arbitrary exercise of power? There is a certainty that crisis, whether economic troubles, security threats, or other, will arise, and republican government and slow deliberation within the Congress will not be up to the challenge, and rapid action must be taken. We can make the slippery slope argument that the consolidation and exercise of power can lend to despotism. But, can we not make a less hypothetical argument that the consolidation and exercise of power in the executive branch, headed by a sole individual is simply wrong, and contrary to democracy?

Even the most laudatory of histories on Theodore Roosevelt refer to him as *Theodore Rex*, the "Roosevelt who would be king." Unlike his future cousin, though, he would not dominate the government for nearly so long. Regardless, the Presidency of Theodore Roosevelt set the groundwork for the dramatic expansion of federal involvement both in the public and private lives of Americans today, far afield from the visions of the republic the Founders had in mind. There have been instances when the use of unilateral power by the executive branch has had, arguably, salutary effects: Lincoln's Emancipation Proclamation, even Roosevelt's establishment of the National Park System. But, we must be cautious in such an

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The Study of Administration by Woodrow Wilson

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I suppose that no practical science is ever studied where there is no need to know it. The very fact, therefore, that the eminently practical science of administration is finding its way into college courses in this country would prove that this country needs to know more about administration, were such proof of the fact required to make out a case. It need not be said, however, that we do not look into college programs for proof of this fact. It is a thing almost taken for granted among us, that the present movement called civil service reform must, after the accomplishment of its first purpose, expand into efforts to improve, not the *personnel* only, but also the organization and methods of our government offices: because it is plain that their organization and methods need improvement only less than their*personnel.* It is the object of administrative study to discover, first, what government can properly and successfully do, and, secondly, how it can do these proper things with the utmost possible efficiency and at the least possible cost either of money or of energy. On both these points there is obviously much need of light among us; and only careful study can supply that light.

Before entering on that study, however, it is needful:

2. To take some account of what others have done in the same line; that is to say, of the history of the study.
3. To ascertain just what is its subject-matter.
4. To determine just what are the best methods by which to develop it, and the most clarifying political conceptions to carry with us into it.

Unless we know and settle these things, we shall set out without chart or compass.

I.

The science of administration is the latest fruit of that study of the science of politics which was begun some twenty-two hundred years ago. It is a birth of our own century, almost of our own generation.

Why was it so late in coming? Why did it wait till this too busy century of ours to demand attention for itself? Administration is the most obvious part of government; it is government in action; it is the executive, the operative, the most visible side of government, and is of course as old as government itself. It is government in action, and one might very naturally expect to find that government in action had arrested the attention and provoked the scrutiny of writers of politics very early in the history of systematic thought.

But such was not the case. No one wrote systematically of administration as a branch of the science of government until the present century had passed its first youth and had begun to put forth its characteristic flower of the systematic knowledge. Up to our own day all the political writers whom we now read had thought, argued, dogmatized only about the*constitution* of government; about the nature of the state, the essence and seat of sovereignty, popular power and kingly prerogative; about the greatest meanings lying at the heart of government, and the high

ends set before the purpose of government by man's nature and man's aims. The central field of controversy was that great field of theory in which monarchy rode tilt against democracy, in which oligarchy would have built for itself strongholds of privilege, and in which tyranny sought opportunity to make good its claim to receive submission from all competitors. Amidst this high warfare of principles, administration could command no pause for its own consideration. The question was always: Who shall make law, and what shall that law be? The other question, how law should be administered with enlightenment, with equity, with speed, and without friction, was put aside as "practical detail" which clerks could arrange after doctors had agreed upon principles.

That political philosophy took this direction was of course no accident, no chance preference or perverse whim of political philosophers. The philosophy of any time is, as Hegel says, "nothing but the spirit of that time expressed in abstract thought"; and political philosophy, like philosophy of every other kind, has only held up the mirror to contemporary affairs. The trouble in early times was almost altogether about the constitution of government; and consequently that was what engrossed men's thoughts. There was little or no trouble about administration,—at least little that was heeded by administrators. The functions of government were simple, because life itself was simple. Government went about imperatively and compelled men, without thought of consulting their wishes. There was no complex system of public revenues and public debts to puzzle financiers; there were, consequently, no financiers to be puzzled. No one who possessed power was long at a loss how to use it. The great and only question was: Who shall possess it? Populations were of manageable numbers; property was of simple sorts. There were plenty of farms, but no stocks and bonds: more cattle than vested interests.

I have said that all this was true of "early times"; but it was substantially true also of comparatively late times. One does not have to look back of the last century for the beginnings of the present complexities of trade and perplexities of commercial speculation, nor for the portentous birth of national debts. Good Queen Bess, doubtless, thought that the monopolies of the sixteenth century were hard enough to handle without burning her hands; but they are not remembered in the presence of the giant monopolies of the nineteenth century. When Blackstone lamented that corporations had no bodies to be kicked and no souls to be damned, he was anticipating the proper time for such regrets by full a century. The perennial discords between master and workmen which now so often disturb industrial society began before the Black Death and the Statute of Laborers; but never before our own day did they assume such ominous proportions as they wear now. In brief, if difficulties of governmental action are to be seen gathering in other centuries, they are to be seen culminating in our own.

This is the reason why administrative tasks have nowadays to be so studiously and systematically adjusted to carefully tested standards of policy, the reason why we are having now what we never had before, a science of administration. The weightier debates of constitutional principle are even yet by no means concluded; but they are no longer of more immediate practical moment than questions of administration. It is getting to be harder to *run* a constitution than to frame one.

Here is Mr. Bagehot's graphic, whimsical way of depicting the difference between the old and the new in administration:

"In early times, when a despot wishes to govern a distant province, he sends down a satrap on a grand horse, and other people on little horses; and very little is heard of the satrap again unless he send back some of the little people to tell what he has been doing. No great labor of superintendence is possible. Common rumor and casual report are the sources of intelligence. If it seems certain that the province is in a bad state, satrap No. 1 is recalled, and satrap No. 2 sent out in his stead. In civilized countries the process is different. You erect a bureau in the province you want to govern; you make it write letters and copy letters; it sends home eight reports *per diem* to the head bureau in St. Petersburg. Nobody does a sum in the province without some one doing the same sum in the capital, to "check" him, and see that he does it correctly. The consequence of this is, to throw on the heads of departments an amount of reading and labor which can only be accomplished by the greatest natural aptitude, the most efficient training, the most firm and regular industry."

There is scarcely a single duty of government which was once simple which is not now complex; government once had but a few masters; it now has scores of masters. Majorities formerly only underwent government; they now conduct government. Where government once might follow the whims of a court, it must now follow the views of a nation.

And those views are steadily widening to new conceptions of state duty; so that, at the same time that the functions of government are every day becoming more complex and difficult, they are also vastly multiplying in number. Administration is everywhere putting its hands to new undertakings. The utility, cheapness, and success of the government's postal service, for instance, point towards the early establishment of governmental control of the telegraph system. Or, even if our government is not to follow the lead of the governments of Europe in buying or building both telegraph and railroad lines, no one can doubt that in some way it must make itself master of masterful corporations. The creation of national commissioners of railroads, in addition to the older state commissions, involves a very important and delicate extension of administrative functions. Whatever hold of authority state or federal governments are to take upon corporations, there must follow cares and responsibilities which will require not a little wisdom, knowledge, and experience. Such things must be studied in order to be well done. And these, as I have said, are only a few of the doors which are being opened to offices of government. The idea of the state and the consequent ideal of its duty are undergoing noteworthy change; and "the idea of the state is the conscience of administration." Seeing every day new things which the state ought to do, the next thing is to see clearly how it ought to do them.

This is why there should be a science of administration which shall seek to straighten the paths of government, to make its business less unbusinesslike, to strengthen and purify its organization, and to crown its duties with dutifulness. This is one reason why there is such a science.

But where has this science grown up? Surely not on this side the sea. Not much impartial scientific method is to be discerned in our administrative practices. The poisonous atmosphere of city government, the crooked secrets of state administration, the confusion, sinecurism, and corruption ever and again discovered in the bureaux at Washington forbid us to believe that any clear conceptions of what constitutes good administration are as yet very widely current in the United States. No; American writers have hitherto taken no very important part in the

advancement of this science. It has found its doctors in Europe. It is not of our making; it is a foreign science, speaking very little of the language of English or American principle. It employs only foreign tongues; it utters none but what are to our minds alien ideas. Its aims, its examples, its conditions, are almost exclusively grounded in the histories of foreign races, in the precedents of foreign systems, in the lessons of foreign revolutions. It has been developed by French and German professors, and is consequently in all parts adapted to the needs of a compact state, and made to fit highly centralized forms of government; whereas, to answer our purposes, it must be adapted, not to a simple and compact, but to a complex and multiform state, and made to fit highly decentralized forms of government. If we would employ it, we must Americanize it, and that not formally, in language merely, but radically, in thought, principle, and aim as well. It must learn our constitutions by heart; must get the bureaucratic fever out of its veins; must inhale much free American air.

If an explanation be sought why a science manifestly so susceptible of being made useful to all governments alike should have received attention first in Europe, where government has long been a monopoly, rather than in England or the United States, where government has long been a common franchise, the reason will doubtless be found to be twofold: first, that in Europe, just because government was independent of popular assent, there was more governing to be done; and, second, that the desire to keep government a monopoly made the monopolists interested in discovering the least irritating means of governing. They were, besides, few enough to adopt means promptly.

It will be instructive to look into this matter a little more closely. In speaking of European governments I do not, of course, include England. She has not refused to change with the times. She has simply tempered the severity of the transition from a polity of aristocratic privilege to a system of democratic power by slow measures of constitutional reform which, without preventing revolution, has confined it to paths of peace. But the countries of the continent for a long time desperately struggled against all change, and would have diverted revolution by softening the asperities of absolute government. They sought so to perfect their machinery as to destroy all wearing friction, so to sweeten their methods with consideration for the interests of the governed as to placate all hindering hatred, and so assiduously and opportunely to offer their aid to all classes of undertakings as to render themselves indispensable to the industrious. They did at last give the people constitutions and the franchise; but even after that they obtained leave to continue despotic by becoming paternal. They made themselves too efficient to be dispensed with, too smoothly operative to be noticed, too enlightened to be inconsiderately questioned, too benevolent to be suspected, too powerful to be coped with. All this has required study; and they have closely studied it.

On this side the sea, we, the while, had known no great difficulties of government. With a new country, in which there was room and remunerative employment for everybody, with liberal principles of government and unlimited skill in practical politics, we were long exempted from the need of being anxiously careful about plans and methods of administration. We have naturally been slow to see the use or significance of those many volumes of learned research and painstaking examination into the ways and means of conducting government which the presses of Europe have been sending to our libraries. Like a lusty child, government with us has expanded in nature and grown great in stature, but has also become awkward in movement. The

vigor and increase of its life has been altogether out of proportion to its skill in living. It has gained strength, but it has not acquired deportment. Great, therefore, as has been our advantage over the countries of Europe in point of ease and health of constitutional development, now that the time for more careful administrative adjustments and larger administrative knowledge has come to us, we are at a signal disadvantage as compared with the transatlantic nations; and this for reasons which I shall try to make clear.

Judging by the constitutional histories of the chief nations of the modern world, there may be said to be three periods of growth through which government has passed in all the most highly developed of existing systems, and through which it promises to pass in all the rest. The first of these periods is that of absolute rulers, and of an administrative system adapted to absolute rule; the second is that in which constitutions are framed to do away with absolute rulers and substitute popular control, and in which administration is neglected for these higher concerns; and the third is that in which the sovereign people undertake to develop administration under this new constitution which has brought them into power.

Those governments are now in the lead in administrative practice which had rulers still absolute but also enlightened when those modern days of political illumination came in which it was made evident to all but the blind that governors are properly only the servants of the governed. In such governments administration has been organized to subserve the general weal with the simplicity and effectiveness vouchsafed only to the undertakings of a single will.

Such was the case in Prussia, for instance, where administration has been most studied and most nearly perfected. Frederic the Great, stern and masterful as was his rule, still sincerely professed to regard himself as only the chief servant of the state, to consider his great office a public trust; and it was he who, building upon the foundations laid by his father, began to organize the public service of Prussia as in very earnest a service of the public. His no less absolute successor, Frederic William III, under the inspiration of Stein, again, in his turn, advanced the work still further, planning many of the broader structural features which give firmness and form to Prussian administration today. Almost the whole of the admirable system has been developed by kingly initiative.

Of similar origin was the practice, if not the plan, of modern French administration, with its symmetrical divisions of territory and its orderly gradations of office. The days of the Revolution—of the Constituent Assembly—were days of *constitution-writing,* but they can hardly be called days of constitution-making. The Revolution heralded a period of constitutional development,—the entrance of France upon the second of those periods which I have enumerated,—but it did not itself inaugurate such a period. It interrupted and unsettled absolutism, but did not destroy it. Napoleon succeeded the monarchs of France, to exercise a power as unrestricted as they had ever possessed.

The recasting of French administration by Napoleon is, therefore, my second example of the perfecting of civil machinery by the single will of an absolute ruler before the dawn of a constitutional era. No corporate, popular will could ever have effected arrangements such as those which Napoleon commanded. Arrangements so simple at the expense of local prejudice, so logical in their indifference to popular choice, might be decreed by a Constituent Assembly, but

could be established only by the unlimited authority of a despot. The system of the year VIII was ruthlessly thorough and heartlessly perfect. It was, besides, in large part, a return to the despotism that had been overthrown.

Among those nations, on the other hand, which entered upon a season of constitution-making and popular reform before administration had received the impress of liberal principle, administrative improvement has been tardy and half-done. Once a nation has embarked in the business of manufacturing constitutions, it finds it exceedingly difficult to close out that business and open for the public a bureau of skilled, economical administration. There seems to be no end to the tinkering of constitutions. Your ordinary constitution will last you hardly ten years without repairs or additions; and the time for administrative detail comes late.

Here, of course, our examples are England and our own country. In the days of the Angevin kings, before constitutional life had taken root in the Great Charter, legal and administrative reforms began to proceed with sense and vigor under the impulse of Henry II's shrewd, busy, pushing, indomitable spirit and purpose; and kingly initiative seemed destined in England, as elsewhere, to shape governmental growth at its will. But impulsive, errant Richard and weak, despicable John were not the men to carry out such schemes as their father's. Administrative development gave place in their reigns to constitutional struggles; and Parliament became king before any English monarch had had the practical genius or the enlightened conscience to devise just and lasting forms for the civil service of the state.

The English race, consequently, has long and successfully studied the art of curbing executive power to the constant neglect of the art of perfecting executive methods. It has exercised itself much more in controlling than in energizing government. It has been more concerned to render government just and moderate than to make it facile, well-ordered, and effective.English and American political history has been a history, not of administrative development, but of legislative oversight,—not of progress in governmental organization, but of advance in law-making and political criticism. Consequently, we have reached a time when administrative study and creation are imperatively necessary to the well-being of our governments saddled with the habits of a long period of constitution-making. That period has practically closed, so far as the establishment of essential principles is concerned, but we cannot shake off its atmosphere. We go on criticizing when we ought to be creating. We have reached the third of the periods I have mentioned,—the period, namely, when the people have to develop administration in accordance with the constitutions they won for themselves in a previous period of struggle with absolute power; but we are not prepared for the tasks of the new period.

Such an explanation seems to afford the only escape from blank astonishment at the fact that, in spite of our vast advantages in point of political liberty, and above all in point of practical political skill and sagacity, so many nations are ahead of us in administrative organization and administrative skill. Why, for instance, have we but just begun purifying a civil service which was rotten full fifty years ago? To say that slavery diverted us is but to repeat what I have said—that flaws in our constitution delayed us.

Of course all reasonable preference would declare for this English and American course of politics rather than for that of any European country. We should not like to have had Prussia's

history for the sake of having Prussia's administrative skill; and Prussia's particular system of administration would quite suffocate us. It is better to be untrained and free than to be servile and systematic. Still there is no denying that it would be better yet to be both free in spirit and proficient in practice. It is this even more reasonable preference which impels us to discover what there may be to hinder or delay us in naturalizing this much-to-be-desired science of administration.

What, then, is there to prevent?

Well, principally, popular sovereignty. It is harder for democracy to organize administration than for monarchy. The very completeness of our most cherished political successes in the past embarrasses us. We have enthroned public opinion; and it is forbidden us to hope during its reign for any quick schooling of the sovereign in executive expertness or in the conditions of perfect functional balance in government. The very fact that we have realized popular rule in its fulness has made the task of *organizing*that rule just so much the more difficult. In order to make any advance at all we must instruct and persuade a multitudinous monarch called public opinion,—a much less feasible undertaking than to influence a single monarch called a king. An individual sovereign will adopt a simple plan and carry it out directly: he will have but one opinion, and he will embody that one opinion in one command. But this other sovereign, the people, will have a score of differing opinions. They can agree upon nothing simple: advance must be made through compromise, by a compounding of differences, by a trimming of plans and a suppression of too straightforward principles. There will be a succession of resolves running through a course of years, a dropping fire of commands running through a whole gamut of modifications.

In government, as in virtue, the hardest of hard things is to make progress. Formerly the reason for this was that the single person who was sovereign was generally either selfish, ignorant, timid, or a fool,—albeit there was now and again one who was wise. Nowadays the reason is that the many, the people, who are sovereign have no single ear which one can approach, and are selfish, ignorant, timid, stubborn, or foolish with the selfishness, the ignorances, the stubbornnesses, the timidities, or the follies of several thousand persons,—albeit there are hundreds who are wise. Once the advantage of the reformer was that the sovereign's mind had a definite locality, that it was contained in one man's head, and that consequently it could be gotten at; though it was his disadvantage that the mind learned only reluctantly or only in small quantities, or was under the influence of some one who let it learn only the wrong things. Now, on the contrary, the reformer is bewildered by the fact that the sovereign's mind has no definite locality, but is contained in a voting majority of several million heads; and embarrassed by the fact that the mind of this sovereign also is under the influence of favorites, who are none the less favorites in a good old-fashioned sense of the word because they are not persons by preconceivedopinions; *i.e.,* prejudices which are not to be reasoned with because they are not the children of reason.

Wherever regard for public opinion is a first principle of government, practical reform must be slow and all reform must be full of compromises. For wherever public opinion exists it must rule. This is now an axiom half the world over, and will presently come to be believed even in Russia.Whoever would effect a change in a modern constitutional government must first educate his fellow-citizens to want *some* change. That done, he must persuade them to want the particular

change he wants. He must first make public opinion willing to listen and then see to it that it listen to the right things. He must stir it up to search for an opinion, and then manage to put the right opinion in its way.

The first step is not less difficult than the second. With opinions, possession is more than nine points of the law. It is next to impossible to dislodge them. Institutions which one generation regards as only a makeshift approximation to the realization of a principle, the next generation honors as the nearest possible approximation to that principle, and the next worships as the principle itself. It takes scarcely three generations for the apotheosis. The grandson accepts his grandfather's hesitating experiment as an integral part of the fixed constitution of nature.

Even if we had clear insight into all the political past, and could form out of perfectly instructed heads a few steady, infallible, placidly wise maxims of government into which all sound political doctrine would be ultimately resolvable, *would the country act on them?* That is the question. The bulk of mankind is rigidly unphilosophical, and nowadays the bulk of mankind votes. A truth must become not only plain but also commonplace before it will be seen by the people who go to their work very early in the morning; and not to act upon it must involve great and pinching inconveniences before these same people will make up their minds to act upon it.

And where is this unphilosophical bulk of mankind more multifarious in its composition than in the United States? To know the public mind of this country, one must know the mind, not of Americans of the older stocks only, but also of Irishmen, of Germans, of negroes. In order to get a footing for new doctrine, one must influence minds cast in every mold of race, minds inheriting every bias of environment, warped by the histories of a score of different nations, warmed or chilled, closed or expanded by almost every climate of the globe.

So much, then, for the history of the study of administration, and the peculiarly difficult conditions under which, entering upon it when we do, we must undertake it. What, now, is the subject-matter of this study, and what are its characteristic objects?

II.

The field of administration is a field of business. It is removed from the hurry and strife of politics; it at most points stands apart even from the debatable ground of constitutional study. It is a part of political life only as the methods of the counting-house are a part of the life of society; only as machinery is part of the manufactured product. But it is, at the same time, raised very far above the dull level of mere technical detail by the fact that through its greater principles it is directly connected with the lasting maxims of political wisdom, the permanent truths of political progress.

The object of administrative study is to rescue executive methods from the confusion and costliness of empirical experiment and set them upon foundations laid deep in stable principle.

It is for this reason that we must regard civil-service reform in its present stages as but a prelude to a fuller administrative reform. We are now rectifying methods of appointment; we must go on to adjust executive functions more fitly and to prescribe better methods of executive organization

and action. Civil-service reform is thus but a moral preparation for what is to follow. It is clearing the moral atmosphere of official life by establishing the sanctity of public office as a public trust, and, by making service unpartisan, it is opening the way for making it businesslike. By sweetening its motives it is rendering it capable of improving its methods of work.

Let me expand a little what I have said of the province of administration. Most important to be observed is the truth already so much and so fortunately insisted upon by our civil-service reformers; namely, thatadministration lies outside the proper sphere of *politics.* Administrative questions are not political questions. Although politics sets the tasks for administration, it should not be suffered to manipulate its offices.

This is distinction of high authority; eminent German writers insist upon it as of course. Bluntschli, for instance, bids us separate administration alike from politics and from law. Politics, he says, is state activity "in things great and universal," while "administration, on the other hand," is "the activity of the state in individual and small things. Politics is thus the special province of the statesman, administration of the technical official." "Policy does nothing without the aid of administration"; but administration is not therefore politics. But we do not require German authority for this position; this discrimination between administration and politics is now, happily, too obvious to need further discussion.

There is another distinction which must be worked into all our conclusions, which, though but another side of that between administration and politics, is not quite so easy to keep sight of: I mean the distinction between*constitutional* and administrative questions, between those governmental adjustments which are essential to constitutional principle and those which are merely instrumental to the possibly changing purposes of a wisely adapting convenience.

One cannot easily make clear to every one just where administration resides in the various departments of any practicable government without entering upon particulars so numerous as to confuse and distinctions so minute as to distract. No lines of demarcation, setting apart administrative from non-administrative functions, can be run between this and that department of government without being run up hill and down dale, over dizzy heights of distinction and through dense jungles of statutory enactment, hither and thither around "ifs" and "buts," "whens" and "howevers," until they become altogether lost to the common eye not accustomed to this sort of surveying, and consequently not acquainted with the use of the theodolite of logical discernment. A great deal of administration goes about *incognito*to most of the world, being confounded now with political "management," and again with constitutional principle.

Perhaps this ease of confusion may explain such utterances as that of Niebuhr's: "Liberty," he says, "depends incomparably more upon administration than upon constitution." At first sight this appears to be largely true. Apparently facility in the actual exercise of liberty does depend more upon administrative arrangements than upon constitutional guarantees; although constitutional guarantees alone secure the existence of liberty. But—upon second thought—is even so much as this true? Liberty no more consists in easy functional movement than intelligence consists in the ease and vigor with which the limbs of a strong man move. The principles that rule within the man, or the constitution, are the vital springs of liberty or

servitude. Because dependence and subjection are without chains, are lightened by every easy-working device of considerate, paternal government, they are not thereby transformed into liberty. Liberty cannot live apart from constitutional principle; and no administration, however perfect and liberal its methods, can give men more than a poor counterfeit of liberty if it rest upon illiberal principles of government.

A clear view of the difference between the province of constitutional law and the province of administrative function ought to leave no room for misconception; and it is possible to name some roughly definite criteria upon which such a view can be built. Public administration is detailed and systematic execution of public law. Every particular application of general law is an act of administration. The assessment and raising of taxes, for instance, the hanging of a criminal, the transportation and delivery of the mails, the equipment and recruiting of the army and navy, *etc.,* are all obviously acts of administration; but the general laws which direct these things to be done are as obviously outside of and above administration. The broad plans of governmental action are not administrative; the detailed execution of such plans is administrative. Constitutions, therefore, properly concern themselves only with those instrumentalities of government which are to control general law. Our federal constitution observes this principle in saying nothing of even the greatest of the purely executive offices, and speaking only of that President of the Union who was to share the legislative and policy-making functions of government, only of those judges of highest jurisdiction who were to interpret and guard its principles, and not of those who were merely to give utterance to them.

This is not quite the distinction between Will and answering Deed, because the administrator should have and does have a will of his own in the choice of means for accomplishing his work. He is not and ought not to be a mere passive instrument. The distinction is between general plans and special means.

There is, indeed, one point at which administrative studies trench on constitutional ground—or at least upon what seems constitutional ground.The study of administration, philosophically viewed, is closely connected with the study of the proper distribution of constitutional authority. To be efficient it must discover the simplest arrangements by which responsibility can be unmistakably fixed upon officials; the best way of dividing authority without hampering it, and responsibility without obscuring it. And this question of the distribution of authority, when taken into the sphere of the higher, the originating functions of government, is obviously a central constitutional question. If administrative study can discover the best principles upon which to base such distribution, it will have done constitutional study an invaluable service. Montesquieu did not, I am convinced, say the last word on this head.

To discover the best principle for the distribution of authority is of greater importance, possibly, under a democratic system, where officials serve many masters, than under others where they serve but a few. All sovereigns are suspicious of their servants, and the sovereign people is no exception to the rule; but how is its suspicion to be allayed by *knowledge?* If that suspicion could but be clarified into wise vigilance, it would be altogether salutary; if that vigilance could be aided by the unmistakable placing of responsibility, it would be altogether beneficent. Suspicion in itself is never healthful either in the private or in the public mind. *Trust is strength* in all relations of life; and, as it is the office of the constitutional reformer to create conditions of

trustfulness, so it is the office of the administrative organizer to fit administration with conditions of clear-cut responsibility which shall insure trustworthiness.

And let me say that large powers and unhampered discretion seem to me the indispensable conditions of responsibility. Public attention must be easily directed, in each case of good or bad administration, to just the man deserving of praise or blame. There is no danger in power, if only it be not irresponsible. If it be divided, dealt out in shares to many, it is obscured; and if it be obscured, it is made irresponsible. But if it be centered in heads of the service and in heads of branches of the service, it is easily watched and brought to book. If to keep his office a man must achieve open and honest success, and if at the same time he feels himself intrusted with large freedom of discretion, the greater his power the less likely is he to abuse it, the more is he nerved and sobered and elevated by it. The less his power, the more safely obscure and unnoticed does he feel his position to be, and the more readily does he relapse into remissness.

Just here we manifestly emerge upon the field of that still larger question,—the proper relations between public opinion and administration.

To whom is official trustworthiness to be disclosed, and by whom is it to be rewarded? Is the official to look to the public for his need of praise and his push of promotion, or only to his superior in office? Are the people to be called in to settle administrative discipline as they are called in to settle constitutional principles? These questions evidently find their root in what is undoubtedly the fundamental problem of this whole study. That problem is: What part shall public opinion take in the conduct of administration?

The right answer seems to be, that public opinion shall play the part of authoritative critic.

But the *method* by which its authority shall be made to tell? Our peculiar American difficulty in organizing administration is not the danger of losing liberty, but the danger of not being able or willing to separate its essentials from its accidents. Our success is made doubtful by that besetting error of ours, the error of trying to do too much by vote. Self-government does not consist in having a hand in everything, any more than housekeeping consists necessarily in cooking dinner with one's own hands. The cook must be trusted with a large discretion as to the management of the fires and the ovens.

In those countries in which public opinion has yet to be instructed in its privileges, yet to be accustomed to having its own way, this question as to the province of public opinion is much more readily soluble than in this country, where public opinion is wide awake and quite intent upon having its own way anyhow. It is pathetic to see a whole book written by a German professor of political science for the purpose of saying to his countrymen, "Please try to have an opinion about national affairs"; but a public which is so modest may at least be expected to be very docile and acquiescent in learning what things it has *not* a right to think and speak about imperatively. It may be sluggish, but it will not be meddlesome. It will submit to be instructed before it tries to instruct. Its political education will come before its political activity. In trying to instruct our own public opinion, we are dealing with a pupil apt to think itself quite sufficiently instructed beforehand.

The problem is to make public opinion efficient without suffering it to be meddlesome. Directly exercised, in the oversight of the daily details and in the choice of the daily means of government, public criticism is of course a clumsy nuisance, a rustic handling delicate machinery. But as superintending the greater forces of formative policy alike in politics and administration, public criticism is altogether safe and beneficent, altogether indispensable. Let administrative study find the best means for giving public criticism this control and for shutting it out from all other interference.

But is the whole duty of administrative study done when it has taught the people what sort of administration to desire and demand, and how to get what they demand? Ought it not to go on to drill candidates for the public service?

There is an admirable movement towards universal political education now afoot in this country. The time will soon come when no college of respectability can afford to do without a well-filled chair of political science. But the education thus imparted will go but a certain length. It will multiply the number of intelligent critics of government, but it will create no competent body of administrators. It will prepare the way for the development of a sure-footed understanding of the general principles of government, but it will not necessarily foster skill in conducting government. It is an education which will equip legislators, perhaps, but not executive officials. If we are to improve public opinion, which is the motive power of government, we must prepare better officials as the *apparatus* of government. If we are to put in new boilers and to mend the fires which drive our governmental machinery, we must not leave the old wheels and joints and valves and bands to creak and buzz and clatter on as best they may at bidding of the new force. We must put in new running parts wherever there is the least lack of strength or adjustment. It will be necessary to organize democracy by sending up to the competitive examinations for the civil service men definitely prepared for standing liberal tests as to technical knowledge. A technically schooled civil service will presently have become indispensable.

I know that a corps of civil servants prepared by a special schooling and drilled, after appointment, into a perfected organization, with appropriate hierarchy and characteristic discipline, seems to a great many very thoughtful persons to contain elements which might combine to make an offensive official class,—a distinct, semi-corporate body with sympathies divorced from those of a progressive, free-spirited people, and with hearts narrowed to the meanness of a bigoted officialism. Certainly such a class would be altogether hateful and harmful in the United States. Any measure calculated to produce it would for us be measures of reaction and of folly.

But to fear the creation of a domineering, illiberal officialism as a result of the studies I am here proposing is to miss altogether the principle upon which I wish most to insist. That principle is, that administration in the United States must be at all points sensitive to public opinion. A body of thoroughly trained officials serving during good behavior we must have in any case: that is a plain business necessity. But the apprehension that such a body will be anything un-American clears away the moment it is asked. What is to constitute good behavior? For that question obviously carries its own answer on its face. Steady, hearty allegiance to the policy of the government they serve will constitute good behavior. That *policy* will have no taint of officialism

about it. It will not be the creation of permanent officials, but of statesmen whose responsibility to public opinion will be direct and inevitable. Bureaucracy can exist only where the whole service of the state is removed from the common political life of the people, its chiefs as well as its rank and file. Its motives, its objects, its policy, its standards, must be bureaucratic. It would be difficult to point out any examples of impudent exclusiveness and arbitrariness on the part of officials doing service under a chief of department who really served the people, as all our chiefs of departments must be made to do. It would be easy, on the other hand, to adduce other instances like that of the influence of Stein in Prussia, where the leadership of one statesman imbued with true public spirit transformed arrogant and perfunctory bureaux into public-spirited instruments of just government.

The ideal for us is a civil service cultured and self-sufficient enough to act with sense and vigor, and yet so intimately connected with the popular thought, by means of elections and constant public counsel, as to find arbitrariness of class spirit quite out of the question.

III.

Having thus viewed in some sort the subject-matter and the objects of this study of administration, what are we to conclude as to the methods best suited to it—the points of view most advantageous for it?

Government is so near us, so much a thing of our daily familiar handling, that we can with difficulty see the need of any philosophical study of it, or the exact point of such study, should it be undertaken. We have been on our feet too long to study now the art of walking. We are a practical people, made so apt, so adept in self-government by centuries of experimental drill, that we are scarcely any longer capable of perceiving the awkwardness of the particular system we may be using, just because it is so easy for us to use any system. We do not study the art of governing: we govern. But mere unschooled genius for affairs will not save us from sad blunders in administration. Though democrats by long inheritance and repeated choice, we are still rather crude democrats. Old as democracy is, its organization on a basis of modern ideas and conditions is still an unaccomplished work. The democratic state has yet to be equipped for carrying those enormous burdens of administration which the needs of this industrial and trading age are so fast accumulating. Without comparative studies in government we cannot rid ourselves of the misconception that administration stands upon an essentially different basis in a democratic state from that on which it stands in a non-democratic state.

After such study we could grant democracy the sufficient honor of ultimately determining by debate all essential questions affecting the public weal, of basing all structures of policy upon the major will; but we would have found but one rule of good administration for all governments alike. So far as administrative functions are concerned, all governments have a strong structural likeness; more than that, if they are to be uniformly useful and efficient, they *must* have a strong structural likeness. A free man has the same bodily organs, the same executive parts, as the slave, however different may be his motives, his services, his energies. Monarchies and democracies, radically different as they are in other respects, have in reality much the same business to look to.

It is abundantly safe nowadays to insist upon this actual likeness of all governments, because

these are days when abuses of power are easily exposed and arrested, in countries like our own, by a bold, alert, inquisitive, detective public thought and a sturdy popular self-dependence such as never existed before. We are slow to appreciate this; but it is easy to appreciate it. Try to imagine personal government in the United States. It is like trying to imagine a national worship of Zeus. Our imaginations are too modern for the feat.

But, besides being safe, it is necessary to see that for all governments alike the legitimate ends of administration are the same, in order not to be frightened at the idea of looking into foreign systems of administration for instruction and suggestion; in order to get rid of the apprehension that we might perchance blindly borrow something incompatible with our principles. That man is blindly astray who denounces attempts to transplant foreign systems into this country. It is impossible: they simply would not grow here. But why should we not use such parts of foreign contrivances as we want, if they be in any way serviceable? We are in no danger of using them in a foreign way. We borrowed rice, but we do not eat it with chopsticks. We borrowed our whole political language from England, but we leave the words "king" and "lords" out of it. What did we ever originate, except the action of the federal government upon individuals and some of the functions of the federal supreme court?

We can borrow the science of administration with safety and profit if only we read all fundamental differences of condition into its essential tenets. We have only to filter it through our constitutions, only to put it over a slow fire of criticism and distil away its foreign gases.

I know that there is a sneaking fear in some conscientiously patriotic minds that studies of European systems might signalize some foreign methods as better than some American methods; and the fear is easily to be understood. But it would scarcely be avowed in any just company.

It is the more necessary to insist upon thus putting away all prejudices against looking anywhere in the world but at home for suggestions in this study, because nowhere else in the whole field of politics, it would seem, can we make use of the historical, comparative method more safely than in this province of administration. Perhaps the more novel the forms we study the better. We shall the sooner learn the peculiarities of our own methods. We can never learn either our own weaknesses or our own virtues by comparing ourselves with ourselves. We are too used to the appearance and procedure of our own system to see its true significance. Perhaps even the English system is too much like our own to be used to the most profit in illustration. It is best on the whole to get entirely away from our own atmosphere and to be most careful in examining such systems as those of France and Germany. Seeing our own institutions through such *media,* we see ourselves as foreigners might see us were they to look at us without preconceptions. Of ourselves, so long as we know only ourselves, we know nothing.

Let it be noted that it is the distinction, already drawn, between administration and politics which makes the comparative method so safe in the field of administration. When we study the administrative systems of France and Germany, knowing that we are not in search of *political*principles, we need not care a peppercorn for the constitutional or political reasons which Frenchmen or Germans give for their practices when explaining them to us. If I see a murderous fellow sharpening a knife cleverly, I can borrow his way of sharpening the knife without borrowing his probable intention to commit murder with it; and so, if I see a monarchist

dyed in the wool managing a public bureau well, I can learn his business methods without changing one of my republican spots. He may serve his king; I will continue to serve the people; but I should like to serve my sovereign as well as he serves his. By keeping this distinction in view,—that is, by studying administration as a means of putting our own politics into convenient practice, as a means of making what is democratically politic towards all administratively possible towards each,—we are on perfectly safe ground, and can learn without error what foreign systems have to teach us. We thus devise an adjusting weight for our comparative method of study. We can thus scrutinize the anatomy of foreign governments without fear of getting any of their diseases into our veins; dissect alien systems without apprehension of blood-poisoning.

Our own politics must be the touchstone for all theories. The principles on which to base a science of administration for America must be principles which have democratic policy very much at heart. And, to suit American habit, all general theories must, as theories, keep modestly in the background, not in open argument only, but even in our own minds,—lest opinions satisfactory only to the standards of the library should be dogmatically used, as if they must be quite as satisfactory to the standards of practical politics as well. Doctrinaire devices must be postponed to tested practices. Arrangements not only sanctioned by conclusive experience elsewhere but also congenial to American habit must be preferred without hesitation to theoretical perfection. In a word, steady, practical statesmanship must come first, closet doctrine second. The cosmopolitan what-to-do must always be commanded by the American how-to-do-it.

Our duty is, to supply the best possible life to a *federal* organization, to systems within systems; to make town, city, county, state, and federal governments live with a like strength and an equally assured healthfulness, keeping each unquestionably its own master and yet making all interdependent and cooperative, combining independence with mutual helpfulness. The task is great and important enough to attract the best minds.

This interlacing of local self-government with federal self-government is quite a modern conception. It is not like the arrangements of imperial federation in Germany. There local government is not yet, fully, local *self*-government. The bureaucrat is everywhere busy. His efficiency springs out of *esprit de corps,* out of care to make ingratiating obeisance to the authority of a superior, or at best, out of the soil of a sensitive conscience. He serves, not the public, but an irresponsible minister. The question for us is, how shall our series of governments within governments be so administered that it shall always be to the interest of the public officer to serve, not his superior alone but the community also, with the best efforts of his talents and the soberest service of his conscience? How shall such service be made to his commonest interest by contributing abundantly to his sustenance, to his dearest interest by furthering his ambition, and to his highest interest by advancing his honor and establishing his character? And how shall this be done alike for the local part and for the national whole?

If we solve this problem we shall again pilot the world. There is a tendency—is there not?—a tendency as yet dim, but already steadily impulsive and clearly destined to prevail, towards, first the confederation of parts of empires like the British, and finally of great states themselves. Instead of centralization of power, there is to be wide union with tolerated divisions of

prerogative. This is a tendency towards the American type—of governments joined with governments for the pursuit of common purposes, in honorary equality and honorable subordination. Like principles of civil liberty are everywhere fostering like methods of government; and if comparative studies of the ways and means of government should enable us to offer suggestions which will practicably combine openness and vigor in the administration of such governments with ready docility to all serious, well-sustained public criticism, they will have approved themselves worthy to be ranked among the highest and most fruitful of the great departments of political study. That they will issue in such suggestions I confidently hope.

1. Woodrow Wilson, "The Study of Administration," *Political Science Quarterly* 2 (July 1887): 197-222.

Wednesday, June 5, 2013 – Essay #78 – The Study of Administration by Woodrow Wilson – Guest Essayist: George Landrith, President of Frontiers of Freedom

Woodrow Wilson: A Failed President

One of the most common ways of judging a president is to simply ask if there was peace and economic prosperity during his time in office? This is a useful analysis, but not entirely complete. The president isn't the only reason there might be peace or prosperity. Thus, other criteria should be taken into account. What policies did the president pursue? What impact did they have? And how did the president use the power entrusted to him by the American public? By these criteria, Woodrow Wilson was a failed president.

While some historians have given Wilson high marks, their logic escapes me. I suspect it is because Woodrow Wilson was America's first unabashedly "progressive" chief executive and America's first "intellectual" president. Thus, liberal academics may have had some affinity "for one of their own" and felt the need to defend his poor record or recast it into a more favorable light. But if Wilson is judged by evaluating how he used and abused the power of the presidency, he is clearly one of the nation's most dangerous politicians and among its worst presidents.

Some argue that Wilson plunged America unnecessarily into World War I. Wilson's own Secretary of State William Jennings Bryan was of this opinion and resigned from office rather than support Wilson's call for war. And while it is true that Wilson ran for reelection on the campaign theme of "He kept us out of the war," only to change his opposition shortly after winning a very close reelection, it is beyond the scope of this article to discuss the merits and demerits of World War I and America's role in it.

Likewise, some argue that Wilson's failed leadership and deeply partisan tactics at the Treaty of Versailles helped result in a treaty that harshly punished Germany saddling it with war

reparations it could not realistically hope to repay and thus set the stage for the Second World War.

Regardless of one's view of World War I or the folly of the Treaty of Versailles, the real reason that Wilson is a failed president is because he zealously and systematically sought, obtained and abused power. Perhaps the greatest hallmark of Wilson's presidency is his disregard for the limits placed on government by the Constitution. This should not come as a surprise because Wilson was a vigorous critic of the Constitution – lamenting that it was a pre-modern approach to government. Additionally, he disliked America's system of divided power and checks and balances. Ironically, Wilson's presidency was a case study in why the Constitution was both wise and necessary.

While Wilson's role in World War I and the Treaty of Versailles are debatable, it is not debatable that Wilson actively sought, obtained, and abused power in a way that would have made Richard Nixon blush. It is because of his abuse of authority and his ruthless use of the power of government to punish his enemies that Wilson is one of our nation's worst presidents.

Once the U.S. was involved in the war, Wilson sought new powers and greatly expanded authority. For example, Wilson created the Committee on Public Information which was essentially a government propaganda bureau designed to manipulate public opinion. An advisor to Wilson, Edward Bernays, characterized the purpose of the Committee as "engineering of consent" and "the conscious manipulation of the … opinions of the masses." Simply stated, WIlson created an Orwellian propaganda ministry.

But it wasn't enough to have a propaganda ministry working to manipulate public support for his agenda. Wilson also tried to silence his opposition. Wilson pushed for laws forbidding Americans to question or criticize their own government during a time of war. Wilson pushed for the Espionage Act, which if it had only criminalized spying, would have been understandable. But it was also used to bully the press and prevent the publication of information that was uncomplimentary of the government. Interestingly, this law, which has seldom been used since Wilson's presidency, has been abused by the Obama Justice Department to investigate, intimidate, and punish news organizations and journalists.

Wilson also pushed for, and obtained, passage of the Sedition Act. Under this law, Americans could not "utter, print, write or publish any disloyal, profane, scurrilous, or abusive language" about the government. Using this law, the Wilson administration prosecuted politicians who opposed the war, shut down scores of publications, and threatened other publications because of their content.

Wilson aggressively sought authority to overtly censor the press, but those provisions were not included in the bill. As a compromise, the bill included a provision that allowed the Wilson Administration to stop circulation of any "offending" publication by using the U.S. Postal Service to stop circulation. At the time, that was a very effective way to shut down those who disagreed with Wilson's policies.

Speaking before Congress in 1915, Wilson ominously said, "The gravest threats against our

national peace and safety have been uttered within our own borders. There are citizens of the United States, I blush to admit … who have poured the poison of disloyalty into the very arteries of our national life; who have sought to bring the authority and good name of our Government into contempt…."

These words are troubling enough, but Wilson took action to punish those who he deemed "disloyal." Using these laws, the Wilson Administration arrested thousands of Americans. Wilson's Justice Department also created the American Protective League which was assigned the responsibility of stopping "seditious street oratory."

Merely criticizing Wilson's policies was grounds for arrest and imprisonment. Robert Goldstein produced a movie entitled The Spirit of '76 which not surprisingly portrayed the British in an unfavorable light, given that it was a film about the American Revolution. But because the British were an ally in World War I, the movie was deemed "seditious." For this "crime," Goldstein was sentenced to a ten year prison term.

Even after the war ended, the Wilson Administration continued to target its political adversaries. In what became known as the Palmer Raids (named for Wilson's Attorney General, Mitchell Palmer) more than 10,000 peopled were arrested for seditious and disloyal speech. The raid became widely criticized as an outrageous unconstitutional overreach. Massachusetts Judge George Anderson, who was hearing the cases of many of those arrested, put a stop to the abuses and wrote,"[A] mob is a mob, whether made up of Government officials acting under instructions from the Department of Justice, or of criminals and loafers and the vicious classes."

But Wilson didn't limit his power grabs to using government power to silence and punish those who disagreed with him. Wilson also took what was then unprecedented authority over the economy. Wilson established the War Industries Board. Its stated purpose was to coordinate the purchase of war supplies, but it went well beyond its stated purpose. The board set production quotas and allocated raw materials. Through the Board and other government agencies, the Wilson Administration closely controlled commerce. Even those industries that were not essential to the war effort were heavily regulated. Grosvenor Clarkson, who was a member of the Board characterized the board as "an industrial dictatorship without parallel."

When a president abuses authority, and takes to himself powers to which he is not entitled, and views the Constitution as an impediment to governing rather than the standard by which good government is to be judged, he makes himself a tyrant and a dictator, and an enemy of freedom.

Notably absent from my analysis of Wilson's presidency are his failed foreign policy adventures like the League of Nations. Also absent are Wilson's well-documented racial hatred and the policies he instituted which formalized racial discrimination in federal employment and instituted segregation in the federal workplace and the armed forces.

As a result of Wilson's policies, segregation and discrimination grew dramatically and generations passed before the damage was undone. But even without these notable and odious deficiencies, Wilson's systematic disdain for the limited government principles in the Constitution have contributed more than any other president to the dramatic reshaping of our

Constitution and our system of government.

George Landrith is the President of Frontiers of Freedom.

The Right of the People to Rule by Theodore Roosevelt

March 20, 1912

The great fundamental issue now before the Republican party and before our people can be stated briefly. It is, Are the American people fit to govern themselves, to rule themselves, to control themselves? I believe they are. My opponents do not. I believe in the right of the people to rule. I believe the majority of the plain people of the United States will, day in and day out, make fewer mistakes in governing themselves than any smaller class or body of men, no matter what their training, will make in trying to govern them. I believe, again, that the American people are, as a whole, capable of self-control and of learning by their mistakes. Our opponents pay lip-loyalty to this doctrine; but they show their real beliefs by the way in which they champion every device to make the nominal rule of the people a sham.

I have scant patience with this talk of the tyranny of the majority. Whenever there is tyranny of the majority, I shall protest against it with all my heart and soul. But we are today suffering from the tyranny of minorities. It is a small minority that is grabbing our coal deposits, our water powers, and our harbor fronts. A small minority is battening on the sale of adulterated foods and drugs. It is a small minority that lies behind monopolies and trusts. It is a small minority that stands behind the present law of master and servant, the sweat-shops, and the whole calendar of social and industrial injustice. It is a small minority that is today using our convention system to defeat the will of a majority of the people in the choice of delegates to the Chicago Convention. The only tyrannies from which men, women, and children are suffering in real life are the tyrannies of minorities.

If the majority of the American people were in fact tyrannous over the minority, if democracy had no greater self-control than empire, then indeed no written words which our forefathers put into the Constitution could stay that tyranny.

No sane man who has been familiar with the government of this country for the last twenty years will complain that we have had too much of the rule of the majority. The trouble has been a far different one—that, at many times and in many localities, there have held public office in the States and in the Nation men who have, in fact, served not the whole people, but some special class or special interest. I am not thinking only of those special interests which by grosser methods, by bribery and crime, have stolen from the people. I am thinking as much of their respectable allies and figureheads, who have ruled and legislated and decided as if in some way the vested rights of privilege had a first mortgage on the whole United States, while the rights of all the people were merely an unsecured debt. Am I overstating the case? Have our political leaders always, or generally, recognized their duty to the people as anything more than a duty to

disperse the mob, see that the ashes are taken away, and distribute patronage? Have our leaders always, or generally, worked for the benefit of human beings, to increase the prosperity of all the people, to give to each some opportunity of living decently and bringing up his children well? The questions need no answer.

Now there has sprung up a feeling deep in the hearts of the people—not of the bosses and professional politicians, not of the beneficiaries of special privilege—a pervading belief of thinking men that when the majority of the people do in fact, as well as theory, rule, then the servants of the people will come more quickly to answer and obey, not the commands of the special interests, but those of the whole people. To reach toward that end the Progressives of the Republican party in certain States have formulated certain proposals for change in the form of the State government—certain new "checks and balances" which may check and balance the special interests and their allies. That is their purpose. Now turn for a moment to their proposed methods.

First, there are the "initiative and referendum," which are so framed that if the Legislatures obey the command of some special interest, and obstinately refuse the will of the majority, the majority may step in and legislate directly. No man would say that it was best to conduct all legislation by direct vote of the people—it would mean the loss of deliberation, of patient consideration—but, on the other hand, no one whose mental arteries have not long since hardened can doubt that the proposed changes are needed when the Legislatures refuse to carry out the will of the people. The proposal is a method to reach an undeniable evil. Then there is the recall of public officers—the principle that an officer chosen by the people who is unfaithful may be recalled by vote of the majority before he finishes his term. I will speak of the recall of judges in a moment—leave that aside—but as to the other officers, I have heard no argument advanced against the proposition, save that it will make the public officer timid and always currying favor with the mob. That argument means that you can fool all the people all the time, and is an avowal of disbelief in democracy. If it be true—and I believe it is not—it is less important than to stop those public officers from currying favor with the interests. Certain States may need the recall, others may not; where the term of elective office is short it may be quite needless; but there are occasions when it meets a real evil, and provides a needed check and balance against the special interests.

Then there is the direct primary—the real one, not the New York one—and that, too, the Progressives offer as a check on the special interests. Most clearly of all does it seem to me that this change is wholly good—for every State. The system of party government is not written in our Constitutions, but it is none the less a vital and essential part of our form of government. In that system the party leaders should serve and carry out the will of their own party. There is no need to show how far that theory is from the facts, or to rehearse the vulgar thieving partnerships of the corporations and the bosses, or to show how many times the real government lies in the hands of the boss, protected from the commands and the revenge of the voters by his puppets in office and the power of patronage. We need not be told how he is thus entrenched nor how hard he is to overthrow. The facts stand out in the history of nearly every State in the Union. They are blots on our political system. The direct primary will give the voters a method ever ready to use, by which the party leader shall be made to obey their command. The direct primary, if accompanied by a stringent corrupt-practices act, will help break up the corrupt partnership of

corporations and politicians.

My opponents charge that two things in my program are wrong because they intrude into the sanctuary of the judiciary. The first is the recall of judges; and the second, the review by the people of judicial decisions on certain constitutional questions. I have said again and again that I do not advocate the recall of judges in all States and in all communities. In my own State I do not advocate it or believe it to be needed, for in this State our trouble lies not with corruption on the bench, but with the effort by the honest but wrong headed judges to thwart the people in their struggle for social justice and fair-dealing. The integrity of our judges from Marshall to White and Holmes—and to Cullen and many others in our own State—is a fine page of American history. But—I say it soberly—democracy has a right to approach the sanctuary of the courts when a special interest has corruptly found sanctuary there; and this is exactly what has happened in some of the States where the recall of the judges is a living issue. I would far more willingly trust the whole people to judge such a case than some special tribunal—perhaps appointed by the same power that chose the judge—if that tribunal is not itself really responsible to the people and is hampered and clogged by the technicalities of impeachment proceedings.

I have stated that the courts of the several States—not always but often—have construed the "due process" clause of the State Constitutions as if it prohibited the whole people of the State from adopting methods of regulating the use of property so that human life, particularly the lives of the working men, shall be safer, freer, and happier. No one can successfully impeach this statement. I have insisted that the true construction of "due process" is that pronounced by Justice Holmes in delivering the unanimous opinion of the Supreme Court of the United States, when he said:

"The police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

I insist that the decision of the New York Court of Appeals in the Ives case, which set aside the will of the majority of the people as to the compensation of injured workmen in dangerous trades, was intolerable and based on a wrong political philosophy. I urge that in such cases where the courts construe the due process clause as if property rights, to the exclusion of human rights, had a first mortgage on the Constitution, the people may, after sober deliberation, vote, and finally determine whether the law which the court set aside shall be valid or not. By this method can be clearly and finally ascertained the preponderant opinion of the people which Justice Holmes makes the test of due process in the case of laws enacted in the exercise of the police power. The ordinary methods now in vogue of amending the Constitution have in actual practice proved wholly inadequate to secure justice in such cases with reasonable speed, and cause intolerable delay and injustice, and those who stand against the changes I propose are champions of wrong and injustice, and of tyranny by the wealthy and the strong over the weak and the helpless.

So that no man may misunderstand me, let me recapitulate:

5. I am not proposing anything in connection with the Supreme Court of the United States,

or with the Federal Constitution.

6. I am not proposing anything having any connection with ordinary suits, civil or criminal, as between individuals.
7. I am not speaking of the recall of judges.
8. I am proposing merely that in a certain class of cases involving the police power, when a State court has set aside as unconstitutional a law passed by the Legislature for the general welfare, the question of the validity of the law—which should depend, as Justice Holmes so well phrases it, upon the prevailing morality or preponderant opinion—be submitted for final determination to a vote of the people, taken after due time for consideration. And I contend that the people, in the nature of things, must be better judges of what is the preponderant opinion than the courts, and that the courts should not be allowed to reverse the political philosophy of the people. My point is well illustrated by a recent decision of the Supreme Court, holding that the Court would not take jurisdiction of a case involving the constitutionality of the initiative and referendum laws of Oregon. The ground of the decision was that such a question was not judicial in its nature, but should be left for determination to the other coordinate departments of the Government. Is it not equally plain that the question whether a given social policy is for the public good is not of a judicial nature, but should be settled by the Legislature, or in the final instance by the people themselves?

The President of the United States, Mr. Taft, devoted most of a recent speech to criticism of this proposition. He says that it "is utterly without merit or utility, and, instead of being…in the interest of all the people, and of the stability of popular government, is sowing the seeds of confusion and tyranny." (By this he of course means the tyranny of the majority, that is, the tyranny of the American people as a whole.) He also says that my proposal (which, as he rightly sees, is merely a proposal to give the people a real, instead of only a nominal, chance to construe and amend a State Constitution with reasonable rapidity) would make such amendment and interpretation "depend on the feverish, uncertain, and unstable determination of successive votes on different laws by temporary and changing majorities;" and that "it lays the axe at the foot of the tree of well-ordered freedom, and subjects the guarantees of life, liberty, and property without remedy to the fitful impulse of a temporary majority of an electorate."

This criticism is really less a criticism of my proposal than a criticism of all popular government. It is wholly unfounded, unless it is founded on the belief that the people are fundamentally untrustworthy. If the Supreme Court's definition of due process in relation to the police power is sound, then an act of the Legislature to promote the collective interests of the community must be valid, if it embodies a policy held by the prevailing morality or a preponderant opinion to be necessary to the public welfare. This is the question that I propose to submit to the people. How can the prevailing morality or a preponderant opinion be better and more exactly ascertained than by a vote of the people? The people must know better than the court what their own morality and their own opinion is. I ask that you, here, you and the others like you, you the people, be given the chance to state your own views of justice and public morality, and not sit meekly by and have your views announced for you by well-meaning adherents of outworn philosophies, who exalt the pedantry of formulas above the vital needs of human life.

The object I have in view could probably be accomplished by an amendment of the State Constitutions taking away from the courts the power to review the Legislature's determination of

a policy of social justice, by defining due process of law in accordance with the views expressed by Justice Holmes of the Supreme Court. But my proposal seems to me more democratic and, I may add, less radical. For under the method I suggest the people may sustain the court as against the Legislature, whereas, if due process were defined in the Constitution, the decision of the Legislature would be final.

Mr. Taft's position is the position that has been held from the beginning of our Government, although not always so openly held, by a large number of reputable and honorable men who, down at bottom, distrust popular government, and, when they must accept it, accept it with reluctance, and hedge it around with every species of restriction and check and balance, so as to make the power of the people as limited and as ineffective as possible.Mr. Taft fairly defines the issue when he says that our Government is and should be a government of all the people by a representative part of the people. This is an excellent and moderate description of an oligarchy. It defines our Government as a government of all the people by a few of the people.

Mr. Taft, in his able speech, has made what is probably the best possible presentation of the case for those who feel in this manner. Essentially this view differs only in its expression from the view nakedly set forth by one of his supporters, Congressman Campbell. Congressman Campbell, in a public speech in New Hampshire, in opposing the proposition to give the people real and effective control over all their servants, including the judges, stated that this was equivalent to allowing an appeal from the umpire to the bleachers. Doubtless Congressman Campbell was not himself aware of the cynical truthfulness with which he was putting the real attitude of those for whom he spoke. But it unquestionably is their real attitude. Mr. Campbell's conception of the part the American people should play in self-government is that they should sit on the bleachers and pay the price of admission, but should have nothing to say as to the contest which is waged in the arena by the professional politicians. Apparently Mr. Campbell ignores the fact that the American people are not mere onlookers at a game, that they have a vital stake in the contest, and that democracy means nothing unless they are able and willing to show that they are their own masters.

I am not speaking jokingly, nor do I mean to be unkind; for I repeat that many honorable and well-meaning men of high character take this view, and have taken it from the time of the formation of the Nation. Essentially this view is that the Constitution is a straight-jacket to be used for the control of an unruly patient—the people. Now I hold that this view is not only false but mischievous, that our Constitutions are instruments designed to secure justice by securing the deliberate but effective expression of the popular will, that the checks and balances are valuable as far, and only so far, as they accomplish that deliberation, and that it is a warped and unworthy and improper construction of our form of government to see in it only a means of thwarting the popular will and of preventing justice. Mr. Taft says that "every class" should have a "voice" in the government. That seems to me a very serious misconception of the American political situation. The real trouble with us is that some classes have had too much voice. One of the most important of all the lessons to be taught and to be learned is that a man should vote, not as a representative of a class, but merely as a good citizen, whose prime interests are the same as those of all other good citizens. The belief in different classes, each having a voice in the Government, has given rise to much of our present difficulty; for whosoever believes in these separate classes, each with a voice, inevitably, even although unconsciously, tends to work, not

for the good of the whole people, but for the protection of some special class—usually that to which he himself belongs.

The same principle applies when Mr. Taft says that the judiciary ought not to be "representative" of the people in the sense that the Legislature and the Executive are. This is perfectly true of the judge when he is performing merely the ordinary functions of a judge in suits between man and man. It is not true of the judge engaged in interpreting, for instance, the due process clause—where the judge is ascertaining the preponderant opinion of the people (as Judge Holmes states it). When he exercises that function he has no right to let his political philosophy reverse and thwart the will of the majority. In that function the judge must represent the people or he fails in the test the Supreme Court has laid down. Take the Workmen's Compensation Act here in New York. The legislators gave us a law in the interest of humanity and decency and fair dealing. In so doing they represented the people, and represented them well. Several judges declared that law Constitutional in our State, and several courts in other States declared similar laws Constitutional, and the Supreme Court of the Nation declared a similar law affecting men in inter-State business constitutional; but the highest court in the State of New York, the Court of Appeals, declared that we, the people of New York, could not have such a law. I hold that in this case the legislators and the judges alike occupied representative positions; the difference was merely that the former represented us well and the latter represented us ill. Remember that the legislators promised that law, and were returned by the people partly in consequence of such promise. That judgment of the people should not have been set aside unless it were irrational. Yet in the Ives case the New York Court of Appeals praised the policy of the law and the end it sought to obtain; and then declared that the people lacked power to do justice!

Mr. Taft again and again, in quotations I have given and elsewhere through his speech, expresses his disbelief in the people when they vote at the polls. In one sentence he says that the proposition gives "powerful effect to the momentary impulse of a majority of an electorate and prepares the way for the possible exercise of the grossest tyranny." Elsewhere he speaks of the "feverish uncertainty" and "unstable determination" of laws by "temporary and changing majorities;" and again he says that the system I propose "would result in suspension or application of Constitutional guarantees according to popular whim," which would destroy "all possible consistency" in Constitutional interpretation. I should much like to know the exact distinction that is to be made between what Mr. Taft calls "the fitful impulse of a temporary majority" when applied to a question such as that I raise and any other question. Remember that under my proposal to review a rule of decision by popular vote, amending or construing, to that extent, the Constitution, would certainly take at least two years from the time of the election of the Legislature which passed the act. Now, only four months elapse between the nomination and the election of a man as President, to fill for four years the most important office in the land. In one of Mr. Taft's speeches he speaks of "the voice of the people as coming next to the voice of God." Apparently, then, the decision of the people about the Presidency, after four months' deliberation, is to be treated as "next to the voice of God;" but if, after two years of sober thought, they decide that women and children shall be protected in industry, or men protected from excessive hours of labor under unhygienic conditions, or wage-workers compensated when they lose life or limb in the service of others, then their decision forthwith becomes a "whim" and "feverish" and "unstable" and an exercise of "the grossest tyranny" and the "laying of the axe to the foot of the tree of freedom." It seems absurd to speak of a conclusion reached by the

people after two years' deliberation, after threshing the matter out before the Legislature, after threshing it out before the Governor, after threshing it out before the court and by the court, and then after full debate for four or six months, as "the fitful impulse of a temporary majority." If Mr. Taft's language correctly describes such action by the people, then he himself and all other Presidents have been elected by "the fitful impulse of a temporary majority;" then the Constitution of each State, and the Constitution of the Nation, have been adopted, and all amendments thereto have been adopted, by "the fitful impulse of a temporary majority." If he is right, it was "the fitful impulse of a temporary majority" which founded, and another fitful impulse which perpetuated, this Nation. Mr. Taft's position is perfectly clear. It is that we have in this country a special class of persons wiser than the people, who are above the people, who cannot be reached by the people, but who govern them and ought to govern them; and who protect various classes of the people from the whole people. That is the old, old doctrine which has been acted upon for thousands of years abroad; and which here in America has been acted upon sometimes openly, sometimes secretly, for forty years by many men in public and in private life, and I am sorry to say by many judges; a doctrine which has in fact tended to create a bulwark for privilege, a bulwark unjustly protecting special interests against the rights of the people as a whole. This doctrine is to me a dreadful doctrine; for its effect is, and can only be, to make the courts the shield of privilege against popular rights. Naturally, every upholder and beneficiary of crooked privilege loudly applauds the doctrine. It is behind the shield of that doctrine that crooked clauses creep into laws, that men of wealth and power control legislation. The men of wealth who praise this doctrine, this theory, would do well to remember that to its adoption by the courts is due the distrust so many of our wage-workers now feel for the courts. I deny that that theory has worked so well that we should continue it. I most earnestly urge that the evils and abuses it has produced cry aloud for remedy; and the only remedy is in fact to restore the power to govern directly to the people, and to make the public servant directly responsible to the whole people—and to no part of them, to no "class" of them.

Mr. Taft is very much afraid of the tyranny of majorities. For twenty-five years here in New York State, in our efforts to get social and industrial justice, we have suffered from the tyranny of a small minority. We have been denied, now by one court, now by another, as in the Bakeshop Case, where the courts set aside the law limiting the hours of labor in bakeries—the "due process" clause again—as in the workmen's compensation act, as in the tenement-house cigar factory case—in all these and many other cases we have been denied by small minorities, by a few worthy men of wrong political philosophy on the bench, the right to protect our people in their lives, their liberty, and their pursuit of happiness. As for "consistency"—why, the record of the courts, in such a case as the income tax for instance, is so full of inconsistencies as to make the fear expressed of "inconsistency" on the part of the people seem childish….

1. Theodore Roosevelt, "The Right of the People to Rule," *The Outlook*100 (March 1912): 618-23.

Thursday, June 6, 2013 – Essay #79 – The Right of the People to Rule by Theodore Roosevelt – Guest Essayist: James Legee, Graduate, Master of Arts in Political Science at Villanova University, Graduate Fellow at the Matthew J. Ryan Center for the study of Free Institutions and the Public Good

Theodore Roosevelt left the office of the President in 1908, only to be drawn back into politics in 1912, disappointed with his predecessor's defense of the Progressive cause. He launched the "Bull Moose" Party with the zeal befitting a man who was photographed actually riding a bull moose. Roosevelt pursued an agenda in 1912 that called for increasing popular participation in government and eroding the barriers between the people and government. This is also an intentional blurring of the line between a republican form of government and a direct democracy of the kind that existed in antiquity.

President Roosevelt's speech outlines several major proposals to, at least tacitly, put greater control directly into the hands of the people to save them from the tyranny of minorities (mostly the wealthy and corporations.) The first is his "initiative and referendum," whereby a legislature that "refuse[s] the will of the majority" may be taken over by the majority, meaning there should be a direct vote on legislation by the populace, as one would have seen in an Athenian democracy. The idea of direct votes on legislation is parceled with the idea of recall elections, whereby an election may be held in the middle of an official's term, to recall (and replace) that official, should he be "unfaithful" to the public. A recent and contentious example of this came with the June 2012 recall vote on Governor Scott Walker, of Wisconsin. Roosevelt's final proposal involves enabling the people to vote on laws struck down by state supreme courts. Roosevelt sought "that in a certain class of cases involving the police power, when a State court has set aside as unconstitutional a law passed by the legislature for the general welfare the question of the validity of the law…be submitted for final determination to a vote of the people…" In other words, if a law were deemed to benefit the general welfare according to the test of Supreme Court Justice Oliver Wendell Holmes (that the law be based "upon the prevailing morality or preponderant opinion") it should be given to the people to vote on, even if had been declared unconstitutional.

Self-government requires a degree of restraint, caution and thought. Recall elections, even direct primaries, make it easier for demagogues and rhetoricians to use the people, play on their emotions, and avoid appealing to their reason. This fact was not lost of the Founders, and the Progressive proposals of Roosevelt are not new; in fact, they were thoroughly considered and rejected by the Founding Fathers. Fisher Ames perhaps best articulated why such notions were rejected in his Speech at the Massachusetts Convention, given on January 15, 1788, where he confronted the issues of delegating power and the distance of the people from their leaders. Ames wrote,

Much has been said about the people's divesting themselves of power, when they delegate it to representatives; and that all representation is to their disadvantage, because it is but an image, a copy, fainter and more imperfect than the original, the people, in whom the light of power is primary and unborrowed, which is only reflected by their delegates. I cannot agree to either of these opinions. The representation of the people is something more than the people. … The people must govern by a majority, with whom all power resides. But how is the sense of this

majority to be obtained? It has been said that a pure democracy is the best government for a small people who assemble in person. It is of small consequence to discuss it, as it would be inapplicable to the great country we inhabit. It may be of some use in this argument, however, to consider that it would be very burdensome, subject to faction and violence; decisions would often be made by surprise, in the precipitancy of passion, by men who either understand nothing, or care nothing about the subject; or by interested men, or those who vote for their own indemnity. It would be a government not by laws, but by men.

Representative government is imperfect, but it is not nearly as unwieldy as direct democracy. Ames continues on to point out elections that are too frequent become meaningless to voters, and those in office do not have an opportunity to learn their jobs, to learn how to be a statesman.

Perhaps most importantly, some distance between what Holmes and Roosevelt would call the "prevailing morality or preponderant opinion" of the people and governance is necessary for wise decision-making. Ames sought that "the sober, second thought of the people shall be law … To provide for popular liberty, we must take care that measures shall not be adopted without due deliberation." Some of the greatest follies have come from the will of the majority, such as when Stephen E. Douglas' popular sovereignty of the 1850s prevailed; Americans in some states voted themselves the right to own slaves. After the anguish and fear of Pearl Harbor, Japanese Americans were placed in camps, with the approval of the federal government (though, it was later found unconstitutional by the Supreme Court.) In the case of slavery, there was years of debate and the peculiar institution predates the American Founding, but it was still the will of the majority. In the case of Japanese internment, popular opinion, fear, and racism, got the best of justice and reasoned deliberation. The Progressive contempt for the slow movement of republican government and desire for the "public good" to lack a long-term definition, but rather, be applicable only to the present, allows for policies based on the whim of the majority at a single and tumultuous time.

It is ironic that Theodore Roosevelt states in the beginning of his address that "the majority of the plain people of the United States will, day in and day out, make fewer mistakes in governing themselves than any smaller class or body of men…will make in trying to govern them" to justify a political ideology that continuously broadens the role of the national government in the day to day lives of the citizens. The doctrine created a bureaucratic state disconnected from the people themselves and not answerable to a vote. The real growth of the bureaucratic state would come in through the New Deal and Great Society, but its antecedents are firmly placed and credited to Theodore Roosevelt and the Progressive Republicans. The people may have the right to rule, but little credence is given to the idea of self government in the most basic sense, running one's own life and being responsible for one's own choices, failures, and successes; this includes voting the wrong people into office and removing them when their term expires.

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Progressive Democracy by Herbert Croly (1869-1930)

1915

Chapter XII: The Advent of Direct Government

…If economic, social, political and technical conditions had remained very much as they were at the end of the eighteenth century, the purely democratic political aspirations might never have obtained the chance of expression. Some form of essentially representative government was at that time apparently the only dependable kind of liberal political organization. It was imposed by the physical and technical conditions under which government had to be conducted. Direct government did not seem to be possible outside of city or tribal states, whose population and area was sufficiently small to permit the actual assemblage of the body politic at some particular place, either at regular intervals or in case of an emergency. But in the case of states chiefly devoted to agriculture, whose free citizens were distributed over a wide area, and were, in any event, too numerous for actual assemblage in any one spot, it seemed necessary for the people to delegate to a body of representatives the power required not merely for public administration, but for the discussion of public questions, the adoption of public policies and the supervising of the administration itself.Some form of a responsible representative government, that is, was prescribed by fundamental economic and social conditions. The function was performed in the several states according to the method best adapted to local traditions and by the class which had proved itself capable of leadership.

In the twentieth century, however, these practical conditions of political association have again changed, and have changed in a manner which enables the mass of the people to assume some immediate control of their political destinies. While it is more impossible than ever for the citizens of a modern industrial and agricultural state actually to assemble after the manner of a New England town-meeting, it is no longer necessary for them so to assemble. They have abundant opportunities of communication and consultation without any actual meeting at one time and place. They are kept in constant touch with one another by means of the complicated agencies of publicity and intercourse which are afforded by the magazines, the press and the like. The active citizenship of the country meets every morning and evening and discusses the affairs of the nation with the newspaper as an impersonal interlocutor. Public opinion has a thousand methods of seeking information and obtaining definite and effective expression which it did not have four generations ago. The community is broken up into innumerable smaller communities, each of which is united by common interests and ideas and each of which is seeking to bring a larger number of people under the influence of its interests and ideas. Under such conditions the discussions which take place in a Congress or a Parliament no longer possess their former function. They no longer create and guide what public opinion there is. Their purpose rather is to provide a mirror for public opinion, to advertise and illuminate its constituent ideas and purposes, and to confront the advocates of those ideas with the discipline of effective resistance and, perhaps, with the responsibilities of power. Phases of public opinion form, develop, gather to a head, assert their power and find their place chiefly by the activity of other more popular unofficial agencies. Thus the democracy has at its disposal a mechanism of developing and exchanging opinions, and of reaching decisions, which is independent of representative assemblies, and which is, or may become, superior to that which it formerly obtained by virtue of

occasional popular assemblages.

The adoption of the machinery of direct government is a legitimate expression of this change. After centuries of political development, in which certain forms of representation were imposed upon progressive nations by conditions of practical efficiency, and in which these representative forms grew continually in variety and complexity, underlying conditions have again shifted. Pure democracy has again become not merely possible, but natural and appropriate. The attempt to return to it is no more retrogressive than was the attempt to recover classic humanism after its eclipse during the Middle Ages. Society has been passing through a period of prodigious fertility, during which new social aspirations, purposes, instruments and activities have multiplied with unprecedented rapidity. If these new interests and activities are to be assimilated, they must be recognized and incorporated into the system of government. As a consequence of the attempt to incorporate them into the system of government, society may seem to be yielding to the power of disintegrating economic and social forces. This appears to be the beginning of a reverse process of denationalization which will be equivalent to dissolution. Those who place any such interpretation upon the facts of modern social development and the corresponding political changes fail to understand their meaning. Increasing direct popular political action is coming to have a function in the political organization of a modern society, because only in this way can the nation again become a master in its own house. Its very fecundity, and the enormous power which many of its offspring obtain, have compelled a democratic nation to adopt a more thoroughgoing method of promoting its integrity. As yet it is not making very much headway. It is distracted and disconcerted by its own fertility. It is terrified in particular by the capitalist and labor organizations to which it has given birth. But it will not continue to be disconcerted and terrified. It is adopting the very political instruments which are necessary for the purpose of keeping control of the increasingly numerous and increasingly powerful agencies of its own life. The attempt, far from being a reactionary reversion to an earlier political and social type, prepares the way, it may be hoped, for an advance towards a better and deeper social and political union, associated with direct popular political action and responsibility.

Chapter XIII: Direct *versus* Representative Government

In the preceding chapter I have submitted some reasons for believing that direct government is not retrogressive merely because its methods exhibit certain analogies to those used in city and tribal states. Neither does the fact that the electorate in a directly governed state has certain positive functions to perform in relation to legislation place upon such a state the stigma of reaction. Direct government cannot be fairly condemned as reactionary unless the exercise of the broad general responsibilities which it imposes upon the electorate proves inimical to the delegation of sufficient and specific additional responsibilities to other departments of the government. This second aspect of the matter still remains to be discussed. Will the advent of direct democracy result in any increase of the confusion and disorganization which prevails in the mechanism of American state representation? Or will the draught of self-confidence, which our local democracies are by way of swallowing, be communicated to the behavior of the rest of the political mechanism and invigorate the whole system? Will direct popular government commit the same fatal mistake which, to a greater or smaller extent, has already been committed by the national monarchies, by parliamentary government and by democratic legalism? Will it seek to appropriate or emasculate legislative or administrative functions which need to be

delegated to other human agencies?

The critics of direct democracy can hardly be blamed for considering doubtful the answers to the foregoing questions. The American experiment in direct democracy is still in its early youth. Its meaning and its tendencies cannot be demonstrated from experience. If the active political responsibilities which it grants to the electorate are redeemed in the negative and suspicious spirit which characterized the attitude of the American democracy towards its official organization during its long and barren alliance with legalism, direct democracy will merely become a source of additional confusion and disorganization. On the other hand, if, as a consequence of its rupture with legalism, the American democracy undergoes a change of spirit, if the attempt to discharge new and responsible activities in connection with its own government brings with it a positive inspiration and genuine social energy, the result may be to renovate American representative institutions and afford novel and desirable opportunities for effective political leadership. I prefer the second of these alternatives, but the preference can hardly be justified by a consideration of the results which have already been achieved in the directly governed states. It is born of an examination of the history, the needs and the ideals of the American local democracies.

The more dogmatic partisans of direct government do not help us very much in making a decision between the foregoing alternatives. In fact, they seem not to understand that any such alternatives exist. They usually attach much the same automatic efficacy to the system of direct government that the Fathers attached to constitutionalism and checks and balances. They have not, indeed, any declared intention of substituting direct for representative government. They admit verbally the necessity in a pure democracy of some effective delegation of specific governmental functions. But as a rule they devote very little attention and thought to the problem of a more powerful and efficient mechanism of legislation and administration. They are preoccupied by the flagrant betrayal of the popular interest which took place under the traditional system, and they seem to think that the adoption of the initiative, referendum and the recall will not merely protect the popular interest, but liberate the popular will—even though the popular will lacks, as much as it has lacked in the past, the impulse of positive social purposes.

Such an attitude toward the instruments of direct government is merely another expression of the old superstitious belief in political mechanics against which progressive democracy is bound to protest. If the people in the directly governed states consider the new instruments of democracy as fundamentally a safeguard against abuse and oppression, they may succeed in abolishing one kind of abuse and oppression, but only at the price of its being succeeded by other kinds. If they do not impose limits on their use of the instruments of direct government, based upon the conditions of their profitable service, it will prove to be a barren and mischievous addition to the stock of democratic political institutions. The success of the new instruments as negative safeguards will be commensurate with their success as agencies for the realization of positive popular political purposes. Their serviceability as agencies for the realization of popular political purposes will depend upon the ability of democratic lawgivers to associate with them an efficient method of delegating popular political authority. Direct democracy, that is, has little meaning except in a community which is resolutely pursuing a vigorous social program. It must become one of a group of political institutions, whose object is fundamentally to invigorate and socialize the action of American public opinion.

The salient reasons which make it necessary to associate the advent of direct democracy with the attempt to realize a positive social program have already been indicated. They are derived from the profound alterations in the balance of a political organization which is substituting a positive for a negative social policy. The abstract legalistic individualism of the Jeffersonian democracy had in theory no need of any machinery of direct popular control. The activity of government was restricted, and its organs were emasculated, in the interest of a specific formulation of individual rights. Government was considered to be merely a form of temporary police supervision. Such a political system was placed in irons by the Law and lacked the power to do any harm. It really needed to operate somewhat independently of public opinion. Fermentation of public opinion and active political and social experimentation could not accomplish anything of real social value. The essential popular needs were already safeguarded in the Law, which deserved vigilant protection and unquestioning obedience on the part of all good citizens. Effective popular control of such a government was unnecessary. Government was not intended to be the instrument of important popular social purposes.

In its actual historical development the government soon became the instrument of important popular social purposes, and it was obliged to develop a corresponding method of popular control. But the popular social purposes which the State and Federal governments formerly attempted to realize were derived from the old individualistic social economy, and the control supposed to be exercised by the partisan organizations was ineffective. A wholly new situation was created when the local democracies came to need and possess a genuinely social policy, which threw increased burdens upon the government, and commensurately increased its power. Under such conditions direct popular control over the mechanism of government became of essential importance. A negative individualistic social policy implies a weak and irresponsible government. A positive comprehensive social policy implies a strong, efficient and responsible government. But a strong and efficient government, which exercises a large part of the authority of the state and which is not bound by the substantive provisions of the fundamental Law, might well be dangerous not only to individual civil rights, but to popular political rights. Every precaution should be adopted to keep it in sensitive touch with public opinion. A lack of responsiveness to public opinion would tempt it to become domineering and oppressive, and would in the long run make its own work abortive as well as dangerous. A social policy is concerned in the most intimate and comprehensive way with the lives of the people. In order to be successful, it must rest on the basis of abundant and cordial popular support.

The mechanism of direct government has, consequently, an essential function to perform in the organization of a social democracy. The realization of a genuine social policy necessitates the aggrandizement of the administrative and legislative branches of the government. Progressive democracy recognizes the need of these instruments, but it recognizes the need of keeping control of them. A strong government with an affirmative policy and effective popular control are supplementary rather than hostile one to another. The realization of such a policy will in the long run demand both an efficient system of representation and an efficient method of direct popular supervision.

The friends of direct government do not usually advocate it, for the reasons indicated in the preceding paragraph. An exclusively representative government is to many of them a perfectly satisfactory form of democratic political organization. It is objectionable only because it has

failed to be really representative. A recent convert to pure democracy, President Woodrow Wilson, has expressed in the following words the reasons for his conversion: “If we felt we had genuine representative government in our state legislatures, no one would propose the initiative and the referendum in the United States. Our most ardent and successful advocates regard them as a sobering means of obtaining genuine representative action on the part of legislative bodies. They do not mean to set anything aside. They mean to restore and to reinvigorate rather.” And a much more radical critic of our traditional system, Professor J. Allen Smith, who also favors direct popular political action, asserts that “a government of the representative type, if responsive to public sentiment, would answer all the requirements of a democratic state.”

The adoption of direct government may, it is true, end by reinvigorating representative government; but if so, the result will not be accomplished by refusing “to set anything aside.” The first thing which must be set aside is the method of representation which has passed in this country under the name of representative government. Direct government will never reinvigorate our existing state of political institutions. What it may accomplish is to supply energy to a new and better method of delegating popular political authority.

A statesman whose dominant object was the reorganization of existing state representative government would be foolish to depend upon the initiative and the referendum for the accomplishment of his purpose. There are a score of ways in which American state government could be made more representative without any invocation of the instrument of direct government. The first condition of effective representation is the bestowal upon the representative body of some effective power and responsibility, which, as all admit, is precisely the condition which has been largely and increasingly absent from our so-called representative institutions. Direct government does not automatically satisfy this need. On the contrary, as the experience of the state of Oregon sufficiently proves, its merely external addition to the existing machinery of representation tends, if anything, to attenuate still further the meagre responsibilities officially conferred on our state representative agencies.

So far as these state representative agencies are concerned, a representative value cannot be restored to them, because they were never intended to be and never have been representative in any self-respecting meaning of the word. A thoroughly representative government is essentially government by men rather than by Law. The active exercise of effective political responsibility is confided to a body of the elect. They assume the same responsibility for the ultimate welfare of the state that the American system delegates to the Law and its official expounders. True, the legislative body may govern, just as the Law was permitted to govern, by virtue of an explicit or implied popular consent, but in a representative system popular power is exercised only to be delegated. For the time being, complete legal responsibility for the public weal is conferred upon the legislature. Quite obviously no such responsibility has been conferred by the American system either upon the legislature or upon the legislature and executive together; and, to my mind, it cannot be expected that any exclusively representative system will be even fairly successful on any other terms.

The Progressive Republicans, who are advocating an increase of executive power and a closer cooperation between the executive and the legislature as the most effective means of reinvigorating the representative system, can make a very strong argument in its favor. They can

make a stronger argument than can those advocates of "pure" democracy who expect to develop a genuinely representative government by grafting the instruments of direct government on an essentially and fatally unrepresentative system. But they cannot make a strong enough argument. The cooperation between an executive and a legislature, each of which derives its authority directly from the people, cannot be made properly operative except by some method of referring disputes to the common master—which means a considerable measure of direct government. Moreover, an American electorate would not submit for long to the increased power of the organs of government which would result from their cooperative action, without the creation of some means of effective popular control. But even if these difficulties could be overcome, it is doubtful how far any system can be considered really representative which does not bestow complete responsibility for the public welfare upon the government. The government must have the power to determine the Law instead of being circumscribed by the Law. Just in so far as its authority was curtailed, its sense of responsibility would be relaxed and its integrity would be undermined.

A purely representative system, such as that of the United Kingdom, seeks to accomplish the fundamental objects of government by a method opposed to that of the traditional American system. The former bestows complete legal responsibility for the welfare of the state and the course of its development upon the elect in the expectation that thereby society will obtain the boon of rational guidance. "Representation is not," says Guizot, who was one of its most ardent advocates, "an arithmetical means employed to count individual wills, but a natural process, whereby public reason, which alone has the right to govern modern society, may be extracted from the bosom of society itself." This account of the ultimate meaning of a purely representative system was accepted substantially by John Stuart Mill, although with certain significant modifications; and it manifestly constitutes the only justification for the enormous power and responsibility bestowed upon the legislative body. As the result of their deliberations the action of the representatives must embody a program based upon the enduring and the binding interests of the nation.

The American constitutional system did not need to create a powerful organ of government whose wise leadership would help to extract reason from the bosom of society. That desirable result had already been accomplished. Reason had been printed on the bosom of society in indelible ink by virtue of the embodiment in the Constitution of the great principles of legal morals. Its human purveyors were rather the judges than the legislature; and the business of the courts was not merely to declare the Word, but to keep the fire of political reason glowing in the political hearth. Under such a system executives and legislatures were not supposed, and did not need, to be particularly reasonable—which is certainly a proof of the wisdom of the Fathers of the Republic. They needed most of all to be obedient and self-restrained. For if any effective method exists of extracting reason from the bosom of society, the human purveyors of this rational extract certainly require some oracular writing for their guidance; and the more authoritative this oracle can be made, the better. So far as the object of political organization is to bring to the surface an already existing fund of reason, the method adopted by the founders of the American constitutional system may be preferred to the method characteristic of a purely representative system. The latter leaves the secretion and extraction of reason much more to the operation of a clumsy mechanism. As an edifice of political rationalism, the record of the discussion and action of the British Parliament during the past century cannot be compared to the

constitutional decisions of the Supreme Court of the United States; and this is true notwithstanding the fact that even in the latter some traces may be occasionally discovered of the fallibility of that sovereign faculty.

Thus the difficulty with a purely representative government is similar to the difficulty which is involved in government by Law. The assumption made by the advocates of both of these systems is that society possesses at any one time a fund of social reason which, by virtue of its superiority to interested, inexperienced and perverse counsel, is entitled to determine social action. The state should be organized chiefly for the purpose of giving control to this fund of social reason. The means whereby this control is exercised differs radically in the two systems; but we need not bother about their respective advantages or disadvantages. Neither of them meets the needs of a progressive democratic society, because in a society of this kind no such fund of really authoritative social reason can be held to exist. There is a fund of social reason which should possess some authority; but it is so small compared to social aspirations and needs that a democratic society must be organized less to obey than to increase it. The work of extracting the stores of reason from the bosom of society must be subordinated to the more fundamental object of augmenting the supply of social reason and improving its distribution. Legalism and purely representative government are unsuited to the needs of a thoroughgoing democracy, because their method of organization depends on popular obedience rather than popular education. The promotion and the diffusion of social reason cannot be brought about without a reverence for orderly procedure and without the leadership of the elect; but the erection of legalism alone or of representation alone into a system is not sufficient to secure this most important of all political objects. The best chance of securing it opens up as a result a more thoroughly popular organization of the state. The electorate must be required as the result of its own actual experience and unavoidable responsibilities to develop those very qualities of intelligence, character, faith and sympathy which are necessary for the success of the democratic experiment.

Thus neither representative government nor government by law nor any combination between the two is competent to meet all the requirements of a democratic polity. A clear-sighted, self-confident and loyal democracy will keep in its own hands the active control of all the agents and instruments of its own fulfilment. The instinctive repugnance which the American democracy has always exhibited to the delegation of too much power to any one of the separate departments of government is explicable and justifiable. No plebiscite can bestow authenticity upon an ostensibly democratic political system which approximates in practice to the exercise of executive omnipotence. No intermittent appeals to the people for their approbation can wholly democratize a system which approximates in practice to the exercise of legislative omnipotence. No reverence for the law can guarantee political and social liberty to a body of democrats who confide their collective destiny to written formulas as expounded by a ruling body of lawyers. In practice each of these systems develops into a method of class government. The men to whom the enormous power is delegated will use it, in part at least, to perpetuate the system which is so beneficial to themselves. But even if they were as wise as Solomon and as gallant and disinterested as Sir Galahad, the systems for which they spoke and acted would still be evading rather than meeting the democratic problem. None of these systems make the people actively responsible for their own reasonableness and welfare. The people do not reap the advantages to which they are entitled, but if they did receive every possible advantage, they would not be earning it and could not keep what they received.

In all three of the principal departments of government, there are essential functions to be performed which must be delegated by a democracy to selected men under conditions which make for technical efficiency and individual independence and self-respect. The Fathers of the Republic were fully justified both in keeping the powers distinguished, and in seeking to balance one against the other. Their mistake consisted in the methods adopted for preserving or readjusting the balance. The preservation of a balance depends upon the harmonious development of several elements which enter into it; and as in the course of nature harmonious development is rare, the preservation of any such balance must usually be contrived by human insistence and intelligence. Only one part of a democratic system is entitled to exercise any such function—the electorate itself. The whole of a democratic political system is divided into three parts, not merely or primarily as a protection to individual and popular liberties, but rather to provide an essential positive function for the people to perform—the function of recreating the unity which is necessarily compromised by the no less necessary specialization of governmental function. Such is the part which the people, or the closest possible approximation to the people, have to play in the process of their own nationalization or socialization. They must divide in order to act, to think, to rule, to move on and to aspire; but they must not impose upon any one of the resulting classifications or subdivisions the responsibility of ultimate social cohesion. That responsibility rests with the whole people, and its fulfilment depends upon popular intelligence, sympathy and faith.

Many sincere social democrats in this country, as well as in England or France, regard any such dependence upon direct government with the utmost repugnance. The industrial and social program of a democracy can, in their opinion, be accomplished with less friction and delay through the agency of an authoritative representative body. They are probably right in expecting that in the near future direct popular government will increase the difficulty of securing the adoption of many items in a desirable social program. But reformers of this class, like the conservatives, attach too much importance to the accomplishment and maintenance of specific results, and too little to the permanent moral welfare of the democracy. They are willing to have the people imposed upon in the interest of what is or is intended to be the popular benefit. An authoritative representative government, particularly one which is associated with inherited leadership and a strong party system, carries with it an enormous prestige. It is frequently in a position either to ignore, to circumvent or to wear down popular opposition. But a social program purchased at such a price is not worth what it costs. It makes no difference how benevolent the intention of the government may be or how wise its legislation. The program which is carried out by such means will do nothing to make the people worthy of their advantages. The result will either be popular servility or organized popular resistance or both. The country in which a benevolent government has succeeded in carrying out the most comprehensive social policy of modern times is the country in which a social democratic party, organized to overthrow the government, has succeeded in obtaining the support of a third of the electorate.

Social reformers must, consequently, be patient as well as eager and tenacious. A moderate program which is well understood and cordially supported by public opinion, and upon which the electorate has been in some measure specifically consulted, will be much more beneficial than a more extensive program which is not so well understood, and which does not represent a genuine popular affirmation. From the beginning of civilization the people have been constantly

imposed upon by moral or social or physical force in the real or supposed interest of their own welfare. The process will doubtless have to continue in some measure; but if democracy means anything, it means popular liberation in precisely this respect. It means that social reformers must present their arguments primarily to the electorate, and welcome every good opportunity of allowing the electorate to pass judgment upon their proposals.

Our conclusion, then, is double-faced. Democracy implies and needs some method of representation which will be efficient and responsible enough to carry out a social policy, but which does not imply the delegation of its own ultimate discretionary power to any body of men or body of law. No such representative system can be found in the provisions of existing state constitutions. An organization of the executive and legislative powers, which will give increased energy to both of them and which is adjusted to their cooperation both one with another and with a sufficient measure of direct government, is what is needed and must be contrived. The new organization will be intended first, last and always to promote political education. It must be adapted to action, but the action must merely be the decisive temporary result of widespread popular fermentation. It must have the chance to be efficient, but only for the purpose of being educational. It must be able to educate, but primarily by the road of efficient action. The new system can accomplish nothing without human energy, intelligence, sacrifice and faith, but if those qualities are present, it will make the best use of them.

1. Herbert Croly, *Progressive Democracy* (New York: The Macmillan Company, 1914), 262–83.

Friday, June 7, 2013 – Essay #80 – Progressive Democracy by Herbert Croly – Guest Essayist: Professor Joerg Knipprath, Professor of Law at Southwestern Law School

Herbert Croly was perhaps the most important intellectual of Progressivism, which seems odd, given the tortuous language and convoluted emotive passages that characterize his work. *Progressive Democracy* was not Croly's most significant book. That was his earlier work, *The Promise of American Life*, a book that supposedly so influenced Theodore Roosevelt it is said to have provided the catalyst for Roosevelt's return to politics as a third-party "Bull Moose" presidential candidate in the 1912 election.

Progressive Democracy is of the same style and substance as Croly's other writings. It rests on the usual Progressive premises, such as the omnipotent, all-caring, and morally perfect Hegelian God-state that is the inevitable evolutionary end of Progressive politics. It reflects the notion—so common in Progressive and other leftist theory—of stages of human social and political development that have been left behind and whose outdated institutions are an impediment to ultimate progress into the promised land. Hence, Croly's insistence that the Constitution's structure of representative government and separation and division of powers needed to be, and would be, changed. Describing the societal realities of the late 18th century, Croly declared,

"Some form of essentially representative government was at that time apparently the only dependable kind of liberal political organization. It was imposed by the physical and technical conditions under which government had to be conducted….The function was performed in the several states according to the method best adapted to local traditions and by the class which had proved itself capable of leadership. In the twentieth century, however, these practical conditions of political association have again changed, and have changed in a manner which enables the mass of the people to assume some immediate control of their political destinies."

The new political mechanism was direct democracy, the most authentic expression of popular will. It was beloved, at least in theory, of leftists of all stripes. It found expression in many states through the adoption of the initiative, referendum, and recall. Croly considered these reforms to be misdirected and inauthentic if they were used only to restrict government power and to correct government abuses. As such, they were still shackled by old conceptions about the primacy of individual rights and by the suspicion of powerful government that had characterized the earlier period of Jeffersonian republicanism. "If the active political responsibilities which it [direct democracy] grants to the electorate are redeemed in the negative and suspicious spirit which characterized the attitude of the American democracy towards its official organization during its long and barren alliance with legalism [the Constitution as a formal system of checks and balances that controls the actions of the political majority], direct democracy will merely become a source of additional confusion and disorganization."

There was, then, bad and good direct democracy. The good form was one that produced the proper, Progressive social policy, and accepted the dominance of powerful state organs that could accomplish that policy: "Direct democracy…has little meaning except in a community which is resolutely pursuing a vigorous social program. It must become one of a group of political institutions, whose object is fundamentally to invigorate and socialize the action of American public opinion." Note some key words: A political system must be measured by "meaning," such as the quintessentially Progressive "Politics of Meaning" associated most recently with Hillary Clinton. "Vigor" and "action," two words that were markers of Progressive ideology and rhetoric at the personal, as well as the political, level. Wilson, the two Roosevelts, and John and Robert Kennedy strove mightily to present themselves as embodying those very characteristics. As the journalist Jonah Goldberg has demonstrated, so did those who opted for a more pronounced fascist political program, both here and abroad. Finally, "social" or "socialize," as the antidote to the traditional American insistence on the rights of individuals that were derived from sources outside the State and which trumped the demands of the collective.

In that good form, popular participation was, in effect, a thermometer to measure the temperature of the public's support for an activist political program that it heeded the rulers to mind. Croly advised, "A negative individualistic social policy implies a weak and irresponsible government. A positive comprehensive social policy implies a strong, efficient and responsible government….A social policy is concerned in the most intimate and comprehensive way with the lives of the people. In order to be successful, it must rest on the basis of abundant and cordial popular support." Instead of a government constrained by the text and the received traditions of fundamental law, government would be limited only by the popularity of its increasingly comprehensive policies.

Despite Croly's perfunctory disclaimer, popular participation was to be little more than a plebiscite on actions to be taken by a legislature otherwise unrestrained by the formal structures of the "Law." "The government must have the power to determine the Law instead of being circumscribed by the Law," he wrote in *Progressive Democracy*. As Croly, and Woodrow Wilson before him, recognized, legislatures would not be up to the task of regulating and administering such an increasingly intrusive paternalistic State. Hence, a powerful administrative apparatus was required. That signature component of the modern regulatory state—the vast, unelected bureaucracy—was necessarily beyond the control of the people, though always, loyally and selflessly, laboring for their weal.

Four results inevitably followed. In the legal academy, the Progressive vision of the supervisory state freed from the grasp of the past gave rise to the "Living Constitution" movement in support of liberal judicial activism and the conflation of law and policy through "sociological jurisprudence." In politics, the growth of the general government (federal share of GDP rose from 2.5% in the early 20th century to 25% a hundred years later) and, in particular, the rise of a permanently powerful Presidency characterized by the new ideal of the (pseudo)-populist charismatic leader reflect the endurance of the Progressive program. In the social realm, the bureaucratic and administrative state has grown as it has weakened institutions that might challenge it for the loyalty and unity of the collective citizenry, such as the family, religious institutions, service clubs, charities, unions, and even political parties. In policy, the nanny state "cares" for the child-like dependent populace and receives its acclaim for an enveloping and increasingly unsustainable program of bread and circuses.

But like H.G. Wells' society of Eloi and Morlocks in *The Time Machine*, the Progressive state was not as benign as its propagandists depicted it on the surface. The Progressives had a strong Darwinian bent. Woodrow Wilson in his writings was fond of comparing the State to an organic entity governed by the biological laws of Darwin, not the mechanics of Newton. Evolution and change were the constants of such a system; evolution required adaptation to change; adaptation could not be left to chance but must be administered rationally. Where survival of the fittest was the rule, only the fittest could rule. That the government was not under more direct control of the people was due to what Croly euphemistically described as the small size of the fund of social reason. Therein is mirrored one of the traits commonly attributed to the left/liberal intellectual. He professes to idolize humanity and the principle of popular government, but he despises humans and distrusts individual autonomy and political choice.

In view of that scarcity of social reason, Croly explained, "[the] work of extracting the stores of reason from the bosom of society must be subordinated to the more fundamental object of augmenting the supply of social reason and improving its distribution." This was a task critical to the success of government unconstrained by the old Constitutional structures. "The electorate must be required as the result of its own actual experience and unavoidable responsibilities to develop those very qualities of intelligence, character, faith and sympathy which are necessary for the success of the democratic experiment."

While Croly argued that education would provide the means of human progress and the nurturing of social reason among the mass of people, there were those who were unfit for such efforts. Croly, like Woodrow Wilson, believed in the need for state regulation of marriage and

reproduction to combat crime and insanity and to promote the propagation of the truly fittest. When he was governor of New Jersey, Wilson signed a law of just such tenor that targeted various "defectives" for sterilization. The Supreme Court, in an opinion by progressive Justice Oliver Wendell Holmes, later upheld this key element of Progressive ideology.

We are still in the grip of the Progressivism championed by the Roosevelts, Wilson, and Croly. President Obama was styled by some of his admirers in the press as the new Lincoln. Other times he has been depicted as the new Franklin Roosevelt. While the latter is more fitting than the former, Obama's style, ideology, and policies have their roots in the Progressivism of Wilson and Croly. The markers are all there: the perpetual campaigning designed for constant popular mobilization; the cradle-to-grave welfare state; the contempt for traditional constitutional allocations of political power; the desire to determine the Law rather than be circumscribed by it; the transformation of politics into a quasi-religious experience of personal and national renewal, as shown by the religious imagery associated with the President in song and picture, by the rhetorical cadences of his sermonizing speeches, and by the topics of his speeches about stopping the rise of the oceans and beginning the healing of the planet; and the calls to his followers to "get angry" and "get in the faces" of his political "enemies." The President promised a "fundamental transformation of America" as his goal. Or, as Michelle Obama declared in a speech in 2008 during her husband's campaign for the Presidency, "Barack Obama will require you to work. He is going to demand that you shed your cynicism. That you put down your divisions. That you come out of your isolation, that you move out of your comfort zones. That you push yourselves to be better. And that you engage. Barack will never allow you to go back to your lives as usual, uninvolved, uninformed."

Herbert Croly could not have said it better.

An expert on constitutional law, Prof. Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

The Inspiration of the Declaration by Calvin Coolidge (1872-1933)

July 5, 1926

We meet to celebrate the birthday of America. The coming of a new life always excites our interest. Although we know in the case of the individual that it has been an infinite repetition reaching back beyond our vision, that only makes it the more wonderful. But how our interest and wonder increase when we behold the miracle of the birth of a new nation. It is to pay our tribute of reverence and respect to those who participated in such a mighty event that we

annually observe the fourth day of July. Whatever may have been the impression created by the news which went out from this city on that summer day in 1776, there can be no doubt as to the estimate which is now placed upon it. At the end of 150 years the four corners of the earth unite in coming to Philadelphia as to a holy shrine in grateful acknowledgement of a service so great, which a few inspired men here rendered to humanity, that it is still the preeminent support of free government throughout the world.

Although a century and a half measured in comparison with the length of human experience is but a short time, yet measured in the life of governments and nations it ranks as a very respectable period. Certainly enough time has elapsed to demonstrate with a great deal of thoroughness the value of our institutions and their dependability as rules for the regulation of human conduct and the advancement of civilization. They have been in existence long enough to become very well seasoned. They have met, and met successfully, the test of experience.

It is not so much then for the purpose of undertaking to proclaim new theories and principles that this annual celebration is maintained, but rather to reaffirm and reestablish those old theories and principles which time and the unerring logic of events have demonstrated to be sound. Amid all the clash of conflicting interests, amid all the welter of partisan politics, every American can turn for solace and consolation to the Declaration of Independence and the Constitution of the United States with the assurance and confidence that those two great charters of freedom and justice remain firm and unshaken. Whatever perils appear, whatever dangers threaten, the Nation remains secure in the knowledge that the ultimate application of the law of the land will provide an adequate defense and protection.

It is little wonder that people at home and abroad consider Independence Hall as hallowed ground and revere the Liberty Bell as a sacred relic. That pile of bricks and mortar, that mass of metal, might appear to the uninstructed as only the outgrown meeting place and the shattered bell of a former time, useless now because of more modern conveniences, but to those who know they have become consecrated by the use which men have made of them. They have long been identified with a great cause. They are the framework of a spiritual event. The world looks upon them, because of their associations of one hundred and fifty years ago, as it looks upon the Holy Land because of what took place there nineteen hundred years ago. Through use for a righteous purpose they have become sanctified.

It is not here necessary to examine in detail the causes which led to the American Revolution. In their immediate occasion they were largely economic. The colonists objected to the navigation laws which interfered with their trade, they denied the power of Parliament to impose taxes which they were obliged to pay, and they therefore resisted the royal governors and the royal forces which were sent to secure obedience to these laws. But the conviction is inescapable that a new civilization had come, a new spirit had arisen on this side of the Atlantic more advanced and more developed in its regard for the rights of the individual than that which characterized the Old World. Life in a new and open country had aspirations which could not be realized in any subordinate position. A separate establishment was ultimately inevitable. It had been decreed by the very laws of human nature. Man everywhere has an unconquerable desire to be the master of his own destiny.

We are obliged to conclude that the Declaration of Independence represented the movement of a people. It was not, of course, a movement from the top. Revolutions do not come from that direction. It was not without the support of many of the most respectable people in the Colonies, who were entitled to all the consideration that is given to breeding, education, and possessions. It had the support of another element of great significance and importance to which I shall later refer. But the preponderance of all those who occupied a position which took on the aspect of aristocracy did not approve of the Revolution and held toward it an attitude either of neutrality or open hostility. It was in no sense a rising of the oppressed and downtrodden. It brought no scum to the surface, for the reason that colonial society had developed no scum. The great body of the people were accustomed to privations, but they were free from depravity. If they had poverty, it was not of the hopeless kind that afflicts great cities, but the inspiring kind that marks the spirit of the pioneer. The American Revolution represented the informed and mature convictions of a great mass of independent, liberty-loving, God-fearing people who knew their rights, and possessed the courage to dare to maintain them.

The Continental Congress was not only composed of great men, but it represented a great people. While its members did not fail to exercise a remarkable leadership, they were equally observant of their representative capacity. They were industrious in encouraging their constituents to instruct them to support independence. But until such instructions were given they were inclined to withhold action.

While North Carolina has the honor of first authorizing its delegates to concur with other Colonies in declaring independence, it was quickly followed by South Carolina and Georgia, which also gave general instructions broad enough to include such action. But the first instructions which unconditionally directed its delegates to declare for independence came from the great Commonwealth of Virginia. These were immediately followed by Rhode Island and Massachusetts, while the other Colonies, with the exception of New York, soon adopted a like course.

This obedience of the delegates to the wishes of their constituents, which in some cases caused them to modify their previous positions, is a matter of great significance. It reveals an orderly process of government in the first place; but more than that, it demonstrates that the Declaration of Independence was the result of the seasoned and deliberate thought of the dominant portion of the people of the Colonies. Adopted after long discussion and as the result of the duly authorized expression of the preponderance of public opinion, it did not partake of dark intrigue or hidden conspiracy. It was well advised. It had about it nothing of the lawless and disordered nature of a riotous insurrection. It was maintained on a plane which rises above the ordinary conception of rebellion. It was in no sense a radical movement but took on the dignity of a resistance to illegal usurpations. It was conservative and represented the action of the colonists to maintain their constitutional rights which from time immemorial had been guaranteed to them under the law of the land.

When we come to examine the action of the Continental Congress in adopting the Declaration of Independence in the light of what was set out in that great document and in the light of succeeding events, we can not escape the conclusion that it had a much broader and deeper significance than a mere secession of territory and the establishment of a new nation. Events of

that nature have been taking place since the dawn of history. One empire after another has arisen, only to crumble away as its constituent parts separated from each other and set up independent governments of their own. Such actions long ago became commonplace. They have occurred too often to hold the attention of the world and command the admiration and reverence of humanity. There is something beyond the establishment of a new nation, great as that event would be, in the Declaration of Independence which has ever since caused it to be regarded as one of the great charters that not only was to liberate America but was everywhere to ennoble humanity.

It was not because it was proposed to establish a new nation, but because it was proposed to establish a nation on new principles, that July 4, 1776, has come to be regarded as one of the greatest days in history. Great ideas do not burst upon the world unannounced. They are reached by a gradual development over a length of time usually proportionate to their importance. This is especially true of the principles laid down in the Declaration of Independence. Three very definite propositions were set out in its preamble regarding the nature of mankind and therefore of government. These were the doctrine that all men are created equal, that they are endowed with certain inalienable rights, and that therefore the source of the just powers of government must be derived from the consent of the governed.

If no one is to be accounted as born into a superior station, if there is to be no ruling class, and if all possess rights which can neither be bartered away nor taken from them by any earthly power, it follows as a matter of course that the practical authority of the Government has to rest on the consent of the governed. While these principles were not altogether new in political action, and were very far from new in political speculation, they had never been assembled before and declared in such a combination. But remarkable as this may be, it is not the chief distinction of the Declaration of Independence. The importance of political speculation is not to be underestimated, as I shall presently disclose. Until the idea is developed and the plan made there can be no action.

It was the fact that our Declaration of Independence containing these immortal truths was the political action of a duly authorized and constituted representative public body in its sovereign capacity, supported by the force of general opinion and by the armies of Washington already in the field, which makes it the most important civil document in the world. It was not only the principles declared, but the fact that therewith a new nation was born which was to be founded upon those principles and which from that time forth in its development has actually maintained those principles, that makes this pronouncement an incomparable event in the history of government. It was an assertion that a people had arisen determined to make every necessary sacrifice for the support of these truths and by their practical application bring the War of Independence to a successful conclusion and adopt the Constitution of the United States with all that it has meant to civilization.

The idea that the people have a right to choose their own rulers was not new in political history. It was the foundation of every popular attempt to depose an undesirable king. This right was set out with a good deal of detail by the Dutch when as early as July 26, 1581, they declared their independence of Philip of Spain. In their long struggle with the Stuarts the British people asserted the same principles, which finally culminated in the Bill of Rights deposing the last of

that house and placing William and Mary on the throne. In each of these cases sovereignty through divine right was displaced by sovereignty through the consent of the people. Running through the same documents, though expressed in different terms, is the clear inference of inalienable rights. But we should search these charters in vain for an assertion of the doctrine of equality. This principle had not before appeared as an official political declaration of any nation. It was profoundly revolutionary. It is one of the corner stones of American institutions.

But if these truths to which the declaration refers have not before been adopted in their combined entirety by national authority, it is a fact that they had been long pondered and often expressed in political speculation. It is generally assumed that French thought had some effect upon our public mind during Revolutionary days. This may have been true. But the principles of our declaration had been under discussion in the Colonies for nearly two generations before the advent of the French political philosophy that characterized the middle of the eighteenth century. In fact, they come from an earlier date. A very positive echo of what the Dutch had done in 1581, and what the English were preparing to do, appears in the assertion of the Reverend Thomas Hooker of Connecticut as early as 1638, when he said in a sermon before the General Court that—

"The foundation of authority is laid in the free consent of the people.

"The choice of public magistrates belongs unto the people by God's own allowance."

This doctrine found wide acceptance among the nonconformist clergy who later made up the Congregational Church. The great apostle of this movement was the Reverend John Wise, of Massachusetts. He was one of the leaders of the revolt against the royal governor Andros in 1687, for which he suffered imprisonment. He was a liberal in ecclesiastical controversies. He appears to have been familiar with the writings of the political scientist, Samuel Pufendorf, who was born in Saxony in 1632. Wise published a treatise, entitled "The Church's Quarrel Espoused," in 1710, which was amplified in another publication in 1717. In it he dealt with the principles of civil government. His works were reprinted in 1772 and have been declared to have been nothing less than a textbook of liberty for our Revolutionary fathers.

While the written word was the foundation, it is apparent that the spoken word was the vehicle for convincing the people. This came with great force and wide range from the successors of Hooker and Wise. It was carried on with a missionary spirit which did not fail to reach the Scotch-Irish of North Carolina, showing its influence by significantly making that Colony the first to give instructions to its delegates looking to independence. This preaching reached the neighborhood of Thomas Jefferson, who acknowledged that his "best ideas of democracy" had been secured at church meetings.

That these ideas were prevalent in Virginia is further revealed by the Declaration of Rights, which was prepared by George Mason and presented to the general assembly on May 27, 1776. This document asserted popular sovereignty and inherent natural rights, but confined the doctrine of equality to the assertion that "All men are created equally free and independent." It can scarcely be imagined that Jefferson was unacquainted with what had been done in his own Commonwealth of Virginia when he took up the task of drafting the Declaration of

Independence. But these thoughts can very largely be traced back to what John Wise was writing in 1710. He said, "Every man must be acknowledged equal to every man." Again, "The end of all good government is to cultivate humanity and promote the happiness of all and the good of every man in all his rights, his life, liberty, estate, honor, and so forth…."

And again, "For as they have a power every man in his natural state, so upon combination they can and do bequeath this power to others and settle it according as their united discretion shall determine." And still again, "Democracy is Christ's government in church and state." Here was the doctrine of equality, popular sovereignty, and the substance of the theory of inalienable rights clearly asserted by Wise at the opening of the eighteenth century, just as we have the principle of the consent of the governed stated by Hooker as early as 1638.

When we take all these circumstances into consideration, it is but natural that the first paragraph of the Declaration of Independence should open with a reference to Nature's God and should close in the final paragraphs with an appeal to the Supreme Judge of the world and an assertion of a firm reliance on Divine Providence. Coming from these sources, having as it did this background, it is no wonder that Samuel Adams could say "The people seem to recognize this resolution as though it were a decree promulgated from heaven."

No one can examine this record and escape the conclusion that in the great outline of its principles the Declaration was the result of the religious teachings of the preceding period. The profound philosophy which Jonathan Edwards applied to theology, the popular preaching of George Whitefield, had aroused the thought and stirred the people of the Colonies in preparation for this great event. No doubt the speculations which had been going on in England, and especially on the Continent, lent their influence to the general sentiment of the times. Of course, the world is always influenced by all the experience and all the thought of the past. But when we come to a contemplation of the immediate conception of the principles of human relationship which went into the Declaration of Independence we are not required to extend our search beyond our own shores. They are found in the texts, the sermons, and the writings of the early colonial clergy who were earnestly undertaking to instruct their congregations in the great mystery of how to live. They preached equality because they believed in the fatherhood of God and the brotherhood of man. They justified freedom by the text that we are all created in the divine image, all partakers of the divine spirit.

Placing every man on a plane where he acknowledged no superiors, where no one possessed any right to rule over him, he must inevitably choose his own rulers through a system of self-government. This was their theory of democracy. In those days such doctrines would scarcely have been permitted to flourish and spread in any other country. This was the purpose which the fathers cherished. In order that they might have freedom to express these thoughts and opportunity to put them into action, whole congregations with their pastors had migrated to the colonies. These great truths were in the air that our people breathed. Whatever else we may say of it, the Declaration of Independence was profoundly American.

If this apprehension of the facts be correct, and the documentary evidence would appear to verify it, then certain conclusions are bound to follow. A spring will cease to flow if its source be dried up; a tree will wither if its roots be destroyed. In its main features the Declaration of

Independence is a great spiritual document. It is a declaration not of material but of spiritual conceptions. Equality, liberty, popular sovereignty, the rights of man—these are not elements which we can see and touch. They are ideals. They have their source and their roots in the religious convictions. They belong to the unseen world. Unless the faith of the American people in these religious convictions is to endure, the principles of our Declaration will perish. We can not continue to enjoy the result if we neglect and abandon the cause.

We are too prone to overlook another conclusion. Governments do not make ideals, but ideals make governments. This is both historically and logically true. Of course the government can help to sustain ideals and can create institutions through which they can be the better observed, but their source by their very nature is in the people. The people have to bear their own responsibilities. There is no method by which that burden can be shifted to the government. It is not the enactment, but the observance of laws, that creates the character of a nation.

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 can not 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. Their ideas are not more modern, but more ancient, than those of the Revolutionary fathers.

In the development of its institutions America can fairly claim that it has remained true to the principles which were declared 150 years ago. In all the essentials we have achieved an equality which was never possessed by any other people. Even in the less important matter of material possessions we have secured a wider and wider distribution of wealth. The rights of the individual are held sacred and protected by constitutional guarantees, which even the Government itself is bound not to violate. If there is any one thing among us that is established beyond question, it is self-government—the right of the people to rule. If there is any failure in respect to any of these principles, it is because there is a failure on the part of individuals to observe them. We hold that the duly authorized expression of the will of the people has a divine sanction. But even in that we come back to the theory of John Wise that "Democracy is Christ's government…." The ultimate sanction of law rests on the righteous authority of the Almighty.

On an occasion like this a great temptation exists to present evidence of the practical success of our form of democratic republic at home and the ever-broadening acceptance it is securing abroad. Although these things are well known, their frequent consideration is an encouragement and an inspiration. But it is not results and effects so much as sources and causes that I believe it is even more necessary constantly to contemplate. Ours is a government of the people. It represents their will. Its officers may sometimes go astray, but that is not a reason for criticizing the principles of our institutions. The real heart of the American Government depends upon the

heart of the people. It is from that source that we must look for all genuine reform. It is to that cause that we must ascribe all our results.

It was in the contemplation of these truths that the fathers made their declaration and adopted their Constitution. It was to establish a free government, which must not be permitted to degenerate into the unrestrained authority of a mere majority or the unbridled weight of a mere influential few. They undertook the balance these interests against each other and provide the three separate independent branches, the executive, the legislative, and the judicial departments of the Government, with checks against each other in order that neither one might encroach upon the other. These are our guarantees of liberty. As a result of these methods enterprise has been duly protected from confiscation, the people have been free from oppression, and there has been an ever-broadening and deepening of the humanities of life.

Under a system of popular government there will always be those who will seek for political preferment by clamoring for reform. While there is very little of this which is not sincere, there is a large portion that is not well informed. In my opinion very little of just criticism can attach to the theories and principles of our institutions. There is far more danger of harm than there is hope of good in any radical changes. We do need a better understanding and comprehension of them and a better knowledge of the foundations of government in general. Our forefathers came to certain conclusions and decided upon certain courses of action which have been a great blessing to the world. Before we can understand their conclusions we must go back and review the course which they followed. We must think the thoughts which they thought. Their intellectual life centered around the meeting-house. They were intent upon religious worship. While there were always among them men of deep learning, and later those who had comparatively large possessions, the mind of the people was not so much engrossed in how much they knew, or how much they had, as in how theywere going to live. While scantily provided with other literature, there was a wide acquaintance with the Scriptures. Over a period as great as that which measures the existence of our independence they were subject to this discipline not only in their religious life and educational training, but also in their political thought. They were a people who came under the influence of a great spiritual development and acquired a great moral power.

No other theory is adequate to explain or comprehend the Declaration of Independence. It is the product of the spiritual insight of the people. We live in an age of science and of abounding accumulation of material things. These did not create our Declaration. Our Declaration created them. The things of the spirit come first. Unless we cling to that, all our material prosperity, overwhelming though it may appear, will turn to a barren scepter in our grasp. If we are to maintain the great heritage which has been bequeathed to us, we must be like-minded as the fathers who created it. We must not sink into a pagan materialism. We must cultivate the reverence which they had for the things that are holy. We must follow the spiritual and moral leadership which they showed. We must keep replenished, that they may glow with a more compelling flame, the altar fires before which they worshipped.

1. Calvin Coolidge, "The Inspiration of the Declaration," in *Foundations of the Republic: Speeches and Addresses* (New York: Scribner's Sons, 1926), 441-54.

Monday, June 10, 2013 – Essay #81 – The Inspiration Of The Declaration – Calvin Coolidge (1872-1933) – Guest Essayist: Charles K. Rowley, Duncan Black Professor Emeritus of Economics at George Mason University and General Director of The Locke Institute in Fairfax, Virginia

President Coolidge delivered this speech on the 150th anniversary of the Declaration of Independence. In this essay, I place President Coolidge's speech into a relevant perspective first, by outlining two divergent visions about the nature of man and secondly by explaining how these divergent visions culminated in the progressive attack on the essence of the Declaration of Independence.

1. A Conflict of Visions

In 1987, Thomas Sowell one of America's best economists distinguished between two categorically opposed visions of the nature of man: the constrained and the unconstrained vision. He claimed, convincingly, that this conflict of visions underpins a large number of disagreements over the role of government and over choices among political alternatives.

For Sowell, a vision is a pre-analytic cognitive act. It is what a person senses or feels before he has constructed any systematic reasoning that could be called a theory. A vision is his sense of how the world works. Visions, in this sense, are the foundation on which theories are built. Logic is an essential ingredient in the process of turning a vision into a theory, just as empirical evidence is then essential for determining the validity of that theory. But it is the initial vision that is crucial for a man's glimpse into the way the world works, not least because a vision is a sense of causation, a way of making sense of diverse phenomena under consideration.

Social visions, Sowell claims, differ in their basic conceptions of the nature of man. A creature from another galaxy who sought information about human beings from reading William Godwin's *Enquiry Concerning Political Justice* in 1793 would scarcely recognize man, as he appears there, as the same being described in *The Federalist Papers* just five years earlier. The contrast would be only slightly less if he compared man as he appeared in Thomas Paine and Edmund Burke, or more recently in the writings of John Kenneth Galbraith and Friedrich von Hayek.

From the wide variety of social visions identifiable in the writings of a multitude of scholars, Thomas Sowell isolates and defines two broad categories: the constrained and the unconstrained. He identifies the constrained vision by reference to a famous passage from Adam Smith's 1759 *Theory of Moral Sentiments*, where Smith outlines the likely response of someone in Europe to a dreadful calamity, for example, the swallowing up of the great empire of China by an earthquake:

'He would, I imagine, first of all express very strongly his sorrow for the misfortune of that unhappy people, he would make many melancholy reflections upon the precariousness of human life, and the vanity of all the labours of man….And when all this fine philosophy was over, when all these humane sentiments had been once fairly expressed, he would pursue his business, or his pleasure, take his repose or his diversion, with the same ease and tranquility as if no such

accident had happened. The most frivolous disaster which could befall himself would occasion a more real disturbance. If he was to lose his little finger tomorrow, he would not sleep tonight, but, provided he never saw them, he would snore with the most profound security over the ruin of a hundred million of his brethren.'

Smith did not at all lament the perceived moral limitations of man in general, and his egocentricity in particular. Nor did Smith view these limitations as things that somehow must be changed. Instead, he treated them as inherent facts of life, the basic constraint in man's vision. In Smith's judgment, the fundamental moral and social challenge was to make the best of the possibilities that existed within that constraint, rather than to waste scarce time and energy in a futile attempt to change human nature:

'Nature, it seems, when she loaded us with our own sorrows, thought that they were enough, and therefore did not command us to take any further share in those of others than what was necessary to prompt us to relieve them.' Smith, *ibid*.

Smith approached the production and distribution of moral behavior in much the same way in which in 1776, in *The Wealth of Nations*, he would approach the production and distribution of material goods. In both instances, the objective was to maximize subject to perceived constraints. His approach was shared, though less happily shouldered, by his great contemporaries in the field of politics, Edmund Burke and Alexander Hamilton. Burke summarized the constrained vision when he spoke of 'a radical infirmity in all human contrivances'. Hamilton expressed a similar view in *The Federalist Papers*: 'It is the lot of all human institutions, even those of the most perfect kind, to have defects as well as excellencies – ill as well as good propensities. This results from the imperfection of the Institutor, Man.'

Smith, Burke and Hamilton, together with the large majority of those who have shared, and continue to share, in this constrained vision of the nature of man, fully recognize that a society cannot function humanely, if at all, when each person acts as though his little finger is more important than the lives of a hundred million other souls. The crucial word, however, is *act*. In practice, people on many occasions sacrifice their own interests to the greater interests of others. But this sacrifice is due to such intervening factors as charitable incentives, devotion to moral principles, to concepts of honor and nobility, rather than to loving one's neighbor as oneself.

Through such artifacts, man may be persuaded to do, for his own self-image, or inner needs, what he surely would not do for the good of his fellow man. To achieve such 'good' outcomes, what is required is a set of moral incentives designed to move man to look to his better angels. Surely what is not possible, and is not to be contemplated, is to try to change the underlying selfish nature of man. For, as David Hume wisely pronounced: before Smith ever made his mark: 'mean sensual man is here to stay.'

Thomas Sowell selects, as an exemplar of the unconstrained vision of mankind, another 18th century contemporary of Adam Smith, William Godwin, whose 1793 book I referred to at the outset of this essay. Godwin's book proved to be an immediate success in Britain, only to retreat under the revealed historical outcome of the unconstrained vision of mankind, namely the French Revolution, as it collapsed into the Terror, and into Madame Guillotine, with blood splashing

down the pavements of *La Place de la Concorde*. Eventually, of course, *liberté*, *égalité*, and *fraternité* disappeared under the unconstrained dictatatorship of Emperor Napoleon Bonaparte, at least until the little man met his Waterloo at the hands of Britain's Duke of Wellington and Prussia's General Blucher.

Godwin's vision of mankind could not have been further distant from that of Adam Smith. According to Godwin, man is a perfectible creature, capable of intentionally creating social benefits. His desire to benefit others, indeed, is the essence of man's virtue and the road to man's happiness. Man is capable of directly feeling the needs of others as being more important than his own, and of acting on such feelings even directly against his own, and his family's interest. Godwin refers to 'men as they hereafter may be made' and concludes that: 'Men are capable, no doubt of preferring an inferior interest of their own to a superior interest of others, but this preference arises from a combination of circumstances and is not the necessary and invariable law of nature.' He also notes the essential unimportance of man: 'If a thousand men are to be benefited, I ought to recollect that I am only an atom in the comparison, and to reason accordingly.'

In consequence, Godwin views man's apparent selfishness as artificially created by false incentives in society. His proposed solution is to exert effort to make individuals do what is right because it is right, not because of economic or psychic payments to divert the great weight of self-interest. The nature of man is not at all constrained by selfishness. It is completely receptive to perfectibility through exposure to ideas such as those expressed in his book

2. The Progressive Assault on the Declaration of Independence

Progressivism was the name given to the reform movement that ran from the late 19th century through the early decades of the 20th century. It picked up political support during the FDR years and has never truly lost ground since then in the United States, though periodically it has been checked (most especially during the administrations of Presidents Eisenhower and Reagan). President Calvin Coolidge, arguably, did more to check the movement than any other president, and his 1926 speech offers a magnificent defense of the Founders constrained vision of mankind. Let me identify the key areas of disagreement between the Founders and the progressives that led *Silent Cal* to speak out so eloquently.

(i). The Founders argued that all men are created equal and that they are endowed with inalienable rights to life and liberty and (I infer) with an imprescriptible right to property. This natural moral order is based on rules discovered by human reason, rules that promote human flourishing. The progressives dismissed these arguments as naïve and unhistorical. In their judgment, liberty is endowed not by God but by the state. Man is not made in the image of God, but rather is a social construct. Thomas Dewey wrote: 'Natural rights and natural liberties exist only in the kingdom of mythological social zoology.'

(ii). For the Founders, the gift to man by nature – the capacity to reason and the moral law discovered through reason – is more valuable than any gift from government. Yet, since men are not angels, government is necessary for the security of liberty. Government, from this perspective, is always and fundamentally at the service of the individual. Its purpose is to

enforce the law of nature, and to secure an individual's negative freedom from the despotic and predatory domination by others. In the Founding, the purpose of government was not envisaged as being to secure positive rights such as the freedom from want or poverty. The progressives disparaged this limited view of government. In their judgment, the role of the state is to free individuals from the limits imposed by nature and necessity. As Thomas Dewey wrote: 'Laws and institutions are means of creating individuals.'

(iii). The Founders argued that political society is formed through a voluntary association of individuals, through a social contract. Government operates under a universally-endorsed rule of law. The progressives poured scorn on this notion. As Charles Merriam wrote: 'The origin of the state is regarded, not as a result of deliberate agreement among men, but as the result of historical development, instinctive rather than conscious, and rights are considered to have their source not in nature, but in law.'

(iv). For the Founders, government – though grounded in the divine law – is itself a human artifact, compromised by all the strengths and weaknesses of human nature. As such it must be strictly limited, both because it is dangerous for it to become too powerful, and because its role is not to provide for the highest things in life. The progressives, in contrast, viewed the state as divine and the natural as low. Private property was singled out for particular criticism, with many progressives referring to themselves as socialists. As John Burgess wrote: ''the most fundamental and indispensable mark of statehood is the original, absolute, unlimited power over the individual subject, and all associations on subjects.'

3. The Coolidge Address

On July 5, 1926, President Coolidge eloquently defended the Founders against the progressive scourge. He upheld the Declaration of Independence as 'a great spiritual document'. He insisted that there could be no progress by moving away from the Declaration of Independence: 'If all men are created equal, 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.' Coolidge concluded that 'Governments do not make ideals, but ideals make governments.' To rekindle the Founders' enduring truths, he admonished, 'We must keep them replenished, that they may glow with a more compelling flame, the altar fires before which they worshipped.'

No President replenished the truths of the Founders more than Calvin Coolidge, both in his rhetoric, and in his actions as a President who honored the constrained vision of mankind via his always constrained governance of a great nation.

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Commonwealth Club Address by Franklin D. Roosevelt (1882-1945)

September 23, 1932

…I want to speak not of politics but of Government. I want to speak not of parties, but of universal principles. They are not political, except in that larger sense in which a great American once expressed a definition of politics, that nothing in all of human life is foreign to the science of politics.

I do want to give you, however, a recollection of a long life spent for a large part in public office. Some of my conclusions and observations have been deeply accentuated in these past few weeks. I have traveled far—from Albany to the Golden Gate. I have seen many people, and heard many things, and today, when in a sense my journey has reached the half-way mark, I am glad of the opportunity to discuss with you what it all means to me.

Sometimes, my friends, particularly in years such as these, the hand of discouragement falls upon us. It seems that things are in a rut, fixed, settled, that the world has grown old and tired and very much out of joint. This is the mood of depression, of dire and weary depression.

But then we look around us in America, and everything tells us that we are wrong. America is new. It is in the process of change and development. It has the great potentialities of youth, and particularly is this true of the great West, and of this coast, and of California.

I would not have you feel that I regard this as in any sense a new community. I have traveled in many parts of the world, but never have I felt the arresting thought of the change and development more than here, where the old, mystic East would seem to be near to us, where the currents of life and thought and commerce of the whole world meet us. This factor alone is sufficient to cause man to stop and think of the deeper meaning of things, when he stands in this community.

But more than that, I appreciate that the membership of this club consists of men who are thinking in terms beyond the immediate present, beyond their own immediate tasks, beyond their own individual interest. I want to invite you, therefore, to consider with me in the large, some of the relationships of Government and economic life that go deeply into our daily lives, our happiness, our future and our security.

The issue of Government has always been whether individual men and women will have to serve some system of Government or economics, or whether a system of Government and economics exists to serve individual men and women. This question has persistently dominated the discussion of Government for many generations. On questions relating to these things men have differed, and for time immemorial it is probable that honest men will continue to differ.

The final word belongs to no man; yet we can still believe in change and in progress. Democracy, as a dear old friend of mine in Indiana, Meredith Nicholson, has called it, is a quest, a never-ending seeking for better things, and in the seeking for these things and the striving for them, there are many roads to follow. But, if we map the course of these roads, we find that there

are only two general directions.

When we look about us, we are likely to forget how hard people have worked to win the privilege of Government. The growth of the national Governments of Europe was a struggle for the development of a centralized force in the Nation, strong enough to impose peace upon ruling barons. In many instances the victory of the central Government, the creation of a strong central Government, was a haven of refuge to the individual. The people preferred the master far away to the exploitation and cruelty of the smaller master near at hand.

But the creators of national Government were perforce ruthless men. They were often cruel in their methods, but they did strive steadily toward something that society needed and very much wanted, a strong central State able to keep the peace, to stamp out civil war, to put the unruly nobleman in his place, and to permit the bulk of individuals to live safely. The man of ruthless force had his place in developing a pioneer country, just as he did in fixing the power of the central Government in the development of Nations. Society paid him well for his services and its development. When the development among the Nations of Europe, however, had been completed, ambition and ruthlessness, having served their term, tended to overstep their mark.

There came a growing feeling that Government was conducted for the benefit of a few who thrived unduly at the expense of all. The people sought a balancing— a limiting force. There came gradually, through town councils, trade guilds, national parliaments, by constitution and by popular participation and control, limitations on arbitrary power.

Another factor that tended to limit the power of those who ruled, was the rise of the ethical conception that a ruler bore a responsibility for the welfare of his subjects.

The American colonies were born in this struggle. The American Revolution was a turning point in it. After the Revolution the struggle continued and shaped itself in the public life of the country. There were those who because they had seen the confusion which attended the years of war for American independence surrendered to the belief that popular Government was essentially dangerous and essentially unworkable. They were honest people, my friends, and we cannot deny that their experience had warranted some measure of fear. The most brilliant, honest and able exponent of this point of view was Hamilton. He was too impatient of slow-moving methods. Fundamentally he believed that the safety of the republic lay in the autocratic strength of its Government, that the destiny of individuals was to serve that Government, and that fundamentally a great and strong group of central institutions, guided by a small group of able and public spirited citizens, could best direct all Government.

But Mr. Jefferson, in the summer of 1776, after drafting the Declaration of Independence turned his mind to the same problem and took a different view. He did not deceive himself with outward forms. Government to him was a means to an end, not an end in itself; it might be either a refuge and a help or a threat and a danger, depending on the circumstances. We find him carefully analyzing the society for which he was to organize a Government. “We have no paupers. The great mass of our population is of laborers, our rich who cannot live without labor, either manual or professional, being few and of moderate wealth. Most of the laboring class possess property, cultivate their own lands, have families and from the demand for their labor, are enabled to exact

from the rich and the competent such prices as enable them to feed abundantly, clothe above mere decency, to labor moderately and raise their families."

These people, he considered, had two sets of rights, those of "personalcompetency" and those involved in acquiring and possessing property. By "personal competency" he meant the right of free thinking, freedom of forming and expressing opinions, and freedom of personal living, each man according to his own lights. To insure the first set of rights, a Government must so order its functions as not to interfere with the individual. But even Jefferson realized that the exercise of the property rights might so interfere with the rights of the individual that the Government, without whose assistance the property rights could not exist, must intervene, not to destroy individualism, but to protect it.

You are familiar with the great political duel which followed; and how Hamilton, and his friends, building toward a dominant centralized power were at length defeated in the great election of 1800, by Mr. Jefferson's party. Out of that duel came the two parties, Republican and Democratic, as we know them today.

So began, in American political life, the new day, the day of the individual against the system, the day in which individualism was made the great watchword of American life. The happiest of economic conditions made that day long and splendid. On the Western frontier, land was substantially free. No one, who did not shirk the task of earning a living, was entirely without opportunity to do so. Depressions could, and did, come and go; but they could not alter the fundamental fact that most of the people lived partly by selling their labor and partly by extracting their livelihood from the soil, so that starvation and dislocation were practically impossible. At the very worst there was always the possibility of climbing into a covered wagon and moving west where the untilled prairies afforded a haven for men to whom the East did not provide a place. So great were our natural resources that we could offer this relief not only to our own people, but to the distressed of all the world; we could invite immigration from Europe, and welcome it with open arms. Traditionally, when a depression came a new section of land was opened in the West; and even our temporary misfortune served our manifest destiny.

It was in the middle of the nineteenth century that a new force was released and a new dream created. The force was what is called the industrial revolution, the advance of steam and machinery and the rise of the forerunners of the modern industrial plant. The dream was the dream of an economic machine, able to raise the standard of living for everyone; to bring luxury within the reach of the humblest; to annihilate distance by steam power and later by electricity, and to release everyone from the drudgery of the heaviest manual toil. It was to be expected that this would necessarily affect Government. Heretofore, Government had merely been called upon to produce conditions within which people could live happily, labor peacefully, and rest secure. Now it was called upon to aid in the consummation of this new dream. There was, however, a shadow over the dream. To be made real, it required use of the talents of men of tremendous will and tremendous ambition, since by no other force could the problems of financing and engineering and new developments be brought to a consummation.

So manifest were the advantages of the machine age, however, that the United States fearlessly, cheerfully, and, I think, rightly, accepted the bitter with the sweet. It was thought that no price

was too high to pay for the advantages which we could draw from a finished industrial system. The history of the last half century is accordingly in large measure a history of a group of financial Titans, whose methods were not scrutinized with too much care, and who were honored in proportion as they produced the results, irrespective of the means they used. The financiers who pushed the railroads to the Pacific were always ruthless, often wasteful, and frequently corrupt; but they did build railroads, and we have them today. It has been estimated that the American investor paid for the American railway system more than three times over in the process; but despite this fact the net advantage was to the United States. As long as we had free land; as long as population was growing by leaps and bounds; as long as our industrial plants were insufficient to supply our own needs, society chose to give the ambitious man free play and unlimited reward provided only that he produced the economic plant so much desired.

During this period of expansion, there was equal opportunity for all and the business of Government was not to interfere but to assist in the development of industry. This was done at the request of business men themselves. The tariff was originally imposed for the purpose of "fostering our infant industry," a phrase I think the older among you will remember as a political issue not so long ago. The railroads were subsidized, sometimes by grants of money, oftener by grants of land; some of the most valuable oil lands in the United States were granted to assist the financing of the railroad which pushed through the Southwest. A nascent merchant marine was assisted by grants of money, or by mail subsidies, so that our steam shipping might ply the seven seas. Some of my friends tell me that they do not want the Government in business. With this I agree; but I wonder whether they realize the implications of the past. For while it has been American doctrine that the Government must not go into business in competition with private enterprises, still it has been traditional, particularly in Republican administrations, for business urgently to ask the Government to put at private disposal all kinds of Government assistance. The same man who tells you that he does not want to see the Government interfere in business—and he means it, and has plenty of good reasons for saying so—is the first to go to Washington and ask the Government for a prohibitory tariff on his product. When things get just bad enough, as they did two years ago, he will go with equal speed to the United States Government and ask for a loan; and the Reconstruction Finance Corporation is the outcome of it. Each group has sought protection from the Government for its own special interests, without realizing that the function of Government must be to favor no small group at the expense of its duty to protect the rights of personal freedom and of private property of all its citizens.

In retrospect we can now see that the turn of the tide came with the turn of the century. We were reaching our last frontier; there was no more free land and our industrial combinations had become great uncontrolled and irresponsible units of power within the State. Clear-sighted men saw with fear the danger that opportunity would no longer be equal; that the growing corporation, like the feudal baron of old, might threaten the economic freedom of individuals to earn a living. In that hour, our antitrust laws were born. The cry was raised against the great corporations. Theodore Roosevelt, the first great Republican Progressive, fought a Presidential campaign on the issue of "trust busting" and talked freely about malefactors of great wealth. If the Government had a policy it was rather to turn the clock back, to destroy the large combinations and to return to the time when every man owned his individual small business.

This was impossible; Theodore Roosevelt, abandoning the idea of "trust busting," was forced to

work out a difference between “good” trusts and “bad” trusts. The Supreme Court set forth the famous “rule of reason” by which it seems to have meant that a concentration of industrial power was permissible if the method by which it got its power, and the use it made of that power, were reasonable.

Woodrow Wilson, elected in 1912, saw the situation more clearly. Where Jefferson had feared the encroachment of political power on the lives of individuals, Wilson knew that the new power was financial. He saw, in the highly centralized economic system, the despot of the twentieth century, on whom great masses of individuals relied for their safety and their livelihood, and whose irresponsibility and greed (if they were not controlled) would reduce them to starvation and penury. The concentration of financial power had not proceeded so far in 1912 as it has today; but it had grown far enough for Mr. Wilson to realize fully its implications. It is interesting, now, to read his speeches. What is called “radical” today (and I have reason to know whereof I speak) is mild compared to the campaign of Mr. Wilson. “No man can deny,” he said, “that the lines of endeavor have more and more narrowed and stiffened; no man who knows anything about the development of industry in this country can have failed to observe that the larger kinds of credit are more and more difficult to obtain unless you obtain them upon terms of uniting your efforts with those who already control the industry of the country, and nobody can fail to observe that every man who tries to set himself up in competition with any process of manufacture which has taken place under the control of large combinations of capital will presently find himself either squeezed out or obliged to sell and allow himself to be absorbed.” Had there been no World War—had Mr. Wilson been able to devote eight years to domestic instead of to international affairs—we might have had a wholly different situation at the present time. However, the then distant roar of European cannon, growing ever louder, forced him to abandon the study of this issue. The problem he saw so clearly is left with us as a legacy; and no one of us on either side of the political controversy can deny that it is a matter of grave concern to the Government.

A glance at the situation today only too clearly indicates that equality of opportunity as we have known it no longer exists. Our industrial plant is built; the problem just now is whether under existing conditions it is not overbuilt. Our last frontier has long since been reached, and there is practically no more free land. More than half of our people do not live on the farms or on lands and cannot derive a living by cultivating their own property. There is no safety valve in the form of a Western prairie to which those thrown out of work by the Eastern economic machines can go for a new start. We are not able to invite the immigration from Europe to share our endless plenty. We are now providing a drab living for our own people.

Our system of constantly rising tariffs has at last reacted against us to the point of closing our Canadian frontier on the north, our European markets on the east, many of our Latin-American markets to the south, and a goodly proportion of our Pacific markets on the west, through the retaliatory tariffs of those countries. It has forced many of our great industrial institutions which exported their surplus production to such countries, to establish plants in such countries, within the tariff walls. This has resulted in the reduction of the operation of their American plants, and opportunity for employment.

Just as freedom to farm has ceased, so also the opportunity in business has narrowed. It still is

true that men can start small enterprises, trusting to native shrewdness and ability to keep abreast of competitors; but area after area has been preempted altogether by the great corporations, and even in the fields which still have no great concerns, the small man starts under a handicap. The unfeeling statistics of the past three decades show that the independent business man is running a losing race. Perhaps he is forced to the wall; perhaps he cannot command credit; perhaps he is "squeezed out," in Mr. Wilson's words, by highly organized corporate competitors, as your corner grocery man can tell you. Recently a careful study was made of the concentration of business in the United States. It showed that our economic life was dominated by some six hundred odd corporations who controlled two-thirds of American industry. Ten million small business men divided the other third. More striking still, it appeared that if the process of concentration goes on at the same rate, at the end of another century we shall have all American industry controlled by a dozen corporations, and run by perhaps a hundred men. Put plainly, we are steering a steady course toward economic oligarchy, if we are not there already.

Clearly, all this calls for a reappraisal of values. A mere builder of more industrial plants, a creator of more railroad systems, an organizer of more corporations, is as likely to be a danger as a help. The day of the great promoter or the financial Titan, to whom we granted anything if only he would build, or develop, is over. Our task now is not discovery or exploitation of natural resources, or necessarily producing more goods. It is the soberer, less dramatic business of administering resources and plants already in hand, of seeking to reestablish foreign markets for our surplus production, of meeting the problem of underconsumption, of adjusting production to consumption, of distributing wealth and products more equitably, of adapting existing economic organizations to the service of the people. The day of enlightened administration has come.

Just as in older times the central Government was first a haven of refuge, and then a threat, so now in a closer economic system the central and ambitious financial unit is no longer a servant of national desire, but a danger. I would draw the parallel one step farther. We did not think because national Government had become a threat in the 18th century that therefore we should abandon the principle of national Government. Nor today should we abandon the principle of strong economic units called corporations, merely because their power is susceptible of easy abuse. In other times we dealt with the problem of an unduly ambitious central Government by modifying it gradually into a constitutional democratic Government. So today we are modifying and controlling our economic units.

As I see it, the task of Government in its relation to business is to assist the development of an economic declaration of rights, an economic constitutional order. This is the common task of statesman and business man. It is the minimum requirement of a more permanently safe order of things.

Happily, the times indicate that to create such an order not only is the proper policy of Government, but it is the only line of safety for our economic structures as well. We know, now, that these economic units cannot exist unless prosperity is uniform, that is, unless purchasing power is well distributed throughout every group in the Nation. That is why even the most selfish of corporations for its own interest would be glad to see wages restored and unemployment ended and to bring the Western farmer back to his accustomed level of prosperity and to assure a permanent safety to both groups. That is why some enlightened industries themselves endeavor

to limit the freedom of action of each man and business group within the industry in the common interest of all; why business men everywhere are asking a form of organization which will bring the scheme of things into balance, even though it may in some measure qualify the freedom of action of individual units within the business.

The exposition need not further be elaborated. It is brief and incomplete, but you will be able to expand it in terms of your own business or occupation without difficulty. I think everyone who has actually entered the economic struggle—which means everyone who was not born to safe wealth—knows in his own experience and his own life that we have now to apply the earlier concepts of American Government to the conditions of today.

The Declaration of Independence discusses the problem of Government in terms of a contract. Government is a relation of give and take, a contract, perforce, if we would follow the thinking out of which it grew. Under such a contract rulers were accorded power, and the people consented to that power on consideration that they be accorded certain rights. The task of statesmanship has always been the redefinition of these rights in terms of a changing and growing social order. New conditions impose new requirements upon Government and those who conduct government.

I held, for example, in proceedings before me as Governor, the purpose of which was the removal of the Sheriff of New York, that under modern conditions it was not enough for a public official merely to evade the legal terms of official wrongdoing. He owed a positive duty as well. I said in substance that if he had acquired large sums of money, he was when accused required to explain the sources of such wealth. To that extent this wealth was colored with a public interest. I said that in financial matters public servants should, even beyond private citizens, be held to a stern and uncompromising rectitude.

I feel that we are coming to a view through the drift of our legislation and our public thinking in the past quarter century that private economic power is, to enlarge an old phrase, a public trust as well. I hold that continued enjoyment of that power by any individual or group must depend upon the fulfillment of that trust. The men who have reached the summit of American business life know this best; happily, many of these urge the binding quality of this greater social contract.

The terms of that contract are as old as the Republic, and as new as the new economic order.

Every man has a right to life; and this means that he has also a right to make a comfortable living. He may by sloth or crime decline to exercise that right; but it may not be denied him. We have no actual famine or dearth; our industrial and agricultural mechanism can produce enough and to spare. Our Government formal and informal, political and economic, owes to everyone an avenue to possess himself of a portion of that plenty sufficient for his needs, through his own work.

Every man has a right to his own property; which means a right to be assured, to the fullest extent attainable, in the safety of his savings. By no other means can men carry the burdens of those parts of life which, in the nature of things, afford no chance of labor: childhood, sickness, old age. In all thought of property, this right is paramount; all other property rights must yield to

it. If, in accord with this principle, we must restrict the operations of the speculator, the manipulator, even the financier, I believe we must accept the restriction as needful, not to hamper individualism but to protect it.

These two requirements must be satisfied, in the main, by the individuals who claim and hold control of the great industrial and financial combinations which dominate so large a part of our industrial life. They have undertaken to be, not business men, but princes of property. I am not prepared to say that the system which produces them is wrong. I am very clear that they must fearlessly and competently assume the responsibility which goes with the power. So many enlightened business men know this that the statement would be little more than a platitude, were it not for an added implication.

This implication is, briefly, that the responsible heads of finance and industry instead of acting each for himself, must work together to achieve the common end. They must, where necessary, sacrifice this or that private advantage; and in reciprocal self-denial must seek a general advantage. It is here that formal Government—political Government, if you chose—comes in. Whenever in the pursuit of this objective the lone wolf, the unethical competitor, the reckless promoter, the Ishmael or Insull whose hand is against every man's, declines to join in achieving an end recognized as being for the public welfare, and threatens to drag the industry back to a state of anarchy, the Government may properly be asked to apply restraint. Likewise, should the group ever use its collective power contrary to the public welfare, the Government must be swift to enter and protect the public interest.

The Government should assume the function of economic regulation only as a last resort, to be tried only when private initiative, inspired by high responsibility, with such assistance and balance as Government can give, has finally failed. As yet there has been no final failure, because there has been no attempt; and I decline to assume that this Nation is unable to meet the situation.

The final term of the high contract was for liberty and the pursuit of happiness. We have learned a great deal of both in the past century. We know that individual liberty and individual happiness mean nothing unless both are ordered in the sense that one man's meat is not another man's poison. We know that the old "rights of personal competency," the right to read, to think, to speak, to choose and live a mode of life, must be respected at all hazards. We know that liberty to do anything which deprives others of those elemental rights is outside the protection of any compact; and that Government in this regard is the maintenance of a balance, within which every individual may have a place if he will take it; in which every individual may find safety if he wishes it; in which every individual may attain such power as his ability permits, consistent with his assuming the accompanying responsibility.

All this is a long, slow task. Nothing is more striking than the simple innocence of the men who insist, whenever an objective is present, on the prompt production of a patent scheme guaranteed to produce a result. Human endeavor is not so simple as that. Government includes the art of formulating a policy, and using the political technique to attain so much of that policy as will receive general support; persuading, leading, sacrificing, teaching always, because the greatest duty of a statesman is to educate. But in the matters of which I have spoken, we are learning

rapidly, in a severe school. The lessons so learned must not be forgotten, even in the mental lethargy of a speculative upturn. We must build toward the time when a major depression cannot occur again; and if this means sacrificing the easy profits of inflationist booms, then let them go; and good riddance.

Faith in America, faith in our tradition of personal responsibility, faith in our institutions, faith in ourselves demand that we recognize the new terms of the old social contract. We shall fulfill them, as we fulfilled the obligation of the apparent Utopia which Jefferson imagined for us in 1776, and which Jefferson, Roosevelt and Wilson sought to bring to realization.We must do so, lest a rising tide of misery, engendered by our common failure, engulf us all. But failure is not an American habit; and in the strength of great hope we must all shoulder our common load.

1. Franklin D. Roosevelt, "Campaign Address on Progressive Government at the Commonwealth Club," September 23, 1932, in Samuel Irving Rosenman, ed., *The Public Papers and Addresses of Franklin D. Roosevelt,* Vol. 1 (New York: Russell & Russell, 1938), 742-56.

Tuesday, June 11, 2013 – Essay #82 – "Commonwealth Club Address," by Franklin D. Roosevelt – Guest Essayist: Tony Williams, Program Director of the Washington-Jefferson-Madison Institute

In 1932, the Democratic candidate, Franklin Delano Roosevelt, was the privileged scion of a wealthy family who ran a campaign that was committed to the Progressive vision of American society and government from the turn of the century. In his "Commonwealth Club Address," FDR embraced the Progressive idea that pitted the "interests" against the people. He also promised the continued growth of the administrative state managed by enlightened bureaucratic elites in the name of the people. Even more importantly, FDR maintained that the purpose of government under the social compact was to preserve rights, but he was bold enough to assert that a redefinition of rights was necessary in an industrial age. Achieving this vision would usher in a secular utopia of progress and equality.

FDR provides a history lesson, as he understands it, which was rooted in the belief that government formerly guaranteed a constitutional rule of law "within which people could live happily, labor peacefully, and rest secure." However, in the course of the late nineteenth century, the ruthless and corrupt financial titans of the industrial age built an economic oligarchy that necessitated a larger national state to regulate the economy for the public good.

FDR even goes so far as to state that the American dream was a fantasy that was no longer true. "A glance at the situation today only too clearly indicates that equality of opportunity as we have known it no longer exists." The solution was clear to FDR – the government would regulate wealth in the public interest and create an equal outcome for all of its citizens.

Progressives such as FDR called upon the government to aid in the creation of a new American dream. The new dream envisioned by FDR would raise the standard of living for everyone, bring luxury to the poorest, and release everyone from heavy manual toil. This dream was not founded upon free enterprise, which he declared to be over, but upon the national government. "The day of enlightened administration has come," he proclaimed.

Since corporations were a "danger" to the economic well-being of the country, they required federal regulation by experts in executive agencies who would manage capitalism. As he saw it, "The task of government in its relation to business is to assist the development of an economic declaration of rights, an economic constitutional order." FDR then made a new social compact regarding the purpose of government and its relation to the economy.

The Lockean purpose of the American government under the Declaration of Independence was to protect the inalienable rights of the people. Although he maintains the idea that government protects rights, FDR subtly alters the rights in his evolutionary understanding of the Constitution The job for him and his "Brains Trust" of advisors was to redefine those rights. "The task of statesmanship has always been the redefinition of these rights in terms of a changing and growing social order. New conditions impose new requirements upon government and those who conduct government."

FDR enumerates the rights of the new social compact:

"Every man has a right to life; and this means that he has also a right to make a comfortable living . . . Our government formal and informal, political and economic, owes to everyone an avenue to possess himself of a portion of that plenty sufficient for his needs."

"Every man has a right to his property; which means a right to be assured, to the fullest extent attainable, in the safety of his savings . . . . In all thought of property, this right is paramount; all other property rights must yield to it."

After asserting these new rights of mankind, FDR claims weakly that he is "not prepared to say that the system which produces [princes of property] is wrong," even though he assailed American capitalism with an unremitting barrage of criticisms. Given the greed that guided the economic royalists, FDR stated that any time a capitalist failed to "join in achieving an end recognized as being for the public welfare . . . the government may properly be asked to apply restraint." The government would be swift to regulate in the public interest, he promised.

FDR celebrated the "new terms" of the social contract that "Roosevelt and Wilson sought to bring to realization." Thus, he acknowledged that the progressive ideals would shape the course of his administration as he sought nothing less than the fundamental transformation of the American government and economy. The Great Depression provided FDR to justification to re-shape American principles and rights that were now defined and granted by government rather than built into the fabric of human nature by nature and nature's God. In 1944, FDR would offer the American people a Second Bill of Rights eclipsing the outmoded natural rights republic of the American founding, thus fulfilling the promise he made in his 1932 Commonwealth Address.

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Democratic Convention Address by Franklin D. Roosevelt

June 27, 1936

Senator Robinson, Members of the Democratic Convention, my friends:

Here, and in every community throughout the land, we are met at a time of great moment to the future of the Nation. It is an occasion to be dedicated to the simple and sincere expression of an attitude toward problems, the determination of which will profoundly affect America.

I come not only as a leader of a party, not only as a candidate for high office, but as one upon whom many critical hours have imposed and still impose a grave responsibility.

For the sympathy, help and confidence with which Americans have sustained me in my task I am grateful. For their loyalty I salute the members of our great party, in and out of political life in every part of the Union. I salute those of other parties, especially those in the Congress of the United States who on so many occasions have put partisanship aside. I thank the Governors of the several States, their Legislatures, their State and local officials who participated unselfishly and regardless of party in our efforts to achieve recovery and destroy abuses. Above all I thank the millions of Americans who have borne disaster bravely and have dared to smile through the storm.

America will not forget these recent years, will not forget that the rescue was not a mere party task. It was the concern of all of us. In our strength we rose together, rallied our energies together, applied the old rules of common sense, and together survived.

In those days we feared fear. That was why we fought fear. And today, my friends, we have won against the most dangerous of our foes. We have conquered fear.

But I cannot, with candor, tell you that all is well with the world. Clouds of suspicion, tides of ill-will and intolerance gather darkly in many places. In our own land we enjoy indeed a fullness of life greater than that of most Nations. But the rush of modern civilization itself has raised for us new difficulties, new problems which must be solved if we are to preserve to the United States the political and economic freedom for which Washington and Jefferson planned and fought.

Philadelphia is a good city in which to write American history. This is fitting ground on which to

reaffirm the faith of our fathers; to pledge ourselves to restore to the people a wider freedom; to give to 1936 as the founders gave to 1776—an American way of life.

That very word freedom, in itself and of necessity, suggests freedom from some restraining power. In 1776 we sought freedom from the tyranny of a political autocracy—from the eighteenth century royalists who held special privileges from the crown. It was to perpetuate their privilege that they governed without the consent of the governed; that they denied the right of free assembly and free speech; that they restricted the worship of God; that they put the average man's property and the average man's life in pawn to the mercenaries of dynastic power; that they regimented the people.

And so it was to win freedom from the tyranny of political autocracy that the American Revolution was fought. That victory gave the business of governing into the hands of the average man, who won the right with his neighbors to make and order his own destiny through his own Government. Political tyranny was wiped out at Philadelphia on July 4, 1776.

Since that struggle, however, man's inventive genius released new forces in our land which reordered the lives of our people. The age of machinery, of railroads; of steam and electricity; the telegraph and the radio; mass production, mass distribution—all of these combined to bring forward a new civilization and with it a new problem for those who sought to remain free.

For out of this modern civilization economic royalists carved new dynasties. New kingdoms were built upon concentration of control over material things. Through new uses of corporations, banks and securities, new machinery of industry and agriculture, of labor and capital—all undreamed of by the fathers—the whole structure of modern life was impressed into this royal service.

There was no place among this royalty for our many thousands of small business men and merchants who sought to make a worthy use of the American system of initiative and profit. They were no more free than the worker or the farmer. Even honest and progressive-minded men of wealth, aware of their obligation to their generation, could never know just where they fitted into this dynastic scheme of things.

It was natural and perhaps human that the privileged princes of these new economic dynasties, thirsting for power, reached out for control over Government itself. They created a new despotism and wrapped it in the robes of legal sanction. In its service new mercenaries sought to regiment the people, their labor, and their property. And as a result the average man once more confronts the problem that faced the Minute Man.

The hours men and women worked, the wages they received, the conditions of their labor—these had passed beyond the control of the people, and were imposed by this new industrial dictatorship. The savings of the average family, the capital of the small business man, the investments set aside for old age—other people's money—these were tools which the new economic royalty used to dig itself in.

Those who tilled the soil no longer reaped the rewards which were their right. The small measure

of their gains was decreed by men in distant cities.

Throughout the Nation, opportunity was limited by monopoly. Individual initiative was crushed in the cogs of a great machine. The field open for free business was more and more restricted. Private enterprise, indeed, became too private. It became privileged enterprise, not free enterprise.

An old English judge once said: "Necessitous men are not free men." Liberty requires opportunity to make a living—a living decent according to the standard of the time, a living which gives man not only enough to live by, but something to live for.

For too many of us the political equality we once had won was meaningless in the face of economic inequality. A small group had concentrated into their own hands an almost complete control over other people's property, other people's money, other people's labor—other people's lives. For too many of us life was no longer free; liberty no longer real; men could no longer follow the pursuit of happiness.

Against economic tyranny such as this, the American citizen could appeal only to the organized power of Government. The collapse of 1929 showed up the despotism for what it was. The election of 1932 was the people's mandate to end it. Under that mandate it is being ended.

The royalists of the economic order have conceded that political freedom was the business of the Government, but they have maintained that economic slavery was nobody's business. They granted that the Government could protect the citizen in his right to vote, but they denied that the Government could do anything to protect the citizen in his right to work and his right to live.

Today we stand committed to the proposition that freedom is no half-and-half affair. If the average citizen is guaranteed equal opportunity in the polling place, he must have equal opportunity in the market place.

These economic royalists complain that we seek to overthrow the institutions of America. What they really complain of is that we seek to take away their power. Our allegiance to American institutions requires the overthrow of this kind of power. In vain they seek to hide behind the Flag and the Constitution. In their blindness they forget what the Flag and the Constitution stand for. Now, as always, they stand for democracy, not tyranny; for freedom, not subjection; and against a dictatorship by mob rule and the overprivileged alike.

The brave and clear platform adopted by this Convention, to which I heartily subscribe, sets forth that Government in a modern civilization has certain inescapable obligations to its citizens, among which are protection of the family and the home, the establishment of a democracy of opportunity, and aid to those overtaken by disaster.

But the resolute enemy within our gates is ever ready to beat down our words unless in greater courage we will fight for them.

For more than three years we have fought for them. This Convention, in every word and deed,

has pledged that that fight will go on.

The defeats and victories of these years have given to us as a people a new understanding of our Government and of ourselves. Never since the early days of the New England town meeting have the affairs of Government been so widely discussed and so clearly appreciated. It has been brought home to us that the only effective guide for the safety of this most worldly of worlds, the greatest guide of all, is moral principle.

We do not see faith, hope and charity as unattainable ideals, but we use them as stout supports of a Nation fighting the fight for freedom in a modern civilization.

Faith—in the soundness of democracy in the midst of dictatorships.

Hope—renewed because we know so well the progress we have made.

Charity—in the true spirit of that grand old word. For charity literally translated from the original means love, the love that understands, that does not merely share the wealth of the giver, but in true sympathy and wisdom helps men to help themselves.

We seek not merely to make Government a mechanical implement, but to give it the vibrant personal character that is the very embodiment of human charity.

We are poor indeed if this Nation cannot afford to lift from every recess of American life the dread fear of the unemployed that they are not needed in the world. We cannot afford to accumulate a deficit in the books of human fortitude.

In the place of the palace of privilege we seek to build a temple out of faith and hope and charity.

It is a sobering thing, my friends, to be a servant of this great cause. We try in our daily work to remember that the cause belongs not to us, but to the people. The standard is not in the hands of you and me alone. It is carried by America. We seek daily to profit from experience, to learn to do better as our task proceeds.

Governments can err, Presidents do make mistakes, but the immortal Dante tells us that divine justice weighs the sins of the cold-blooded and the sins of the warm-hearted in different scales.

Better the occasional faults of a Government that lives in a spirit of charity than the consistent omissions of a Government frozen in the ice of its own indifference.

There is a mysterious cycle in human events. To some generations much is given. Of other generations much is expected. This generation of Americans has a rendezvous with destiny.

In this world of ours in other lands, there are some people, who, in times past, have lived and fought for freedom, and seem to have grown too weary to carry on the fight. They have sold their heritage of freedom for the illusion of a living. They have yielded their democracy.

I believe in my heart that only our success can stir their ancient hope. They begin to know that here in America we are waging a great and successful war. It is not alone a war against want and destitution and economic demoralization. It is more than that; it is a war for the survival of democracy. We are fighting to save a great and precious form of government for ourselves and for the world.

I accept the commission you have tendered me. I join with you. I am enlisted for the duration of the war.

1. Franklin D. Roosevelt, "Acceptance of the Renomination for the Presidency," June 27, 1936, in in Samuel Irving Rosenman, ed., *The Public Papers and Addresses of Franklin D. Roosevelt,* Vol. 5 (New York: Russell & Russell, 1969), 230-36.

Wednesday, June 12, 2013 – Essay #83 – Franklin Roosevelt's Democratic Convention Address – Guest Essayist: Tony Williams, Program Director of the Washington-Jefferson-Madison Institute

On June 27, 1936, Franklin D. Roosevelt accepted the Democratic nomination for the presidency. Despite all of the success in getting Congress to pass New Deal legislation during his first administration and his excellent chances for re-election, FDR felt beleaguered. Republicans in Congress and conservatives such as Herbert Hoover and the Liberty League continued to oppose the legislation he believed would solve the economic crisis and transform America. Populist radicals such as Huey Long and Charles Townshend went even further than FDR in seeking to provide a guaranteed income for Americans and won some of his support. The Supreme Court declared some of the centerpieces of the New Deal, such as the National Industrial Recovery Act (NIRA) and the Agricultural Adjustment Act (AAA), among others, unconstitutional because they blatantly violated the Constitution by regulating intrastate trade and delegated legislative authority to newly-created executive agencies. Finally, almost every interest group representing big business, small business, farmers, workers, and consumers was frustrated by the New Deal and its administrative broker state that tried to navigate among various conflicting interests.

FDR could not abide the opposition to his attempt to create economic recovery and restructure American capitalism. As he stated in his acceptance speech, FDR promised that 1936 would be as historic in laying down a foundation for America as did 1776 – but the foundation would be built of different principles and purposes than those of the founding fathers.

FDR's view of the founding was rooted upon a presentist and Progressive understanding of history. According to FDR, the founding stripped political power from the privileged interests and granted the power of governing to the common man. The industrial revolution, however, created new privilege by the "economic royalists" who built their kingdoms upon concentrated economic power. In this highly moralist view, the "privileged princes" of the corporations

created a "new despotism" by creating their "industrial dictatorship[s]." The men who ran the great corporations did not create wealth or jobs in FDR's estimation but instead perpetrated great evil. They destroyed equal opportunity, got rich off the backs of the workers, and took advantage of the common man in the pursuit of greed. In short, the economic royalists put private gain and profit ahead of FDR's preference that they pursue the public interest. Indeed, he strangely states that, "Private enterprise . . . became too private."

FDR's solution would not have surprised anyone familiar with his Commonwealth Club Address from his 1932 campaign, or with the policies of his first administration. Governing according to the principle that "Necessitous men are not free men," FDR wanted to use the government to ensure that no American would be needy. It would be responsible to guarantee that all would receive "a living decent according to the standard of the time." He believed that his first election (in 1932) was a people's mandate for the government to act, and to act to solve problems, not follow constitutional niceties or the founding purposes of government. "The defeats and victories of these years," FDR tells his fellow Democrats, "have given to us as a people a new understanding of our Government and ourselves." 1932 America had evolved and progressed much beyond the simple 1776 founding.

FDR unsurprisingly endorsed the Democratic platform adopted by the convention, which "sets forth that Government in a modern civilization has certain inescapable obligations." FDR (mis)used the Christian virtues of hope, love, and charity to explain what those obligations were. After relating each one vaguely, he states more definitively that, "We seek not merely to make Government a mechanical implement, but to give it a vibrant personal character that is the very embodiment of human charity." FDR was ascribing to government the tasks of a vibrant civil society embodied in churches, civic associations, charities, local communities, and local government. But, the charitable Christian work and thriving localism of these groups and institutions were swept aside for increasing the size and power of the national government to manage the economy and destroy the power of the economic royalists.

FDR knew that many Americans were wary of strengthening the national government. He attempted to head off opposition by averring that he would rather have the "occasional faults of a Government that lives in a spirit of charity," than the "consistent omissions" of a limited government and self-governing people who took care of their own. FDR believed in the quasi-providential nature of his presidency. He told the Americans that they had a "rendezvous with destiny" and that in waging his war against want and destitution, "I am enlisted for the duration of the war."

FDR nearly fulfilled his promise by running successfully for the president four times, breaking with the moral precedent of surrendering power after two terms that George Washington had established and followed by every subsequent president. FDR, who criticized the economic royalists so severely for their concentration of power, refused surrender power due to his hubris and arrogant belief that the country simply could not survive in the hands of any other president. And, he concentrated power in the hands of the national government and the executive arguably more than any other twentieth-century president. No wonder that he in turn was charged with royalism and dictatorship. If he wasn't those things, he was certainly a Progressive who broke with the founding vision of the purposes of American self-government.

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What Good's a Constitution? by Winston Churchill (1874-1965)

August 22, 1936

No one can think clearly or sensibly about this vast and burning topic without in the first instance making up his mind upon the fundamental issue. Does he value the State above the citizen, or the citizen above the State? Does a government exist for the individual, or do individuals exist for the government? One must recognize that the world today is deeply divided upon this. Some of the most powerful nations and races have definitely chosen to subordinate the citizen or subject to the life of the State. In Russia, Germany and Italy we have this sombre, tremendous decision, expressed in varying forms. All nations agree that in time of war, where the life and independence of the country are at stake, every man and woman must be ready to work and, if need be, die in defense of these supreme objects; and that the government must be empowered to call upon them to any extent.

But what we are now considering is the existence of this principle in times of peace and its erection into a permanent system to which the life of great communities must be made to conform. The argument is used that economic crises are only another form of war, and as they are always with us, or can always be alleged to be with us, it is claimed that we must live our lives in a perpetual state of war, only without actual shooting, bayoneting or cannonading.

This is, of course, the Socialist view. As long as Socialists present themselves in an international guise as creators of a new world order, like the beehive or the ant heap, with a new human heart to fit these novel conceptions, they could easily be beaten, and have been very effectively beaten both by argument and by nature. But when new forms of socialism arose which were grafted not upon world ideals but upon the strongest forms of nationalism, their success was remarkable.

In Germany, for instance, the alliance between national patriotism, tradition and pride on the one hand, and discontent about the inequalities of wealth on the other, made the Weimar Constitution 'a scrap of paper'. Either of these two fierce, turbulent torrents separately might have been kept within bounds. Joined together in a fierce confluence, they proved irresistible.

Once the rulers of a country can create a war atmosphere in time of peace, can allege that the State is in danger and appeal to all the noblest national instincts, as well as all the basest, it is only in very solidly established countries that the rights of the citizens can be preserved. In Germany these rights vanished almost overnight. Today no one may criticize the dictatorship, either in speech or writing. Voters still go to the polls—in fact, are herded to the polls like

sheep—but the method of election has become a fantastic travesty of popular government. A German can vote for the régime, but not against it. If he attempts to indicate disapproval, his ballot paper is reckoned as 'spoiled'.

The tyranny of the ruling junta extends into every department of life. Friends may not greet each other without invoking the name of Hitler. At least on certain days, the very meals that a family eats in the privacy of its home are regulated by decree. The shadow of an all-powerful State falls between parent and child, husband and wife. Love itself is fettered and confined. No marriage, no love relation of any kind is permitted which offends against a narrow and arbitrary code based upon virulent race prejudice.

Nor is this all. Even in the sphere of religion the State must intervene. It comes between the priest and his penitent, between the worshipper and the God to whom he prays. And this last, by one of the curious ironies of history, in the land of Luther.

To rivet this intolerable yoke upon the necks of the German people all the resources of propaganda have been utilized to magnify the sense of crisis and to exhibit sometimes France, sometimes Poland, sometimes Lithuania, always the Soviets and the Jews, as antagonists at whom the patriotic Teuton must grind his teeth.

Much the same thing has happened in Russia. The powerful aid of national sentiment and imperialist aspirations has been invoked to buttress a decaying Communism.

In the United States, also, economic crisis has led to an extension of the activities of the Executive and to the pillorying, by irresponsible agitators, of certain groups and sections of the population as enemies of the rest. There have been efforts to exalt the power of the central government and to limit the rights of individuals. It has been sought to mobilize behind this reversal of the American tradition, at once the selfishness of the pensioners, or would-be pensioners, of Washington, and the patriotism of all who wish to see their country prosperous once more.

It is when passions and cupidities are thus unleashed and, at the same time, the sense of public duty rides high in the hearts of all men and women of good will that the handcuffs can be slipped upon the citizens and they can be brought into entire subjugation to the executive government. Then they are led to believe that, if they will only yield themselves, body, mind and soul, to the State, and obey unquestioningly its injunctions, some dazzling future of riches and power will open to them, either—as in Italy—by the conquest of the territories of others, or—as in America—by a further liberation and exploitation of the national resources.

I take the opposite view. I hold that governments are meant to be, and must remain, the servants of the citizens; that states and federations only come into existence and can only by justified by preserving the 'life, liberty and the pursuit of happiness' in the homes and families of individuals. The true right and power rest in the individual. He gives of his right and power to the State, expecting and requiring thereby in return to receive certain advantages and guarantees. I do not admit that an economic crisis can ever truly be compared with the kind of struggle for existence by races constantly under primordial conditions. I do not think that modern nations in

time of peace ought to regard themselves as if they were the inhabitants of besieged cities, liable to be put to the sword or led into slavery if they cannot make good their defense.

One of the greatest reasons for avoiding war is that it is destructive to liberty. But we must not be led into adopting for ourselves the evils of war in time of peace upon any pretext whatever. The word ‘civilization’ means not only peace by the non-regimentation of the people such as is required in war. Civilization means that officials and authorities, whether uniformed or not, whether armed or not, are made to realize that they are servants and not masters.

Socialism or overweening State life, whether in peace or war, is only sharing miseries and not blessings. Every self-respecting citizen in every country must be on his guard lest the rulers demand of him in time of peace sacrifices only tolerable in a period of war for national self-preservation.

I judge the civilization of any community by simple tests. What is the degree of freedom possessed by the citizen or subject? Can he think, speak and act freely under well-established, well-known laws? Can he criticize the executive government? Can he sue the State if it has infringed his rights? Are there also great processes for changing the law to meet new conditions?

Judging by these standards, Great Britain and the United States can claim to be in the forefront of civilized communities. But we owe this only in part to the good sense and watchfulness of our citizens. In both our countries the character of the judiciary is a vital factor in the maintenance of the rights and liberties of the individual citizen.

Our judges extend impartially to all men protection, not only against wrongs committed by private persons, but also against the arbitrary acts of public authority. The independence of the courts is, to all of us, the guarantee of freedom and the equal rule of law.

It must, therefore, be the first concern of the citizens of a free country to preserve and maintain the independence of the courts of justice, however inconvenient that independence may be, on occasion, to the government of the day.

But all this implies peace conditions, an atmosphere of civilization rather than militarization or officialization. It implies a balance and equipoise of society which can be altered only gradually. It is so hard to build the structure of a vast economic community, and so easy to upset it and throw it into confusion. The onus must lie always upon those who propose a change, and the process of change is hardly ever beneficial unless it considers what is due to the past as well as what is claimed for the future.

It is for these reasons among many others that the founders of the American Republic in their Declaration of Independence inculcate as a duty binding upon all worthy sons of America ‘a frequent recurrence to first principles’.Do not let us too readily brush aside the grand, simple affirmations of the past. All wisdom is not new wisdom. Let us never forget that the glory of the nineteenth century was founded upon what seemed to be the successful putting down of those twin curses, anarchy and tyranny.

The question we are discussing is whether a fixed constitution is a bulwark or a fetter. From what I have written it is plain that I incline to the side of those who would regard it as a bulwark, and that I rank the citizen higher than the State, and regard the State as useful only in so far as it preserves his inherent rights. All forms of tyranny are odious. It makes very little difference to the citizen, father of a family, head of a household, whether tyranny comes from a royal or imperial despot, or from a Pope or Inquisitor, or from a military caste, or from an aristocratic or plutocratic oligarchy, or from a ring of employers, or a trade union, or a party caucus—or worst of all, from a terrified and infuriated mob. 'A man's a man for a' that.' The whole point is, whether he can make head against oppression in any of its Protean shapes, and defend the island of his home, his life and soul. And here is the point at which we may consider and contrast the constitutions of our respective countries.

It is very difficult for us in England to realize the kind of deadlock which has been reached in the United States. Imagine, for instance, the gigantic India Bill, passed through Parliament and for two or three years in active operation throughout the whole of India, suddenly being declared illegal by the law lords sitting as a tribunal. Imagine—to take an instance nearer home—some gigantic measure of insurance as big as our widows' pensions, health and employment insurance rolled together, which had deeply interwoven itself in the whole life of the people, upon which every kind of contract and business arrangement had been based, being declared to have no validity by a court of law. We simply cannot conceive it. Yet something very like that has occurred on your side of the Atlantic.

In our country an act of Parliament which, upon the advice of the ministers responsible for it, has received the royal assent is the law of the land. Its authority cannot be questioned by any court. There is no limit to the powers of Crown and Parliament. Even the gravest changes in our Constitution can in theory be carried out by simple majority votes in both Houses and the consequential assent of the Crown.

But we now watch the workings of a written Constitution enforced by a Supreme Court according to the letter of the law, under which anyone may bring a test case challenging not merely the interpretation of a law, but the law itself, and if the Court decides for the appellant, be he only an owner of a few chickens, the whole action of the Legislature and the Executive becomes to that extent null and void. We know that to modify the Constitution even in the smallest particular requires a two-thirds majority of the sovereign states forming the American Union. And this has been achieved, after prodigious struggles, on only a score of occasions during the whole history of the United States.

American citizens or jurists in their turn, gaze with wonder at our great British democracy expressing itself with plenary powers through a Government and Parliament controlled only by the fluctuating currents of public opinion. British Governments live from day to day only upon the approval of the House of Commons. There is no divorce between the Executive and the Legislature. The ministers, new or old, must be chosen from men and parties which in the aggregate will command a majority in the House of Commons. Parliament can, if it chooses, even prolong its own life beyond the statutory limit. Ministers may at any time advise the King to a sudden dissolution. Yet all classes and all parties have a deep, underlying conviction that these vast, flexible powers will not be abused, that the spirit of our unwritten Constitution will be

respected at every stage.

To understand how this faith is justified, how the British people are able to enjoy a real stability of government without a written Constitution, it is necessary to consider the beginning of party politics in Britain. Whigs and Tories were almost equally concerned to assert the authority of Parliament as a check upon the Executive. With the Whigs this was a matter of fundamental principle; with the Tories it was a question of expediency. James II was a Catholic and his efforts to further the cause of his co-religionists alienated the great bulk of the Tory party, who were loyal to the Church of England. Then from the advent of William of Orange to the accession of George III, with a brief interval in the reign of Queen Anne, the Crown could do nothing without the Whigs and the government of the country was predominantly or exclusively in the hands of that party.

The Tories were thus vitally interested in preserving and extending the rights of the parliamentary opposition. In this way a jealous care for constitutional rights came to mark both the great parties of the State. And as to all men the Constitution represented security and freedom, none would consent willingly to any breach of it, even to gain a temporary advantage.

Modern times offer respect for law and constitutional usage. Nothing contributed so much to the collapse of the general strike ten years ago as the declaration by great lawyers that it was illegal. And the right of freedom of speech and publication is extended, under the Constitution, to those who in theory seek to overthrow established institutions by force of arms so long as they do not commit any illegal act.

Another factor making for stability is our permanent civil service. Governments come and go; parliamentary majorities fluctuate; but the civil servants remain. To new and inexperienced ministers they are ‘guides, philosophers and friends’. Themselves untouched by the vicissitudes of party fortunes, they impart to the business of administration a real continuity.

On the whole, too, popular opinion acts as a guardian of the unwritten Constitution. Public chastisement would speedily overtake any minister, however powerful, who fell below the accepted standards of fair play or who descended to trickwork or dodgery.

When one considers the immense size of the United States and the extraordinary contrasts of climate and character which differentiate the forty-eight sovereign states of the American Union, as well as the inevitable conflict of interests between North and South and between East and West, it would seem that the participants of so vast a federation have the right to effectual guarantees upon the fundamental laws, and that these should not be easily changed to suit a particular emergency or fraction of the country.

The founders of the Union, although its corpus was then so much smaller, realized this with profound conviction. They did not think it possible to entrust legislation for so diverse a community and enormous an area to a simple majority. They were as well acquainted with the follies and intolerance of parliaments as with the oppression of princes. ‘To control the powers and conduct of the legislature,’ said a leading member of the Convention of 1787, ‘by an overruling constitution was an improvement in the science and practice of government reserved

to the American States.'

All the great names of American history can be invoked behind this principle. Why should it be considered obsolete? If today we are framing that constitution for a 'United States of Europe' for which so many thinkers on this side of the ocean aspire, fixed and almost unalterable guarantees would be required by the acceding nations.

It may well be that this very quality of rigidity, which is today thought to be so galling, has been a prime factor in founding the greatness of the United States. In the shelter of the Constitution nature has been conquered, a mighty continent has been brought under the sway of man, and an economic entity established, unrivalled in the whole history of the globe.

In this small island of Britain we make laws for ourselves. But if we had again attempted to apply this flexibility and freedom to the British Empire, and to frame an Imperial Constitution to make laws for the whole body, it would have been broken to pieces. Although we have a free, flexible Constitution at the centre and for the centre of the Empire, nothing is more rigid than the established practice—namely, that we claim no powers to interfere with the affairs of its self-governing component parts. No supreme court is needed to enforce this rule. We have learned the lessons of the past too well.

And here we must note a dangerous misuse of terminology. 'Taking the rigidity out of the American Constitution' means, and is intended to mean, new gigantic accessions of power to the dominating centre of government and giving it the means to make new fundamental laws enforceable upon all American citizens.

Such a departure in the British Empire by a chance parliamentary majority or even by aggregate Dominion parliamentary majorities, would shatter it to bits. The so-called 'rigidity' of the American Constitution is in fact the guarantee of freedom to its widespread component parts. That a set of persons, however eminent, carried into office upon some populist heave should have the power to make the will of a bare majority effective over the whole of the United States might cause disasters upon the greatest scale from which recovery would not be swift or easy.

I was reading the other day a recent American novel by Sinclair Lewis—*It Can't Happen Here.* Such books render a public service to the English-speaking world. When we see what has happened in Germany, Italy and Russia we cannot neglect their warning. This is an age in which the citizen requires more, and not less, legal protection in the exercise of his rights and liberties.

That is doubtless why, after all the complaints against the rigidity of the United States Constitution and the threats of a presidential election on this issue, none of the suggested constitutional amendments has so far been adopted by the Administration. This may explain why the 'Nine Old Men' of the Supreme Court have not been more seriously challenged. But the challenge may come at a later date, though it would perhaps be wiser to dissociate it from any question of the age of the judges, lest it be the liberal element in the court which is weakened.

Now, at the end of these reflections, I must strike a minor and different note. The rigidity of the

Constitution of the United States is the shield of the common man. But that rigidity ought not to be interpreted by pedants. In England we continually give new interpretation to the archaic language of our fundamental institutions, and this is no new thing in the United States. The judiciary have obligations which go beyond expounding the mere letter of the law. The Constitution must be made to work.

A true interpretation, however, of the British or the American Constitution is certainly not a chop-logic or pedantic interpretation. So august a body as the Supreme Court in dealing with law must also deal with the life of the United States, and words, however solemn, are only true when they preserve their vital relationship to facts. It would certainly be a great disaster, not only to the American Republic but to the whole world, if a violent collision should take place between the large majority of the American people and the great instrument of government which has so long presided over their expanding fortunes.

1. Winston S. Churchill, "What Good's a Constitution?" *Collier's* 98 (August 22, 1936): 386-93.

Thursday, June 13, 2013 – Essay #84 – What Good's A Constitution? – Winston Churchill – Guest Essayist: Troy Kickler, Ph.D., Founding Director, North Carolina History Project and editor of www.northcarolinahistory.org

It seems today that many Americans wrongly perceive the Constitution as a roadblock on the way to a better America. Not too long ago during a dinner conversation, this unfavorable view of the Constitution was expressed to me. The person had overlooked the enduring qualities of the document—qualities that have allowed freedom to flourish and have kept tyranny in check.

In "What Good's A Constitution," former British Prime Minister Winston Churchill reminds readers that the American Constitution has been the "shield of the common man," and its framework and provisions reveal that a government exists for individuals. Individuals do not exist for the government. Churchill wrote the 1936 article in an era in which Fascist dictatorships had emerged in Italy and Germany and Russia's Communist experiment had been underway for almost two decades. Churchill was speculating why such despotic trends occurred in those nations and not in Great Britain or the United States.

According to Churchill, war is "destructive to liberty." Wartime demands for security and order can often temporarily encroach on individual liberties. The Prime Minister describes this process as "the evils of war."

The real danger, notes Churchill, is when a war environment is created during times of peace. This occurs especially when indicators of the national economy are continually dipping, and citizens are suffering from high unemployment and inflation. People want answers and hope for

the best. Tyrannical leaders understand this national frame of mind, so they heighten the public's passionate discontent and take advantage of a patriotic people looking for answers and willing to submit to more authority.

The Third Reich, for instance, heightened the passions of Germans during a time of economic depression and fostered a sense of urgency that enabled Germans to overlook, to bypass, their Weimar Constitution. The whole process facilitated Adolph Hitler's rise to power.

Churchill notices that a centralizing approach, to a much lesser degree, was attempted in the United States during the 1930s, a decade that included the Great Depression. When describing the situation in America, he writes, "There have been efforts to exalt the power of the central government and to limit the rights of the individuals." Freedom survived mostly intact in America, however.

During the tumultuous decades of the 1930s and 1940s, the United States and Great Britain, according to Churchill, were "at the forefront of civilized states." The watchful eye of the general public had been alert to encroachments on individual liberties, and both nations, generally speaking, adhered to established laws and allowed for citizens to criticize the government. In both, an independent judiciary existed, and judges were aware that they were to interpret the law and not to do a leader's bidding.

America's and Great Britain's constitutional systems are different—the former has a written constitution, and the latter has an unwritten one based on common law and political tradition that has emerged in a stable polity. In Great Britain, a respect for constitutional authority and checks and balances within government emerged out of the Glorious Revolution. Although Churchill explains the differences in the two constitutional systems, and prefers his nation's version, he respects the American Constitution as a protector of freedom.

The American Constitution is more "rigid." For instance, two-thirds of a majority of the states are needed to revise it, in any way. This is a time-consuming and difficult process that rarely occurs. It can not be changed on the whim of a public majority. Churchill writes the founding fathers knew the importance of a written Constitution, for the U.S. was created out of a set of diverse people with regional interests. The opinion of the majority of Americans would not necessarily represent, as Churchill puts it, "so diverse a community" as the United States. The game of politics needed a rulebook, and the Constitution became that rulebook.

Churchill questions those who denounce the "rigid" American Constitution. Instead of preventing progress, he writes, the document has allowed freedom to flourish. A permanent, fixed Constitution prevents, the Prime Minister writes, "new gigantic accessions of power to the dominating centre of government." It also prevents more and more government intervention into individuals' lives.

Everyone, from the ordinary citizen to political leaders and legal scholars and jurists, Churchill urges, should have knowledge of the Constitution. Indeed, the American founding fathers believed it an American's duty to return to "first principles." All that is new is not wise, they believed, and the ages can provide wisdom for modern times. It is then our duty to return to the

first principles of the United States of America, for in doing so, we will understand how the "great instrument of government" has "presided over [Americans'] expanding fortunes."

So, what good is a Constitution? It provides a rule of law, a rulebook for the game of American politics. It also allows for freedom to flourish, and the Constitution ensures that Americans do not exist for the government. And, furthermore, it reveals that Americans enumerated certain powers to the government, and as Churchill reminds us, government exists for Americans so that their rights of life, liberty, and the pursuit of happiness may be preserved in individuals' homes and families.

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Annual Message to Congress by Franklin D. Roosevelt

January 11, 1944

…It is our duty now to begin to lay the plans and determine the strategy for the winning of a lasting peace and the establishment of an American standard of living higher than ever before known. We cannot be content, no matter how high that general standard of living may be, if some fraction of our people—whether it be one-third or one-fifth or one-tenth—is ill-fed, ill-clothed, ill-housed, and insecure.

This Republic had its beginning, and grew to its present strength, under the protection of certain inalienable political rights—among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures. They were our rights to life and liberty.

As our Nation has grown in size and stature, however—as our industrial economy expanded—these political rights proved inadequate to assure us equality in the pursuit of happiness.

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous men are not free men." People who are hungry and out of a job are the stuff of which dictatorships are made.

In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed.

Among these are:

The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;

The right to earn enough to provide adequate food and clothing and recreation;

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

The right of every family to a decent home;

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

The right to a good education.

All of these rights spell security. And after this war is won we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.

America's own rightful place in the world depends in large part upon how fully these and similar rights have been carried into practice for our citizens. For unless there is security here at home there cannot be lasting peace in the world.

One of the great American industrialists of our day—a man who has rendered yeoman service to his country in this crisis—recently emphasized the grave dangers of "rightist reaction" in this Nation. All clear-thinking businessmen share his concern. Indeed, if such reaction should develop—if history were to repeat itself and we were to return to the so-called "normalcy" of the 1920′s—then it is certain that even though we shall have conquered our enemies on the battlefields abroad, we shall have yielded to the spirit of Fascism here at home.

I ask the Congress to explore the means for implementing this economic bill of rights—for it is definitely the responsibility of the Congress so to do.Many of these problems are already before committees of the Congress in the form of proposed legislation. I shall from time to time communicate with the Congress with respect to these and further proposals. In the event that no adequate program of progress is evolved, I am certain that the Nation will be conscious of the fact.

Our fighting men abroad—and their families at home—expect such a program and have the right to insist upon it. It is to their demands that this Government should pay heed rather than to the whining demands of selfish pressure groups who seek to feather their nests while young Americans are dying.

The foreign policy that we have been following—the policy that guided us at Moscow, Cairo, and Teheran—is based on the common sense principle which was best expressed by Benjamin Franklin on July 4, 1776: "We must all hang together, or assuredly we shall all hang separately."

I have often said that there are no two fronts for America in this war. There is only one front. There is one line of unity which extends from the hearts of the people at home to the men of our attacking forces in our farthest outposts. When we speak of our total effort, we speak of the factory and the field, and the mine as well as of the battleground—we speak of the soldier and the civilian, the citizen and his Government.

Each and every one of us has a solemn obligation under God to serve this Nation in its most critical hour—to keep this Nation great—to make this Nation greater in a better world.

1. Franklin D. Roosevelt, "Message on the State of the Union," 1944, in Samuel Irving Rosenman, ed., *The Public Papers and Addresses of Franklin D. Roosevelt,* Vol. 13 (New York: Harper, 1950), 40-42.

Friday, June 14, 2013 – Essay #85 – Annual Message to Congress – Franklin D. Roosevelt – Guest Essayist: Dr. Roberta Herzberg, Utah State University Department of Political Science

FDR and the Second Bill of Rights

As World War 2 was winding down, Franklin Delano Roosevelt set his sights for the nation on transitioning the newly expanded role of government from the war effort to an expanded social and economic role. FDR called for the guarantees outlined in this address, as he argued that "true individual freedom cannot exist without economic security and independence. "Necessitous men are not free men." By assuming a role in protecting citizens from the potential problems of their own economic security, government entered an arena in which the citizen operates as a co-producer of the circumstance. Those with the most to gain would seek additional services, while others ignored the pattern of growing government until its scope and size became overwhelming.

The guarantees outlined by FDR constitute one of the most direct statements of the philosophy held by many modern Democrats and referenced in numerous speeches in president Obama's first term and election campaigns. The continued relevance of these goals suggests the importance of this speech for setting security in terms of quality of life as a goal for modern America.

Unlike the 1789 Bill of Rights, which was designed to protect individuals' natural rights from government, the 1944 social guarantees were intended to extend rights from government. When government grants such rights, it may also deny or revise them. Citizens are constantly wondering what they may expect and the political pressure to do more is a constant. The result is the continually expanding welfare state we face today with an estimated 75year obligation of $82Trillion, and little prospect for reversal.

This 1944 radio address sketched FDR's outline for eight major economic "protections" and laid

the groundwork for the government we see today:

1. The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation.

While no one can argue that full employment is a desirable feature of any modern economy, nothing government may do in a free society can deliver on such a promise. Unless government becomes the employer of all citizens, how can they guarantee that any free employer will choose to hire a given individual at a specified rate? Clearly, the tax rates necessary to provide such an extensive commitment stretch Americans' willingness to contribute to any "public good". Furthermore, since our perceived value is based not on the nominal salary, but instead on the post tax compensation, the high taxes needed to fulfill the promise generate even higher initial salary demands in response. Alternatively, trying to achieve the goal through regulations of the private sector results in either lower salaries or fewer jobs as employers seek to manage their total costs of labor. It is not surprising that since this goal was suggested, the level of unemployment that is natural to our society has ratcheted up as well.

2. The right to earn enough to provide adequate food and clothing and recreation;

Regulations that mandate a living wage in the private sector alter employers' demand for employees and historically increase unemployment (especially among low skill workers). Moreover, since this "right" is stated in the vague terms of adequate food, clothing, and recreation, it requires officials to define levels for society. The higher it is set, the more likely the problems of reduced demand will occur as evidenced in the debate over minimum wages. Moreover, defining levels of optimal goods will pose problems for a diverse society. Two recent examples illustrate this dilemma – the defined Essential Health Benefit in mandated health care and the level of food stamps designated for low-income families. Reaction to the health benefits example demonstrates that even a high minimum is inadequate for some, but for others this level requires far more than many had purchased voluntarily in the unregulated market. Many analysts fear that the requirement that plans meet the Essential Benefit guidelines will force some to drop coverage as the cost now exceeds their value for health benefits. Likewise, others worry that treatments and coverage left out of the essential plan will eventually be unavailable to those seeking them. Likewise, debate about the adequacy of nutrition and choice associated with food stamps provision generates some of the greatest controversies in social policies. Some worry that the program is abused and used to buy "wasteful" items, while others note the difficulty of purchasing healthier and fresh foods within the limited budget. In each example, we see the challenge of getting agreement across the politically and socially diverse population at the national level. Prior to the New Deal, such decisions were made locally and close to communities where greater social consensus was a more reasonable assumption.

3. The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The agricultural price supports started during the FDR era have continued into modern times, despite significant changes in the agriculture industry that would seem to make them less necessary. Retaining price supports is more a result of politics and rent seeking by agricultural

interests, rather than the stabilizing goal of earlier eras. With the resulting costs of price supports spread diffusely across all consumers and the benefits concentrated on a limited number of attentive growers, it is not surprising that such supports continue after economic justification is no longer met. Consumers are unlikely to lobby to stop the extra dime in cost on a pound of sugar, but the millions of dollars each sugar farmer may receive continues to make a trip to DC worthwhile.

4. The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

This commitment requires those charged with regulating economic competition to define what is meant by unfair competition before they can pursue policies to achieve it. Does a business grow large because it satisfies the value decision of an overwhelming majority, or is it manipulation by that business? If it is large because of the free choices of consumers, then we might ask whether the effort to curtail market concentration makes consumers better off or worse off. Frequently, business leaders are critical of their competitors and seek assistance from government in addressing concerns. This does not mean there is a legitimate market failure. The existence of crony capitalism today is a result of the power of government to decide winners and losers in these political fights rather than the marketplace. Market failure can emerge as a result of government intervention. The question citizens must consider is whether the cure of eliminating all market concentration delivers more benefit than the risk it poses from continued crony capitalism.

5. The right of every family to a decent home;

We are just beginning to recover from multiple administrations' desires that every U.S. family has a home to call its own. During the 1990's and 2000's, federal policymakers pressed banks and mortgage lenders to make loans to risky recipients at reduced rates. This excess market demand drove up prices, and eventually resulted in a market collapse that many cities are only now beginning to move beyond. Policymakers wanted to make affordable housing a realizable goal for all, but instead their manipulation imposed the largest loss in capital in the nation's history on a majority of Americans. Never underestimate the cost of politicians wanting to "do good".

6. The right to adequate medical care and the opportunity to achieve and enjoy good health;

As noted above, the definition of adequate health care has evolved extensively over the years and continues to generate extraordinary controversy in the latest reforms. It is not that Americans oppose access to basic health care, but when this basic level is defined in the public arena, diverse perspectives on what coverage means creates conflict. Before the recent health reform, this guarantee meant that no person could be denied emergency services if they showed up at a hospital. After reform, that guarantee extends to planned preventive care, which while a good thing to do, is neither unexpected nor rare as needed for most functioning insurance systems. The result will likely be higher costs, not the lower costs promised by president Obama and ACA supporters in passing the bill.

7. The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

One of the central features of the New Deal, the creation of Social Security and Welfare protections, has changed politics forever and locked us into a growing national role in areas once preserved for the states. Today these programs provide benefits for a wide number of vulnerable groups. They shape overall economic activity and employment patterns and they alter individual incentives regarding employment and savings. Politicians continue to promise larger benefits and extended coverage, despite economic realities, and voters continue to reward those who do and punish the limited few willing to convey this future economic reality. As a result, Social Security, Medicare, and extended unemployment and disability benefits have become the third rail of American Politics – touch it and you are likely to die politically.

8. The right to a good education.

While support for education continues as one of the most consistent and strongly held views among the American public, the performance has not always lived up to the promise. The U.S. falls further behind other countries in academic performance, despite spending more. Faced with these results, one might expect policymakers to question the policy direction, but instead they have actually expanded the commitment in recent decades. Originally defined as K-12 public education, this guarantee has now expanded to incorporate mandated assistance for higher education. As spending has increased many times its earlier level, we have not seen education performance and career potential keep pace.

FDR's 1944 promise set the stage for the modern welfare state in America. Unfortunately, the promise has not always delivered, as the policy outcomes and the continued focus on unmet goals continue to challenge our economy as well as our personal freedoms.

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Commencement Address at Yale University by John F. Kennedy (1917-1963)

June 11, 1962

President Griswold, members of the faculty, graduates and their families, ladies and gentlemen:

Let me begin by expressing my appreciation for the very deep honor that you have conferred upon me. As General de Gaulle occasionally acknowledges America to be the daughter of Europe, so I am pleased to come to Yale, the daughter of Harvard. It might be said now that I have the best of both worlds, a Harvard education and a Yale degree.

I am particularly glad to become a Yale man because as I think about my troubles, I find that a lot of them have come from other Yale men. Among businessmen, I have had a minor disagreement with Roger Blough, of the law school class of 1931, and I have had some

complaints, too, from my friend Henry Ford, of the class of 1940. In journalism I seem to have a difference with John Hay Whitney, of the class of 1926—and sometimes I also displease Henry Luce of the class of 1920, not to mention also William F. Buckley, Jr., of the class of 1950. I even have some trouble with my Yale advisers. I get along with them, but I am not always sure how they get along with each other.

I have the warmest feelings for Chester Bowles of the class of 1924, and for Dean Acheson of the class of 1915, and my assistant, McGeorge Bundy, of the class of 1940. But I am not 100 percent sure that these three wise and experienced Yale men wholly agree with each other on every issue.

So this administration which aims at peaceful cooperation among all Americans has been the victim of a certain natural pugnacity developed in this city among Yale men. Now that I, too, am a Yale man, it is time for peace. Last week at West Point, in the historic tradition of that Academy, I availed myself of the powers of Commander in Chief to remit all sentences of offending cadets. In that same spirit, and in the historic tradition of Yale, let me now offer to smoke the clay pipe of friendship with all of my brother Elis, and I hope that they may be friends not only with me but even with each other.

In any event, I am very glad to be here and as a new member of the club, I have been checking to see what earlier links existed between the institution of the Presidency and Yale. I found that a member of the class of 1878, William Howard Taft, served one term in the White House as preparation for becoming a member of this faculty. And a graduate of 1804, John C. Calhoun, regarded the Vice Presidency, quite naturally, as too lowly a status for a Yale alumnus—and became the only man in history to ever resign that office.

Calhoun in 1804 and Taft in 1878 graduated into a world very different from ours today. They and their contemporaries spent entire careers stretching over 40 years in grappling with a few dramatic issues on which the Nation was sharply and emotionally divided, issues that occupied the attention of a generation at a time: the national bank, the disposal of the public lands, nullification or union, freedom or slavery, gold or silver. Today these old sweeping issues very largely have disappeared. The central domestic issues of our time are more subtle and less simple. They relate not to basic clashes of philosophy or ideology but to ways and means of reaching common goals—to research for sophisticated solutions to complex and obstinate issues. The world of Calhoun, the world of Taft had its own hard problems and notable challenges. But its problems are not our problems. Their age is not our age. As every past generation has had to disenthrall itself from an inheritance of truisms and stereotypes, so in our own time we must move on from the reassuring repetition of stale phrases to a new, difficult, but essential confrontation with reality.

For the great enemy of the truth is very often not the lie—deliberate, contrived, and dishonest—but the myth—persistent, persuasive, and unrealistic. Too often we hold fast to the cliches of our forebears. We subject all facts to a prefabricated set of interpretations. We enjoy the comfort of opinion without the discomfort of thought.

Mythology distracts us everywhere—in government as in business, in politics as in economics, in foreign affairs as in domestic affairs. But today I want to particularly consider the myth and

reality in our national economy. In recent months many have come to feel, as I do, that the dialogue between the parties—between business and government, between the government and the public—is clogged by illusion and platitude and fails to reflect the true realities of contemporary American society.

I speak of these matters here at Yale because of the self-evident truth that a great university is always enlisted against the spread of illusion and on the side of reality. No one has said it more clearly than your President Griswold: "Liberal learning is both a safeguard against false ideas of freedom and a source of true ones." Your role as university men, whatever your calling, will be to increase each new generation's grasp of its duties.

There are three great areas of our domestic affairs in which, today, there is a danger that illusion may prevent effective action. They are, first, the question of the size and the shape of the government's responsibilities; second, the question of public fiscal policy; and third, the matter of confidence, business confidence or public confidence, or simply confidence in America. I want to talk about all three, and I want to talk about them carefully and dispassionately—and I emphasize that I am concerned here not with political debate but with finding ways to separate false problems from real ones.

If a contest in angry argument were forced upon it, no administration could shrink from response, and history does not suggest that American Presidents are totally without resources in an engagement forced upon them because of hostility in one sector of society. But in the wider national interest, we need not partisan wrangling but common concentration on common problems. I come here to this distinguished university to ask you to join in this great task.

Let us take first the question of the size and shape of government. The myth here is that government is big, and bad—and steadily getting bigger and worse. Obviously this myth has some excuse for existence. It is true that in recent history each new administration has spent much more money than its predecessor. Thus President Roosevelt outspent President Hoover, and with allowances for the special case of the Second World War, President Truman outspent President Roosevelt. Just to prove that this was not a partisan matter, President Eisenhower then outspent President Truman by the handsome figure of $182 billion. It is even possible, some think, that this trend may continue.

But does it follow from this that big government is growing relatively bigger? It does not—for the fact is for the last fifteen years, the Federal Government—and also the Federal debt—and also the Federal bureaucracy—have grown less rapidly than the economy as a whole. If we leave defense and space expenditures aside, the Federal Government since the Second World War has expanded less than any other major sector of our national life—less than industry, less than commerce, less than agriculture, less than higher education, and very much less than the noise about big government.

The truth about big government is the truth about any other great activity—it is complex. Certainly it is true that size brings dangers—but it is also true that size can bring benefits. Here at Yale which has contributed so much to our national progress in science and medicine, it may be proper for me to mention one great and little noticed expansion of government which has brought strength to our whole society—the new role of our Federal Government as the major

patron of research in science and in medicine. Few people realize that in 1961, in support of all university research in science and medicine, three dollars out of every four came from the Federal Government. I need hardly point out that this has taken place without undue enlargement of Government control—that American scientists remain second to none in their independence and in their individualism.

I am not suggesting that Federal expenditures cannot bring some measure of control. The whole thrust of Federal expenditures in agriculture have been related by purpose and design to control, as a means of dealing with the problems created by our farmers and our growing productivity. Each sector, my point is, of activity must be approached on its own merits and in terms of specific national needs. Generalities in regard to Federal expenditures, therefore, can be misleading—each case, science, urban renewal, education, agriculture, natural resources, each case must be determined on its merits if we are to profit from our unrivaled ability to combine the strength of public and private purpose.

Next, let us turn to the problem of our fiscal policy. Here the myths are legion and the truth hard to find. But let me take as a prime example the problem of the Federal budget. We persist in measuring our Federal fiscal integrity today by the conventional or administrative budget—with results which would be regarded as absurd in any business firm—in any country of Europe—or in any careful assessment of the reality of our national finances. The administrative budget has sound administrative uses. But for wider purposes it is less helpful. It omits our special trust funds and the effect that they have on our economy; it neglects changes in assets or inventories. It cannot tell a loan from a straight expenditure—and worst of all it cannot distinguish between operating expenditures and long term investments.

This budget, in relation to the great problems of Federal fiscal policy which are basic to our economy in 1962, is not simply irrelevant; it can be actively misleading. And yet there is a mythology that measures all of our national soundness or unsoundness on the single simple basis of this same annualadministrative budget. If our Federal budget is to serve not the debate but the country, we must and will find ways of clarifying this area of discourse.

Still in the area of fiscal policy, let me say a word about deficits. The myth persists that Federal deficits create inflation and budget surpluses prevent it. Yet sizeable budget surpluses after the war did not prevent inflation, and persistent deficits for the last several years have not upset our basic price stability. Obviously deficits are sometimes dangerous—and so are surpluses. But honest assessment plainly requires a more sophisticated view than the old and automatic cliche that deficits automatically bring inflation.

There are myths also about our public debt. It is widely supposed that this debt is growing at a dangerously rapid rate. In fact, both the debt per person and the debt as a proportion of our gross national product have declined sharply since the Second World War. In absolute terms the national debt since the end of World War II has increased only eight percent, while private debt was increasing 305 percent, and the debts of State and local governments—on whom people frequently suggest we should place additional burdens—the debts of State and local governments have increased 378 percent. Moreover, debts, public and private, are neither good nor bad, in and of themselves. Borrowing can lead to over-extension and collapse—but it can also lead to expansion and strength. There is no single, simple slogan in this field that we can trust.

Finally, I come to the problem of confidence. Confidence is a problem of myth and also a matter of truth—and this time let me take the truth of the matter first.

It is true—and of high importance—that the prosperity of this country depends on the assurance that all major elements within it will live up to their responsibilities. If business were to neglect its obligations to the public, if labor were blind to all public responsibility, above all, if government were to abandon its obvious—and statutory—duty of watchful concern for our economic health—if any of these things should happen, then confidence might well be weakened and the danger of stagnation would increase. This is the true issue of confidence.

But there is also the false issue—and its simplest form is the assertion that any and all unfavorable turns of the speculative wheel—however temporary and however plainly speculative in character—are the result of, and I quote, "a lack of confidence in the national administration." This I must tell you, while comforting, is not wholly true. Worse, it obscures the reality—which is also simple. The solid ground of mutual confidence is the necessary partnership of government with all of the sectors of our society in the steady quest for economic progress.

Corporate plans are not based on a political confidence in party leaders but on an economic confidence in the Nation's ability to invest and produce and consume. Business had full confidence in the administrations in power in 1929, 1954, 1958, and 1960—but this was not enough to prevent recession when business lacked full confidence in the economy. What matters is the capacity of the Nation as a whole to deal with its economic problems and its opportunities.

The stereotypes I have been discussing distract our attention and divide our effort. These stereotypes do our Nation a disservice, not just because they are exhausted and irrelevant, but above all because they are misleading—because they stand in the way of the solution of hard and complicated facts. It is not new that past debates should obscure present realities. But the damage of such a false dialogue is greater today than ever before simply because today the safety of all the world—the very future of freedom—depends as never before upon the sensible and clearheaded management of the domestic affairs of the United States.

The real issues of our time are rarely as dramatic as the issues of Calhoun. The differences today are usually matters of degree. And we cannot understand and attack our contemporary problems in 1962 if we are bound by traditional labels and wornout slogans of an earlier era. But the unfortunate fact of the matter is that our rhetoric has not kept pace with the speed of social and economic change. Our political debates, our public discourse—on current domestic and economic issues—too often bear little or no relation to the actual problems the United States faces.

What is at stake in our economic decisions today is not some grand warfare of rival ideologies which will sweep the country with passion but the practical management of a modern economy. What we need is not labels and cliches but more basic discussion of the sophisticated and technical questions involved in keeping a great economic machinery moving ahead.

The national interest lies in high employment and steady expansion of output, in stable prices, and a strong dollar. The declaration of such an objective is easy; their attainment in an intricate and interdependent economy and world is a little more difficult. To attain them, we require not

some automatic response but hard thought. Let me end by suggesting a few of the real questions on our national agenda.

First, how can our budget and tax policies supply adequate revenues and preserve our balance of payments position without slowing up our economic growth?

Two, how are we to set our interest rates and regulate the flow of money in ways which will stimulate the economy at home, without weakening the dollar abroad? Given the spectrum of our domestic and international responsibilities, what should be the mix between fiscal and monetary policy?

Let me give several examples from my experience of the complexity of these matters and how political labels and ideological approaches are irrelevant to the solution.

Last week, a distinguished graduate of this school, Senator Proxmire, of the class of 1938, who is ordinarily regarded as a liberal Democrat, suggested that we should follow in meeting our economic problems a stiff fiscal policy, with emphasis on budget balance and an easy monetary policy with low interest rates in order to keep our economy going. In the same week, the Bank for International Settlement in Basel, Switzerland, a conservative organization representing the central bankers of Europe suggested that the appropriate economic policy in the United States should be the very opposite; that we should follow a flexible budget policy, as in Europe, with deficits when the economy is down and a high monetary policy on interest rates, as in Europe, in order to control inflation and protect goals. Both may be right or wrong. It will depend on many different factors.

The point is that this is basically an administrative or executive problem in which political labels or cliches do not give us a solution.

A well-known business journal this morning, as I journeyed to New Haven, raised the prospects that a further budget deficit would bring inflation and encourage the flow of gold. We have had several budget deficits beginning with a twelve and a half billion dollars deficit in 1958, and it is true that in the fall of 1960 we had a gold dollar loss running at five billion dollars annually. This would seem to prove the case that a deficit produces inflation and that we lose gold, yet there was no inflation following the deficit of 1958 nor has there been inflation since then.

Our wholesale price index since 1958 has remained completely level in spite of several deficits, because the loss of gold has been due to other reasons: price instability, relative interest rates, relative export-import balances, national security expenditures—all the rest.

Let me give you a third and final example. At the World Bank meeting in September, a number of American bankers attending predicted to their European colleagues that because of the fiscal 1962 budget deficit, there would be a strong inflationary pressure on the dollar and a loss of gold. Their predictions of inflation were shared by many in business and helped push the market up. The recent reality of noninflation helped bring it down. We have had no inflation because we have had other factors in our economy that have contributed to price stability.

I do not suggest that the Government is right and they are wrong. The fact of the matter is in the Federal Reserve Board and in the administration this fall, a similar view was held by many well-

informed and disinterested men that inflation was the major problem that we would face in the winter of 1962. But it was not. What I do suggest is that these problems are endlessly complicated and yet they go to the future of this country and its ability to prove to the world what we believe it must prove.

I am suggesting that the problems of fiscal and monetary policies in the sixties as opposed to the kinds of problems we faced in the thirties demand subtle challenges for which technical answers, not political answers, must be provided. These are matters upon which government and business may and in many cases will disagree. They are certainly matters that government and business should be discussing in the most sober, dispassionate, and careful way if we are to maintain the kind of vigorous economy upon which our country depends.

How can we develop and sustain strong and stable world markets for basic commodities without unfairness to the consumer and without undue stimulus to the producer? How can we generate the buying power which can consume what we produce on our farms and in our factories? How can we take advantage of the miracles of automation with the great demand that it will put upon highly skilled labor and yet offer employment to the half million of unskilled school dropouts each year who enter the labor market, eight million of them in the 1960′s?

How do we eradicate the barriers which separate substantial minorities of our citizens from access to education and employment on equal terms with the rest?

How, in sum, can we make our free economy work at full capacity—that is, provide adequate profits for enterprise, adequate wages for labor, adequate utilization of plant, and opportunity for all?

These are the problems that we should be talking about—that the political parties and the various groups in our country should be discussing. They cannot be solved by incantations from the forgotten past. But the example of Western Europe shows that they are capable of solution—that governments, and many of them are conservative governments, prepared to face technical problems without ideological preconceptions, can coordinate the elements of a national economy and bring about growth and prosperity—a decade of it.

Some conversations I have heard in our own country sound like old records, long-playing, left over from the middle thirties. The debate of the thirties had its great significance and produced great results, but it took place in a different world with different needs and different tasks. It is our responsibility today to live in our own world, and to identify the needs and discharge the tasks of the 1960′s.

If there is any current trend toward meeting present problems with old cliches, this is the moment to stop it—before it lands us all in a bog of sterile acrimony.

Discussion is essential; and I am hopeful that the debate of recent weeks, though up to now somewhat barren, may represent the start of a serious dialogue of the kind which has led in Europe to such fruitful collaboration among all the elements of economic society and to a decade of unrivaled economic progress. But let us not engage in the wrong argument at the wrong time between the wrong people in the wrong country—while the real problems of our own time grow and multiply, fertilized by our neglect.

Nearly 150 years ago Thomas Jefferson wrote, "The new circumstances under which we are placed call for new words, new phrases, and for the transfer of old words to new objects." New words, new phrases, the transfer of old words to new objects—that is truer today than it was in the time of Jefferson, because the role of this country is so vastly more significant. There is a show in England called "Stop the World, I Want to Get Off." You have not chosen to exercise that option. You are part of the world and you must participate in these days of our years in the solution of the problems that pour upon us, requiring the most sophisticated and technical judgment; and as we work in consonance to meet the authentic problems of our times, we will generate a vision and an energy which will demonstrate anew to the world the superior vitality and the strength of the free society.

1. John F. Kennedy, "Commencement Address at Yale University," June 11, 1962, in *Public Papers of the Presidents of the United States: John F. Kennedy* (Washington, D.C.: Government Printing Office, 1962-64), 470-75.

Monday, June 17, 2013 – Essay #86 – Commencement Address at Yale University – John F. Kennedy – Guest Essayist: Tony Williams, Program Director of the Washington-Jefferson-Madison Institute

John F. Kennedy, "Commencement Address at Yale University"

Throughout the twentieth century, one of the most fundamental tenets of progressive ideology was what many historians called the "gospel of efficiency" that found salvation in scientific rather than republican government. Progressives believed that democratic, partisan politics based upon representative government was often corrupt but always too messy. The people were too uninformed, the Progressives believed, and political compromise did not always result in the "best solutions."

The Progressives thought that they had a much better alternative. They believed that if policymaking were removed from the hands of the sovereign people and their representatives and placed in the hands of the academic experts in executive agencies, then scientific government could rationalize all areas of American life to bring order and efficiency out of democratic chaos. The gospel of efficiency became indisputable truth and worshipped as a creed by those who simply knew better than ordinary people.

The result of this for progressive liberals has been to believe arrogantly that they are acting scientifically and rationally while conservatives rest their arguments on platitudes and slogans. This was recently seen in the debate over gun control in the wake of several tragic mass shootings. The supporters of increased gun control described their reforms as "reasonable," "common sense," or "moderate," implying that anyone who opposed them were irrational extremists. Progressives after all were academic experts – they simply knew better than everyone else, who should simply passively accept the policies handed down to them.

President John F. Kennedy clearly expressed his belief in the kind of progressive ideals described above. His 1962 Commencement Address at Yale University reads like a Progressive manifesto on the superiority of progressive over consensual government.

After some amusing digs at Yale from a Harvard Man, Kennedy tells the graduates that the central domestic issues of his administration were not based upon "basic clashes of philosophy or ideology but to ways and means of reaching common goals – to research for sophisticated solutions to complex and obstinate issues." Kennedy explains some of the hidden meaning behind his statement. The Republicans and conservatives, though without naming them, rest their arguments on "myths," "clichés," "repetition of stale phrases," "illusions," and "platitudes." Instead, Kennedy offers a post-partisan, progressive solution. "We need not partisan wrangling, but common concentration on common problems," he explains to his audience. If the Republicans would simply accepted Kennedy's ideas about government, then there wouldn't be a problem.

He uses the occasion to shatter three prevailing illusions that "prevent effective action." The first myth is that government is too large and that government is bad. He seeks to demolish this myth with the argument that the size of the government bureaucracy and federal debt had grown less rapidly than the size of the economy and any other sector of national life. Moreover, he argues that the large size of government "can bring benefits." For example, even though he proudly states that three out of every four dollars for medical and scientific research comes from the federal government, "American scientists remain second to none in their independence and in their individualism."

The second myth is that the growing federal debt is a problem. As proof, Kennedy states that although the debt was growing, it was decreasing as per capita and relative to Gross National Product. Additionally, he maintains that the public debt is increasing at a slower pace than private debt or the debt of state governments. If Kennedy can be forgiven for not guessing that our debt would reach a staggering seventeen trillion dollars, he might have foreseen that his support of a much larger government with almost limitless responsibility might contribute mightily to an unsustainable federal debt.

The third myth that Kennedy debunks is that business lacked confidence in his administration leading to stagnation. The president argues instead that confidence is rooted upon institutions – business, labor, and government – all fulfilling their obvious "obligations to the public." The "solid ground of mutual confidence is the necessary partnership of government with all of the sectors of our society in the steady quest for economic progress." The national administrative state run by experts necessarily reaches into every aspect of American life to usher in a perfect society not just for the United States but the world. Indeed, he continues, arguing that, "The safety of all the world – the very future of freedom – depends as never before upon the sensible and clearheaded management of the domestic affairs of the United States."

What is at stake, Kennedy avers, is not contending rival visions of liberals and conservatives who would debate as politicians in a republican system, but the "practical management of a modern economy" by experts who could solve "sophisticated and technical questions." Political compromise and representative government may have been adequate in a bygone age but the

modern era had more subtle challenges for which only "technical answers, not political answers, must be provided."

Kennedy's embrace of progressivism traced its lineage back to Woodrow Wilson and the early twentieth century. Kennedy advocates a government based upon the European model when he promotes a government by experts and an increasingly large government that manages society,. Just as Wilson admired the German model and philosophy, Kennedy thinks America should become more like Europe. "The example of Western Europe," Kennedy explains, "shows that they are capable of solution – that governments . . . prepared to face technical problems without ideological preconceptions, can coordinate the elements of a national economy and bring about growth and prosperity."

President John F. Kennedy sought to administer government by progressive experts rather than the people. He sought to bring efficiency and order to democratic politics and free enterprise. He sought to impose a European vision of statism on American institutions, and then promised that this was the way to protect and promote freedom. It would supposedly "demonstrate anew to the world the superior vitality and the strength of a free society." Perhaps we are living with the illusion that one could live freely and enjoy prosperity in a managed society.

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Remarks at the University of Michigan by Lyndon B. Johnson (1908-1973)

May 22, 1964

President Hatcher, Governor Romney, Senators McNamara and Hart, Congressmen Meader and Staebler, and other members of the fine Michigan delegation, members of the graduating class, my fellow Americans:

It is a great pleasure to be here today. This university has been coeducational since 1870, but I do not believe it was on the basis of your accomplishments that a Detroit high school girl said, "In choosing a college, you first have to decide whether you want a coeducational school or an educational school."

Well, we can find both here at Michigan, although perhaps at different hours.

I came out here today very anxious to meet the Michigan student whose father told a friend of mine that his son's education had been a real value. It stopped his mother from bragging about

him.

I have come today from the turmoil of your Capital to the tranquility of your campus to speak about the future of your country.

The purpose of protecting the life of our Nation and preserving the liberty of our citizens is to pursue the happiness of our people. Our success in that pursuit is the test of our success as a Nation.

For a century we labored to settle and to subdue a continent. For half a century we called upon unbounded invention and untiring industry to create an order of plenty for all of our people.

The challenge of the next half century is whether we have the wisdom to use that wealth to enrich and elevate our national life, and to advance the quality of our American civilization.

Your imagination, your initiative, and your indignation will determine whether we build a society where progress is the servant of our needs, or a society where old values and new visions are buried under unbridled growth. For in your time we have the opportunity to move not only toward the rich society and the powerful society, but upward to the Great Society.

The Great Society rests on abundance and liberty for all. It demands an end to poverty and racial injustice, to which we are totally committed in our time. But that is just the beginning.

The Great Society is a place where every child can find knowledge to enrich his mind and to enlarge his talents. It is a place where leisure is a welcome chance to build and reflect, not a feared cause of boredom and restlessness. It is a place where the city of man serves not only the needs of the body and the demands of commerce but the desire for beauty and the hunger for community.

It is a place where man can renew contact with nature. It is a place which honors creation for its own sake and for what it adds to the understanding of the race. It is a place where men are more concerned with the quality of their goals than the quantity of their goods.

But most of all, the Great Society is not a safe harbor, a resting place, a final objective, a finished work. It is a challenge constantly renewed, beckoning us toward a destiny where the meaning of our lives matches the marvelous products of our labor.

So I want to talk to you today about three places where we begin to build the Great Society—in our cities, in our countryside, and in our classrooms.

Many of you will live to see the day, perhaps fifty years from now, when there will be 400 million Americans—four-fifths of them in urban areas. In the remainder of this century urban population will double, city land will double, and we will have to build homes, highways, and facilities equal to all those built since this country was first settled. So in the next forty years we must rebuild the entire urban United States.

Aristotle said: “Men come together in cities in order to live, but they remain together in order to live the good life.” It is harder and harder to live the good life in American cities today.

The catalog of ills is long: there is the decay of the centers and the despoiling of the suburbs. There is not enough housing for our people or transportation for our traffic. Open land is vanishing and old landmarks are violated.

Worst of all expansion is eroding the precious and time honored values of community with neighbors and communion with nature. The loss of these values breeds loneliness and boredom and indifference.

Our society will never be great until our cities are great. Today the frontier of imagination and innovation is inside those cities and not beyond their borders.

New experiments are already going on. It will be the task of your generation to make the American city a place where future generations will come, not only to live but to live the good life.

I understand that if I stayed here tonight I would see that Michigan students are really doing their best to live the good life.

This is the place where the Peace Corps was started. It is inspiring to see how all of you, while you are in this country, are trying so hard to live at the level of the people.

A second place where we begin to build the Great Society is in our countryside. We have always prided ourselves on being not only America the strong and America the free, but America the beautiful. Today that beauty is in danger. The water we drink, the food we eat, the very air that we breathe, are threatened with pollution. Our parks are overcrowded, our seashores overburdened. Green fields and dense forests are disappearing.

A few years ago we were greatly concerned about the “Ugly American.” Today we must act to prevent an ugly America.

For once the battle is lost, once our natural splendor is destroyed, it can never be recaptured. And once man can no longer walk with beauty or wonder at nature his spirit will wither and his sustenance be wasted.

A third place to build the Great Society is in the classrooms of America. There your children’s lives will be shaped. Our society will not be great until every young mind is set free to scan the farthest reaches of thought and imagination. We are still far from that goal.

Today, eight million adult Americans, more than the entire population of Michigan, have not finished five years of school. Nearly twenty million have not finished eight years of school. Nearly fifty-four million—more than one-quarter of all America—have not even finished high school.

Each year more than 100,000 high school graduates, with proved ability, do not enter college because they cannot afford it. And if we cannot educate today's youth, what will we do in 1970 when elementary school enrollment will be five million greater than 1960? And high school enrollment will rise by five million. College enrollment will increase by more than three million.

In many places, classrooms are overcrowded and curricula are outdated. Most of our qualified teachers are underpaid, and many of our paid teachers are unqualified. So we must give every child a place to sit and a teacher to learn from. Poverty must not be a bar to learning, and learning must offer an escape from poverty.

But more classrooms and more teachers are not enough. We must seek an educational system which grows in excellence as it grows in size. This means better training for our teachers. It means preparing youth to enjoy their hours of leisure as well as their hours of labor. It means exploring new techniques of teaching, to find new ways to stimulate the love of learning and the capacity for creation.

These are three of the central issues of the Great Society. While our Government has many programs directed at those issues, I do not pretend that we have the full answer to those problems.

But I do promise this: We are going to assemble the best thought and the broadest knowledge from all over the world to find those answers for America. I intend to establish working groups to prepare a series of White House conferences and meetings—on the cities, on natural beauty, on the quality of education, and on other emerging challenges. And from these meetings and from this inspiration and from these studies we will begin to set our course toward the Great Society.

The solution to these problems does not rest on a massive program in Washington, nor can it rely solely on the strained resources of local authority. They require us to create new concepts of cooperation, a creative federalism, between the National Capital and the leaders of local communities.

Woodrow Wilson once wrote: "Every man sent out from his university should be a man of his Nation as well as a man of his time."

Within your lifetime powerful forces, already loosed, will take us toward a way of life beyond the realm of our experience, almost beyond the bounds of our imagination.

For better or for worse, your generation has been appointed by history to deal with those problems and to lead America toward a new age. You have the chance never before afforded to any people in any age. You can help build a society where the demands of morality, and the needs of the spirit, can be realized in the life of the Nation.

So, will you join in the battle to give every citizen the full equality which God enjoins and the law requires, whatever his belief, or race, or the color of his skin?

Will you join in the battle to give every citizen an escape from the crushing weight of poverty?

Will you join in the battle to make it possible for all nations to live in enduring peace—as neighbors and not as mortal enemies?

Will you join in the battle to build the Great Society, to prove that our material progress is only the foundation on which we will build a richer life of mind and spirit?

There are those timid souls who say this battle cannot be won; that we are condemned to a soulless wealth. I do not agree. We have the power to shape the civilization that we want. But we need your will, your labor, your hearts, if we are to build that kind of society.

Those who came to this land sought to build more than just a new country. They sought a new world. So I have come here today to your campus to say that you can make their vision our reality. So let us from this moment begin our work so that in the future men will look back and say: It was then, after a long and weary way, that man turned the exploits of his genius to the full enrichment of his life.

Thank you. Goodbye.

1. Lyndon B. Johnson, "Remarks at the University of Michigan," May 22, 1964, in *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1963–64,* Vol. 1 (Washington, D.C.: Government Printing Office, 1965), 704-7.

Tuesday, June 18, 2013 – Essay #87 – Remarks at the University of Michigan – Lyndon B. Johnson – Guest Essayist: J. Eric Wise, Partner at Gibson Dunn & Crutcher LLP, New York City

The Great Society Speech

President Lyndon Johnson delivered the Great Society speech at the University of Michigan in May of 1964. Superficially, the Great Society speech is a typical modern speech, an agenda of platitudinous and pragmatic goals. More deeply, the Great Society speech represents a dramatic rhetorical reorientation of the United States.

Ambitious American political speeches invoke the founding. And the Great Society Speech is no exception, alluding to the Declaration of Independence. The Declaration of Independence sets forth both the basis for the dissolution of government and the foundation of governmental authority. This is the political equality of human beings, particularly as they are endowed with inalienable rights of life, liberty and the pursuit of happiness. Governments are instituted to protect these rights, deriving their just (or rightful) powers from the consent of the governed.

Johnson's Great Society Speech transforms this. Johnson says, "The purpose of protecting the life of our Nation and the liberty of our citizens is to pursue the happiness of our people." But the life and liberty and the pursuit of happiness Johnson referred to are not individual natural rights, they are collective rights. Life and liberty are not inalienable rights; they are conventional rights. In this new light, respect for these rights is compelling only as a means to an end, the "happiness of our people."

According to Johnson, in the first half of the century "we called upon unbounded invention and untiring industry to create an order of plenty for our people." Although the product of private enterprise, Johnson's words "we called upon" recast the origin of the fruits of industry as directed by national authority. The Great Society, according to President Johnson, challenges Americans, through their national government, to "use that wealth to enrich and elevate our national life and to advance the quality of our American civilization."

The audience at the University of Michigan must have felt some relief when the notoriously coarse Johnson said he did not "pretend that we have the full answer" to the qualities of an advanced civilization. Instead, Johnson flattered the gathering of academics, he would "assemble the best thought and the broadest knowledge from all over the world to find these answers for America." The federal government, through "working groups" of assembled experts would hold meetings "on cities, on natural beauty, on the quality of education and other challenges."

Federalism recedes before the Great Society. According to Johnson, the top down implementation of the findings of these experts would require new governmental structures, or at least new uses and constitutional understandings of existing governmental structures. Thus Johnson pledged that the federal government "will create new concepts of cooperation, a creative federalism, between the National Capital and the leaders of local communities."

Most radically, the Great Society never ends. "It is," Johnson said, "a challenge to be constantly renewed, beckoning us toward a destiny where the meaning our lives matches the marvelous products of our labor." Johnson's unspoken corollary is that the power required for the effort is likewise limitless.

The Great Society speech's themes of technocracy guiding the transformation of ideas and, with it, the use of the material means of production parallel historicist (and Marxist-Leninist) themes in which history and revolution transform human ideology to change permanently the relationship of capital and labor and the citizen and the state. The Great Society Speech is both a conscious attempt to politically co-opt the growing radicalism of the '60s and an expression of progressive historicist thinking, widespread, then and now, in American elite opinion.

Johnson also invoked Aristotle, perhaps as a throwback for dissenters. Johnson noted that the city comes together for the sake of living but remains together for sake of living well. But for Aristotle the happiness of a people, or a city, is grounded not in an unfolding history but in an unchanging human nature. The perfection of this nature requires the city but is essentially individual. Health in the city exists to the extent that good citizenship is compatible with – and in fact requires – the individual exercise of the virtues, which radiate from practical wisdom. Aristotle's good life is knowable, indeed is more or less known, not just to experts but to good

people everywhere, at any time. This idea that sufficient knowledge of the good life is broadly possible is as much at the foundation of self-government as the idea of equality.

The Great Society has come and gone, but its legacy remains. The threads of historicism, the unending call for transformation, a future we cannot fully see but confidently know to be better, and the appeal to the authority of expertise as a substitute for political judgment, these are the bread, butter and jam of progressive rhetoric. Confidence in the benevolent rationality of history as opposed to the rationality of deliberate individuals is at the root of the claim recently made that a bill must be made law to know what is in it.

It is ironic that President Johnson gave his Great Society Speech just forty miles from the City of Detroit. In 1966, under the Great Societies' Model Cities Program, Detroit, funded by massive federal Great Society grants totaling $490 million, leveled nine square miles of the city to build a new centrally planned "Model City." No city received more Great Society central planning attention and money than Detroit. And today, Detroit is on the brink of the largest municipal bankruptcy in history.

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Commencement Address at Howard University by Lyndon B. Johnson

June 4, 1965

Dr. Nabrit, my fellow Americans:

I am delighted at the chance to speak at this important and this historic institution. Howard has long been an outstanding center for the education of Negro Americans. Its students are of every race and color and they come from many countries of the world. It is truly a working example of democratic excellence.

Our earth is the home of revolution. In every corner of every continent men charged with hope contend with ancient ways in the pursuit of justice. They reach for the newest of weapons to realize the oldest of dreams, that each may walk in freedom and pride, stretching his talents, enjoying the fruits of the earth.

Our enemies may occasionally seize the day of change, but it is the banner of our revolution they take. And our own future is linked to this process of swift and turbulent change in many lands in the world. But nothing in any country touches us more profoundly, and nothing is more freighted with meaning for our own destiny than the revolution of the Negro American.

In far too many ways American Negroes have been another nation: deprived of freedom, crippled by hatred, the doors of opportunity closed to hope.

In our time change has come to this Nation, too. The American Negro, acting with impressive

restraint, has peacefully protested and marched, entered the courtrooms and the seats of government, demanding a justice that has long been denied. The voice of the Negro was the call to action. But it is a tribute to America that, once aroused, the courts and the Congress, the President and most of the people, have been the allies of progress.

Legal Protection for Human Rights

Thus we have seen the high court of the country declare that discrimination based on race was repugnant to the Constitution, and therefore void. We have seen in 1957, and 1960, and again in 1964, the first civil rights legislation in this Nation in almost an entire century.

As majority leader of the United States Senate, I helped to guide two of these bills through the Senate. And, as your President, I was proud to sign the third. And now very soon we will have the fourth—a new law guaranteeing every American the right to vote.

No act of my entire administration will give me greater satisfaction than the day when my signature makes this bill, too, the law of this land.

The voting rights bill will be the latest, and among the most important, in a long series of victories. But this victory—as Winston Churchill said of another triumph for freedom—"is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning."

That beginning is freedom; and the barriers to that freedom are tumbling down. Freedom is the right to share, share fully and equally, in American society—to vote, to hold a job, to enter a public place, to go to school. It is the right to be treated in every part of our national life as a person equal in dignity and promise to all others.

Freedom is Not Enough

But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair.

Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.

This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.

For the task is to give twenty million Negroes the same chance as every other American to learn and grow, to work and share in society, to develop their abilities—physical, mental and spiritual, and to pursue their individual happiness.

To this end equal opportunity is essential, but not enough, not enough. Men and women of all races are born with the same range of abilities. But ability is not just the product of birth. Ability is stretched or stunted by the family that you live with, and the neighborhood you live in—by the school you go to and the poverty or the richness of your surroundings. It is the product of a hundred unseen forces playing upon the little infant, the child, and finally the man.

Progress for Some

This graduating class at Howard University is witness to the indomitable determination of the Negro American to win his way in American life.

The number of Negroes in schools of higher learning has almost doubled in fifteen years. The number of non-white professional workers has more than doubled in ten years. The median income of Negro college women tonight exceeds that of white college women. And there are also the enormous accomplishments of distinguished individual Negroes—many of them graduates of this institution, and one of them the first lady ambassador in the history of the United States.

These are proud and impressive achievements. But they tell only the story of a growing middle class minority, steadily narrowing the gap between them and their white counterparts.

A Widening Gulf

But for the great majority of Negro Americans—the poor, the unemployed, the uprooted, and the dispossessed—there is a much grimmer story. They still, as we meet here tonight, are another nation. Despite the court orders and the laws, despite the legislative victories and the speeches, for them the walls are rising and the gulf is widening.

Here are some of the facts of this American failure.

Thirty-five years ago the rate of unemployment for Negroes and whites was about the same. Tonight the Negro rate is twice as high.

In 1948 the eight percent unemployment rate for Negro teenage boys was actually less than that of whites. By last year that rate had grown to twenty-three percent, as against thirteen percent for whites unemployed.

Between 1949 and 1959, the income of Negro men relative to white men declined in every section of this country. From 1952 to 1963 the median income of Negro families compared to white actually dropped from fifty-seven percent to fifty-three percent.

In the years 1955 through 1957, twenty-two percent of experienced Negro workers were out of work at some time during the year. In 1961 through 1963 that proportion had soared to twenty-nine percent.

Since 1947 the number of white families living in poverty has decreased twenty-seven percent

while the number of poorer nonwhite families decreased only three percent.

The infant mortality of nonwhites in 1940 was seventy percent greater than whites. Twenty-two years later it was ninety percent greater.

Moreover, the isolation of Negro from white communities is increasing, rather than decreasing as Negroes crowd into the central cities and become a city within a city.

Of course Negro Americans as well as white Americans have shared in our rising national abundance. But the harsh fact of the matter is that in the battle for true equality too many—far too many—are losing ground every day.

The Causes of Inequality

We are not completely sure why this is. We know the causes are complex and subtle. But we do know the two broad basic reasons. And we do know that we have to act.

First, Negroes are trapped—as many whites are trapped—in inherited, gateless poverty. They lack training and skills. They are shut in, in slums, without decent medical care. Private and public poverty combine to cripple their capacities.

We are trying to attack these evils through our poverty program, through our education program, through our medical care and our other health programs, and a dozen more of the Great Society programs that are aimed at the root causes of this poverty.

We will increase, and we will accelerate, and we will broaden this attack in years to come until this most enduring of foes finally yields to our unyielding will.

But there is a second cause—much more difficult to explain, more deeply grounded, more desperate in its force. It is the devastating heritage of long years of slavery; and a century of oppression, hatred, and injustice.

Special Nature of Negro Poverty

For Negro poverty is not white poverty. Many of its causes and many of its cures are the same. But there are differences—deep, corrosive, obstinate differences—radiating painful roots into the community, and into the family, and the nature of the individual.

These differences are not racial differences. They are solely and simply the consequence of ancient brutality, past injustice, and present prejudice. They are anguishing to observe. For the Negro they are a constant reminder of oppression. For the white they are a constant reminder of guilt. But they must be faced and they must be dealt with and they must be overcome, if we are ever to reach the time when the only difference between Negroes and whites is the color of their skin.

Nor can we find a complete answer in the experience of other American minorities. They made a

valiant and a largely successful effort to emerge from poverty and prejudice.

The Negro, like these others, will have to rely mostly upon his own efforts. But he just can not do it alone. For they did not have the heritage of centuries to overcome, and they did not have a cultural tradition which had been twisted and battered by endless years of hatred and hopelessness, nor were they excluded—these others—because of race or color—a feeling whose dark intensity is matched by no other prejudice in our society.

Nor can these differences be understood as isolated infirmities. They are a seamless web. They cause each other. They result from each other. They reinforce each other.

Much of the Negro community is buried under a blanket of history and circumstance. It is not a lasting solution to lift just one corner of that blanket. We must stand on all sides and we must raise the entire cover if we are to liberate our fellow citizens.

The Roots of Injustice

One of the differences is the increased concentration of Negroes in our cities. More than seventy-three percent of all Negroes live in urban areas compared with less than seventy percent of the whites. Most of these Negroes live in slums. Most of these Negroes live together—a separated people.

Men are shaped by their world. When it is a world of decay, ringed by an invisible wall, when escape is arduous and uncertain, and the saving pressures of a more hopeful society are unknown, it can cripple the youth and it can desolate the men.

There is also the burden that a dark skin can add to the search for a productive place in our society. Unemployment strikes most swiftly and broadly at the Negro, and this burden erodes hope. Blighted hope breeds despair. Despair brings indifferences to the learning which offers a way out. And despair, coupled with indifferences, is often the source of destructive rebellion against the fabric of society.

There is also the lacerating hurt of early collision with white hatred or prejudice, distaste or condescension. Other groups have felt similar intolerance. But success and achievement could wipe it away. They do not change the color of a man’s skin. I have seen this uncomprehending pain in the eyes of the little, young Mexican-American schoolchildren that I taught many years ago. But it can be overcome. But, for many, the wounds are always open.

Family Breakdown

Perhaps most important—its influence radiating to every part of life—is the breakdown of the Negro family structure. For this, most of all, white America must accept responsibility. It flows from centuries of oppression and persecution of the Negro man. It flows from the long years of degradation and discrimination, which have attacked his dignity and assaulted his ability to produce for his family.

This, too, is not pleasant to look upon. But it must be faced by those whose serious intent is to improve the life of all Americans.

Only a minority—less than half—of all Negro children reach the age of eighteen having lived all their lives with both of their parents. At this moment, tonight, little less than two-thirds are at home with both of their parents. Probably a majority of all Negro children receive federally-aided public assistance sometime during their childhood.

The family is the cornerstone of our society. More than any other force it shapes the attitude, the hopes, the ambitions, and the values of the child. And when the family collapses it is the children that are usually damaged. When it happens on a massive scale the community itself is crippled.

So, unless we work to strengthen the family, to create conditions under which most parents will stay together—all the rest: schools, and playgrounds, and public assistance, and private concern, will never be enough to cut completely the circle of despair and deprivation.

To Fulfill these Rights

There is no single easy answer to all of these problems.

Jobs are part of the answer. They bring the income which permits a man to provide for his family.

Decent homes in decent surroundings and a chance to learn—an equal chance to learn—are part of the answer.

Welfare and social programs better designed to hold families together are part of the answer.

Care for the sick is part of the answer.

An understanding heart by all Americans is another big part of the answer.

And to all of these fronts—and a dozen more—I will dedicate the expanding efforts of the Johnson administration.

But there are other answers that are still to be found. Nor do we fully understand even all of the problems. Therefore, I want to announce tonight that this fall I intend to call a White House conference of scholars, and experts, and outstanding Negro leaders—men of both races—and officials of Government at every level.

This White House conference's theme and title will be "To Fulfill These Rights."

Its object will be to help the American Negro fulfill the rights which, after the long time of injustice, he is finally about to secure.

To move beyond opportunity to achievement.

To shatter forever not only the barriers of law and public practice, but the walls which bound the condition of many by the color of his skin.

To dissolve, as best we can, the antique enmities of the heart which diminish the holder, divide the great democracy, and do wrong—great wrong—to the children of God.

And I pledge you tonight that this will be a chief goal of my administration, and of my program next year, and in the years to come. And I hope, and I pray, and I believe, it will be a part of the program of all America.

What is Justice

For what is justice?

It is to fulfill the fair expectations of man.

Thus, American justice is a very special thing. For, from the first, this has been a land of towering expectations. It was to be a nation where each man could be ruled by the common consent of all—enshrined in law, given life by institutions, guided by men themselves subject to its rule. And all—all of every station and origin—would be touched equally in obligation and in liberty.

Beyond the law lay the land. It was a rich land, glowing with more abundant promise than man had ever seen. Here, unlike any place yet known, all were to share the harvest.

And beyond this was the dignity of man. Each could become whatever his qualities of mind and spirit would permit—to strive, to seek, and, if he could, to find his happiness.

This is American justice. We have pursued it faithfully to the edge of our imperfections, and we have failed to find it for the American Negro.

So, it is the glorious opportunity of this generation to end the one huge wrong of the American Nation and, in so doing, to find America for ourselves, with the same immense thrill of discovery which gripped those who first began to realize that here, at last, was a home for freedom.

All it will take is for all of us to understand what this country is and what this country must become.

The Scripture promises: “I shall light a candle of understanding in thine heart, which shall not be put out.”

Together, and with millions more, we can light that candle of understanding in the heart of all America.

And, once lit, it will never again go out.

1. Lyndon B. Johnson, "Commencement Address at Howard University: 'To Fulfill These Rights,'" June 4, 1965, in *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965,* Vol. 2 (Washington, D.C.: Government Printing Office, 1966), 635-40.

Wednesday, June 19, 2013 – Essay #88 – Commencement Address at Howard University – Lyndon B. Johnson – Guest Essayist: David J. Bobb, Director, Allan P. Kirby, Jr. Center for Constitutional Studies and Citizenship, Hillsdale College, Washington, D.C.

"Commencement Address at Howard University"

Lyndon B. Johnson

At the end of the United States Civil War, a century before President Lyndon B. Johnson's 1965 Commencement Address at Howard University, the ex-slave turned American orator and statesman Frederick Douglass concluded that the best thing the federal government could do for Americans of African descent was to leave them alone.

In his most popular speech, which he delivered first in 1859, and repeated more than fifty times before his death in 1895, Douglass reflected on the idea of "Self-Made Men." While careful not to assert man's autonomy from what the Declaration of Independence calls "the laws of Nature and of Nature's God," Douglass argued that the self-made man's soul is refined and made great only by extraordinary effort. "If they have ascended high," he says of these noble human beings, "they have built their own ladder."

Douglass's idea of high achievement was tied to his idea of human nature. "Man," he said, "is too closely related to the Infinite to be divided, weighed, measure and reduced to fixed standards, and thus adjusted to finite comprehension. No two of anything are exactly alike, and what is true of man in one generation may lack some degree of truth in another, but his distinctive qualities as man, are inherent and remain forever."

In reflecting on the state of black America at Howard University, a historically black institution founded in 1867, President Johnson articulated an idea of progress—and of justice—very different from that endorsed by Frederick Douglass. Whereas Douglass saw progress for human beings rooted in their natural desire for self-improvement of the soul, Johnson insisted upon an unending progress defined by the government's transformation of the individual's material well-being.

President Johnson's idea was Progress with a capital "P." As he said in this commencement speech, "We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result." This redefinition of equality from one of opportunity to results required a redefinition of what was possible for human beings. Justice,

Johnson claimed, “is to fulfill the fair expectations of man.”

Redefining human beings mainly by the way they can be organized collectively, and redefining justice as fairness (as seen in the eye of the beholder), Johnson disregarded the longstanding American emphasis on the capacity of the individual for self-government, and on justice defined by an equal possession of natural rights. Favoring the Progressive’s new democratic ideal, Johnson parted ways with the plan America’s Founders, Abraham Lincoln, and Frederick Douglass endorsed for the fulfillment of the American promise.

Motivated by this new understanding of justice and the place of government, Johnson declared a “War on Poverty” a year and a half before the Howard University commencement speech. The war’s launch was marked by the establishment of dozens of Great Society programs aimed at ending poverty in America. Today, after nearly fifty years, the rate of poverty in America is no better than when Johnson started his grand campaign.

Frederick Douglass held that government handouts were not the way to lift anyone out of poverty. “A man may, at times, get something for nothing,” he said in “Self-Made Men,” “but it will, in his hands, amount to nothing.” This Douglass held not because he lacked compassion for those in poverty, but because he, having known enslavement and poverty of the worst kind, believed that real progress can come only when crafted according to enduring principles and personal sacrifice.

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A Time for Choosing by Ronald Reagan (1911-2004)

October 27, 1964

I am going to talk of controversial things. I make no apology for this. I have been talking on this subject for ten years, obviously under the administration of both parties. I mention this only because it seems impossible to legitimately debate the issues of the day without being subjected to name-calling and the application of labels. Those who deplore use of the terms “pink” and “leftist” are themselves guilty of branding all who oppose their liberalism as right wing extremists. How long can we afford the luxury of this family fight when we are at war with the most dangerous enemy ever known to man?

If we lose that war, and in so doing lose our freedom, it has been said history will record with the greatest astonishment that those who had the most to lose did the least to prevent its happening. The guns are silent in this war but frontiers fall while those who should be warriors prefer neutrality. Not too long ago two friends of mine were talking to a Cuban refugee. He was a businessman who had escaped from Castro. In the midst of his tale of horrible experiences, one of my friends turned to the other and said, “We don’t know how lucky we are.” The Cuban

stopped and said, “How lucky you are? I had some place to escape to.” And in that sentence he told the entire story. If freedom is lost here there is no place to escape to.

It’s time we asked ourselves if we still know the freedoms intended for us by the Founding Fathers. James Madison said, “We base all our experiments on the capacity of mankind for self-government.” This idea that government was beholden to the people, that it had no other source of power except the sovereign people, is still the newest, most unique idea in all the long history of man’s relation to man. For almost two centuries we have proved man’s capacity for self-government, but today we are told we must choose between a left and right or, as others suggest, a third alternative, a kind of safe middle ground. I suggest to you there is no left or right, only an up or down. Up to the maximum of individual freedom consistent with law and order, or down to the ant heap of totalitarianism; and regardless of their humanitarian purpose those who would sacrifice freedom for security have, whether they know it or not, chosen this downward path. Plutarch warned, “The real destroyer of the liberties of the people is he who spreads among them bounties, donations, and benefits.”

Today there is an increasing number who can’t see a fat man standing beside a thin one without automatically coming to the conclusion the fat man got that way by taking advantage of the thin one. So they would seek the answer to all the problems of human need through government. Howard K. Smith of television fame has written, “The profit motive is outmoded. It must be replaced by the incentives of the welfare state.” He says, “The distribution of goods must be effected by a planned economy.”

Another articulate spokesman for the welfare state defines liberalism as meeting the material needs of the masses through the full power of centralized government. I for one find it disturbing when a representative refers to the free men and women of this country as the masses, but beyond this the full power of centralized government was the very thing the Founding Fathers sought to minimize. They knew you don’t control things; you can’t control the economy without controlling *people.* So we have come to a time for choosing. Either we accept the responsibility for our own destiny, or we abandon the American Revolution and confess that an intellectual belief in a far-distant capitol can plan our lives for us better than we can plan them ourselves.

Already the hour is late. Government has laid its hand on health, housing, farming, industry, commerce, education, and, to an ever-increasing degree, interferes with the people’s right to know. Government tends to grow; government programs take on weight and momentum, as public servants say, always with the best of intentions, “What greater service we could render if only we had a little more money and a little more power.” But the truth is that outside of its legitimate function, government does nothing as well or as economically as the private sector of the economy. What better example do we have of this than government’s involvement in the farm economy over the last thirty years. One-fourth of farming has seen a steady decline in the per capita consumption of everything it produces. That one-fourth is regulated and subsidized by government.

In contrast, the three-fourths of farming unregulated and unsubsidized has seen a twenty-one percent increase in the per capita consumption of all its produce. Since 1955 the cost of the farm program has nearly doubled. Direct payment to farmers is eight times as great as it was nine

years ago, but farm income remains unchanged while farm surplus is bigger. In that same period we have seen a decline of five million in the farm population, but an increase in the number of Department of Agriculture employees.

There is now one such employee for every thirty farms in the United States, and still they can't figure how sixty-six shiploads of grain headed for Austria could disappear without a trace, and Billy Sol Estes never left shore. Three years ago the government put into effect a program to curb the over-production of feed grain. Now, two and a half billion dollars later, the corn crop is one hundred million bushels bigger than before the program started. And the cost of the program prorates out to forty-three dollars for every dollar bushel of corn we don't grow. Nor is this the only example of the price we pay for government meddling. Some government programs with the passage of time take on a sacrosanct quality.

One such considered above criticism, sacred as motherhood, is TVA. This program started as a flood control project; the Tennessee Valley was periodically ravaged by destructive floods. The Army Engineers set out to solve this problem. They said that it was possible that once in 500 years there could be a total capacity flood that would inundate some six hundred thousand acres. Well, the engineers fixed that. They made a permanent lake which inundated a million acres. This solved the problem of floods, but the annual interest on the TVA debt is five times as great as the annual flood damage they sought to correct.

Of course, you will point out that TVA gets electric power from the impounded waters, and this is true, but today eighty-five percent of TVA's electricity is generated in coal-burning steam plants. Now perhaps you'll charge that I'm overlooking the navigable waterway that was created, providing cheap barge traffic, but the bulk of the freight barged on that waterway is coal being shipped to the TVA steam plants, and the cost of maintaining that channel each year would pay for shipping all of the coal by rail, and there would be money left over.

One last argument remains: the prosperity produced by such large programs of government spending. Certainly there are few areas where more spending has taken place. The Labor Department lists fifty percent of the 169 counties in the Tennessee Valley as permanent areas of poverty, distress, and unemployment.

Meanwhile, back in the city, under Urban Renewal, the assault on freedom carries on. Private property rights have become so diluted that public interest is anything a few planners decide it should be. In Cleveland, Ohio, to get a project under way, city officials reclassified eighty-four buildings as substandard in spite of the fact their own inspectors had previously pronounced these buildings sound. The owners stood by and watched twenty-six million dollars worth of property as it was destroyed by the headache ball. Senate Bill 628 says: "Any property, be it home or commercial structure, can be declared slum or blighted and the owner has no recourse at law. The Law Division of the Library of Congress and the General Accounting Office have said that the Courts will have to rule against the owner."

Housing. In one key Eastern city a man owning a blighted area sold his property to Urban Renewal for several million dollars. At the same time, he submitted his own plan for the rebuilding of this area and the government sold him back his own property for twenty-two

percent of what they paid. Now the government announces, “We are going to build subsidized housing in the thousands where we have been building in the hundreds.” At the same time FHA and the Veterans Administration reveal they are holding 120 thousand housing units reclaimed from mortgage foreclosure, mostly because the low down payment and the easy terms brought the owners to a point where they realized the unpaid balance on the homes amounted to a sum greater than the homes were worth, so they just walked out the front door, possibly to take up residence in newer subsidized housing, again with little or no down payment and easy terms.

Some of the foreclosed homes have already been bulldozed into the earth, others, it has been announced, will be refurbished and put on sale for down payments as low as $100 and thirty-five years to pay. This will give the bulldozers a second crack. It is in the area of social welfare that government has found its most fertile growing bed. So many of us accept our responsibility for those less fortunate. We are susceptible to humanitarian appeals.

Federal welfare spending is today ten times greater than it was in the dark depths of the Depression. Federal, state, and local welfare combined spend forty-five billion dollars a year. Now the government has announced that twenty percent, some 9.3 million families, are poverty-stricken on the basis that they have less than a $3,000 a year income.

If this present welfare spending was prorated equally among these poverty-stricken families, we could give each family more than $4,500 a year. Actually, direct aid to the poor averages less than $600 per family. There must be some administrative overhead somewhere. Now, are we to believe that another billion dollar program added to the half a hundred programs and the forty-five billion dollars, will, through some magic, end poverty?For three decades we have tried to solve unemployment by government planning, without success. The more the plans fail, the more the planners plan.

The latest is the Area Redevelopment Agency, and in two years less than one-half of one percent of the unemployed could attribute new jobs to this agency, and the cost to the taxpayer for each job found was $5,000. But beyond the great bureaucratic waste, what are we doing to the people we seek to help?

Recently a judge told me of an incident in his court. A fairly young woman with six children, pregnant with her seventh, came to him for a divorce. Under his questioning it became apparent her husband did not share this desire. Then the whole story came out. Her husband was a laborer earning $250 a month. By divorcing him she could get an eighty dollars raise. She was eligible for $350 a month from the Aid to Dependent Children Program. She had been talked into the divorce by two friends who had already done this very thing. But any time we question the schemes of the do-gooders, we are denounced as being opposed to their humanitarian goal. It seems impossible to legitimately debate their solutions with the assumption that all of us share the desire to help those less fortunate. They tell us we are always against, never for anything. Well, it isn’t so much that liberals are ignorant. It’s just that they know so much that isn’t so.

We are for a provision that destitution should not follow unemployment by reason of old age. For that reason we have accepted Social Security as a step toward meeting that problem. However, we are against the irresponsibility of those who charge that any criticism or suggested

improvement of the program means we want to end payment to those who depend on Social Security for a livelihood.

Fiscal Irresponsibility. We have been told in millions of pieces of literature and press releases that Social Security is an insurance program, but the executives of Social Security appeared before the Supreme Court in the case of *Nestor* v. *Fleming* and proved to the Court's satisfaction that it is not insurance but is a welfare program, and Social Security dues are a tax for the general use of the government. Well it can't be both: insurance and welfare. Later, appearing before a Congressional Committee, they admitted that Social Security is today 298 billion dollars in the red. This fiscal irresponsibility has already caught up with us.

Faced with a bankruptcy, we find that today a young man in his early twenties, going to work at less than an average salary, will, with his employer, pay into Social Security an amount which could provide the young man with a retirement insurance policy guaranteeing $220 a month at age sixty-five, and the government promises him $127.

Now, are we so lacking in business sense that we cannot put this program on a sound actuarial basis, so that those who do depend on it won't come to the cupboard and find it bare, and at the same time can't we introduce voluntary features so that those who can make better provision for themselves are allowed to do so? Incidentally, we might also allow participants in Social Security to name their own beneficiaries, which they cannot do in the present program. These are not insurmountable problems.

Youth Aid Plans. We have today thirty million workers protected by industrial and union pension funds that are soundly financed by some seventy billion dollars invested in corporate securities and income earning real estate. I think we are for telling our senior citizens that no one in this country should be denied medical care for lack of funds, but we are against forcing all citizens into a compulsory government program regardless of need. Now the government has turned its attention to our young people, and suggests that it can solve the problem of school dropouts and juvenile delinquency through some kind of revival of the old C.C.C. camps. The suggested plan prorates out to a cost of $4,700 a year for each young person we want to help. We can send them to Harvard for $2,700 a year. Of course, don't get me wrong—I'm not suggesting Harvard as the answer to juvenile delinquency.

We are for an international organization where the nations of the world can legitimately seek peace. We are against subordinating American interests to an organization so structurally unsound that a two-thirds majority can be mustered in the U.N. General Assembly among nations representing less than ten percent of the world population.

Is there not something of hypocrisy in assailing our allies for so-called vestiges of colonialism while we engage in a conspiracy of silence about the peoples enslaved by the Soviet in the satellite nations? We are for aiding our allies by sharing our material blessings with those nations which share our fundamental beliefs. We are against doling out money, government to government, which ends up financing socialism all over the world.

We set out to help nineteen war-ravaged countries at the end of World War II. We are now

helping 107. We have spent 146 billion dollars. Some of that money bought a two million dollar yacht for Haile Selassie. We bought dress suits for Greek undertakers. We bought one thousand TV sets with twenty-three-inch screens for a country where there is no electricity, and some of our foreign aid funds provided extra wives for Kenya government officials. When Congress moved to cut foreign aid they were told that if they cut it one dollar they endangered national security, and then Senator Harry Byrd revealed that since its inception foreign aid has rarely spent its allotted budget. It has today $21 billion in unexpended funds.

Some time ago Dr. Howard Kershner was speaking to the Prime Minister of Lebanon. The Prime Minister told him proudly that his little country balanced its budget each year. It had no public debt, no inflation, a modest tax rate, and had increased its gold holdings from seventy to 120 million dollars. When he finished, Dr. Kershner said, "Mr. Prime Minister, my country hasn't balanced its budget twenty-eight out of the last forty years. My country's debt is greater than the combined debt of all the nations of the world. We have inflation, we have a tax rate that takes from the private sector a percentage of income greater than any civilized nation has ever taken and survived. We have lost gold at such a rate that the solvency of our currency is in danger. Do you think that my country should continue to give your country millions of dollars each year?" The Prime Minister smiled and said, "No, but if you are foolish enough to do it, we are going to keep on taking the money."

Nine Stalls for One Bull. And so we built a model stock farm in Lebanon, and we built nine stalls for each bull. I find something peculiarly appropriate in that. We have in our vaults $15 billion in gold. We don't own an ounce. Foreign dollar claims against that gold total $27 billion. In the last six years, fifty-two nations have bought $7 billion worth of our gold and all fifty-two are receiving foreign aid.

Because no government ever voluntarily reduces itself in size, government programs once launched never go out of existence. A government agency is the nearest thing to eternal life we'll ever see on this earth. The United States Manual takes twenty-five pages to list by name every Congressman and Senator, and all the agencies controlled by Congress. It then lists the agencies coming under the Executive Branch, and this requires 520 pages.

Since the beginning of the century our gross national product has increased by thirty-three times. In the same period the cost of federal government has increased 234 times, and while the work force is only one and one-half times greater, federal employees number nine times as many. There are now two and one-half million federal employees. No one knows what they all do. One Congressman found out what one of them does. This man sits at a desk in Washington. Documents come to him each morning. He reads them, initials them, and passes them on to the proper agency. One day a document arrived he wasn't supposed to read, but he read it, initialled it and passed it on. Twenty-four hours later it arrived back at his desk with a memo attached that said, "You weren't supposed to read this. Erase your initials, and initial the erasure."

While the federal government is the great offender, the idea filters down. During a period in California when our population has increased ninety percent, the cost of state government has gone up 862 percent and the number of employees 500 percent. Governments, state and local, now employ one out of six of the nation's work force. If the rate of increase of the last three

years continues, by 1970 one-fourth of the total work force will be employed by government. Already we have a permanent structure so big and complex it is virtually beyond the control of Congress and the comprehension of the people, and tyranny inevitably follows when this permanent structure usurps the policy-making function that belongs to elected officials.

One example of this occurred when Congress was debating whether to lend the United Nations $100 million. While they debated, the State Department gave the United Nations $217 million and the United Nations used part of that money to pay the delinquent dues of Castro's Cuba.

Under bureaucratic regulations adopted with no regard to the wish of the people, we have lost much of our Constitutional freedom. For example, federal agents can invade a man's property without a warrant, can impose a fine without a formal hearing, let alone a trial by jury, and can seize and sell his property at auction to enforce payment of that fine.

Rights by Dispensation. An Ohio deputy fire marshal sentenced a man to prison after a secret proceeding in which the accused was not allowed to have a lawyer present. The Supreme Court upheld that sentence, ruling that it was an administrative investigation of incidents damaging to the economy. Someplace a perversion has taken place. Our natural unalienable rights are now presumed to be a dispensation of government, divisible by a vote of the majority. The greatest good for the greatest number is a high-sounding phrase but contrary to the very basis of our nation, unless it is accompanied by recognition that we have certain rights which cannot be infringed upon, even if the individual stands outvoted by all of his fellow citizens. Without this recognition, majority rule is nothing more than mob rule.

It is time we realized that socialism can come without overt seizure of property or nationalization of private business. It matters little that you hold the title to your property or business if government can dictate policy and procedure and holds life and death power over your business. The machinery of this power already exists. Lowell Mason, former anti-trust law enforcer for the Federal Trade Commission, has written "American business is being harassed, bled and even blackjacked under a preposterous crazy quilt system of laws." There are so many that the government literally can find some charge to bring against any concern it chooses to prosecute. Are we safe in our books and records?

The natural gas producers have just been handed a 428-page questionnaire by the Federal Power Commission. It weights ten pounds. One firm has estimated it will take 70,000 accountant man-hours to fill out this questionnaire, and it must be done in quadruplicate. The Power Commission says it must have it to determine whether a proper price is being charged for gas. The National Labor Relations Board ruled that a business firm could not discontinue its shipping department even though it was more efficient and economical to subcontract this work out.

The Supreme Court has ruled the government has the right to tell a citizen what he can grow on his own land for his own use. The Secretary of Agriculture has asked for the right to imprison farmers who violate their planting quotas. One business firm has been informed by the Internal Revenue Service that it cannot take a tax deduction for its institutional advertising because this advertising espoused views not in the public interest.

A child's prayer in a school cafeteria endangers religious freedom, but the people of the Amish religion in the State of Ohio, who cannot participate in Social Security because of their religious beliefs, have had their livestock seized and sold at auction to enforce payment of Social Security dues.

We approach a point of no return when government becomes so huge and entrenched that we fear the consequences of upheaval and just go along with it. The federal government accounts for one-fifth of the industrial capacity of the nation, one-fourth of all construction, holds or guarantees one-third of all mortgages, owns one-third of the land, and engages in some nineteen thousand businesses covering half a hundred different lines. The Defense Department runs 269 supermarkets. They do a gross business of $730 million a year, and lose $150 million. The government spends $11 million an hour every hour of the twenty-four and pretends we had a tax cut while it pursues a policy of planned inflation that will more than wipe out any benefit with depreciation of our purchasing power.

We need true tax reform that will at least make a start toward restoring for our children the American dream that wealth is denied to no one, that each individual has the right to fly as high as his strength and ability will take him. The economist Sumner Schlicter has said, "If a visitor from Mars looked at our tax policy, he would conclude it had been designed by a Communist spy to make free enterprise unworkable." But we cannot have such reform while our tax policy is engineered by people who view the tax as a means of achieving changes in our social structure. Senator [Joseph S.] Clark (D.-Pa.) says the tax issue is a class issue, and the government must use the tax to redistribute the wealth and earnings downward.

Karl Marx. On January 15th in the White House, the President [Lyndon Johnson] told a group of citizens they were going to take all the money they thought was being unnecessarily spent, "take it from the haves and give it to the have-nots who need it so much." When Karl Marx said this he put it:…"from each according to his ability, to each according to his need."

Have we the courage and the will to face up to the immorality and discrimination of the progressive surtax, and demand a return to traditional proportionate taxation? Many decades ago the Scottish economist, John Ramsey McCulloch, said, "The moment you abandon the cardinal principle of exacting from all individuals the same proportion of their income or their property, you are at sea without a rudder or compass and there is no amount of injustice or folly you may not commit."

No nation has survived the tax burden that reached one-third of its national income. Today in our country the tax collector's share is thirty-seven cents of every dollar earned. Freedom has never been so fragile, so close to slipping from our grasp. I wish I could give you some magic formula, but each of us must find his own role. One man in Virginia found what he could do, and dozens of business firms have followed his lead. Concerned because his two hundred employees seemed unworried about government extravagance he conceived the idea of taking all of their withholding out of only the fourth paycheck each month. For three paydays his employees received their full salary. On the fourth payday all withholding was taken. He has one employee who owes him $4.70 each fourth payday. It only took one month to produce two hundred conservatives.

Are you willing to spend time studying the issues, making yourself aware, and then conveying that information to family and friends? Will you resist the temptation to get a government handout for your community? Realize that the doctor's fight against socialized medicine is your fight. We can't socialize the doctors without socializing the patients. Recognize that government invasion of public power is eventually an assault upon your own business. If some among you fear taking a stand because you are afraid of reprisals from customers, clients, or even government, recognize that you are just feeding the crocodile hoping he'll eat you last.

If all of this seems like a great deal of trouble, think what's at stake. We are faced with the most evil enemy mankind has known in his long climb fromthe swamp to the stars. There can be no security anywhere in the free world if there is not fiscal and economic stability within the United States. Those who ask us to trade our freedom for the soup kitchen of the welfare state are architects of a policy of accommodation. They tell us that by avoiding a direct confrontation with the enemy he will learn to love us and give up his evil ways. All who oppose this idea are blanket indicted as war-mongers.Well, let us set one thing straight, there is no argument with regard to peace and war. It is cheap demagoguery to suggest that anyone would want to send other people's sons to war. The only argument is with regard to the best way to avoid war. There is only one sure way—surrender.

Appeasement or Courage? The spectre our well-meaning liberal friends refuse to face is that their policy of accommodation is appeasement, and appeasement does not give you a choice between peace and war, only between fight and surrender. We are told that the problem is too complex for a simple answer. They are wrong. There is no easy answer, but there is a simple answer. We must have the courage to do what we know is morally right, and this policy of accommodation asks us to accept the greatest possible immorality. We are being asked to buy our safety from the threat of "the bomb" by selling into permanent slavery our fellow human beings enslaved behind the Iron Curtain, to tell them to give up their hope of freedom because we are ready to make a deal with their slave masters.

Alexander Hamilton warned us that a nation which can prefer disgrace to danger is prepared for a master and deserves one. Admittedly there is a risk in any course we follow. Choosing the high road cannot eliminate that risk.Already some of the architects of accommodation have hinted what their decision will be if their plan fails and we are faced with the final ultimatum. The English commentator [Kenneth] Tynan has put it this way: he would rather live on his knees than die on his feet. Some of our own have said "Better Red than dead." If we are to believe that nothing is worth the dying, when did this begin? Should Moses have told the children of Israel to live in slavery rather than dare the wilderness? Should Christ have refused the Cross? Should the patriots at Concord Bridge have refused to fire the shot heard 'round the world? Are we to believe that all the martyrs of history died in vain?

You and I have a rendezvous with destiny. We can preserve for our children this, the last best hope of man on earth, or we can sentence them to take the first step into a thousand years of darkness. If we fail, at least let our children and our children's children say of us we justified our brief moment here. We did all that could be done.

1. Ronald Reagan, "A Time for Choosing," 1964, in Alfred A. Bolitzer et al., eds., *A Time for Choosing: The Speeches of Ronald Reagan, 1961-1982* (Chicago: Regnery, 1983), 41-57.

June 20, 2013 – Essay #89 – "A Time for Choosing" – Ronald Reagan – Guest Essayist: The Honorable Jim Miller, President Reagan's Chairman of the Federal Trade Commission, Director of the Office of Management and Budget, and Member of his Cabinet

It's all there! That was my reaction when I reread Ronald Reagan's "A Time for Choosing" – commonly known as "The Speech" – toward the end of the President's second term. Presidential assistant Martin Anderson had compiled Reagan's various campaign speeches and policy papers, so the President's positions on the issues were readily available. But nothing summarized the Reagan message quite so succinctly and boldly as The Speech.

Reagan's view of the world evolved during the two decades following World War II, first as president of the Hollywood Screen Actors Guild, where he came to see international communism as the greatest evil in the world, and later, in the late 1950s and early 1960s as a roving ambassador for the General Electric Company in connection with his hosting of the GE Theater on TV. In his ambassadorial role, Reagan made hundreds of appearances before GE's employees, customers, and public-spirited organizations at GE locations throughout the country. Reagan used this period to research public policy, to formulate a coherent philosophy, and to hone his presentations.

The Speech reflects Reagan's development of extraordinary communications skills, but also his transformation from liberal to conservative. It was given on behalf of Senator Barry Goldwater's campaign for president late in the contest – October 27, 1964. It electrified the nationwide TV audience and brought Goldwater a needed boost in public appeal and donations. Although Goldwater lost to President Johnson, The Speech launched Reagan to local and national prominence, as two years later he won the governorship of California in a landside, and eventually the presidency by a similar margin.

Just what do we see in The Speech? First, it is compact and beautifully written. This is not surprising, as Reagan had given versions of the text many times before. Second, it addresses controversy head-on ("I am going to talk of controversial things. I make no apology for this."). Reagan was not one to sugar-coat things. Third, The Speech calls upon us to recognize American exceptionalism – that we have a very special place in history and are the bulwark to freedom in the world.

Reagan asks us to look past ideological differences and to avoid name-calling. He says the choice is not between "left" and "right," but only between "up" and "down." "Up" he characterizes as maximum individual freedom consistent with law and order, whereas "down" means the "ant heap of totalitarianism." Accordingly, Reagan weighs in against the notion that government can solve all problems and still preserve individual liberties. "[Y]ou can't control

the economy without controlling *people*," he warns. The choice, he says, is that we "accept the responsibility for our own destiny, or we….confess that [government] can plan our lives for us better than we can plan them ourselves." Years later, Reagan would put this more bluntly: "Government is not the solution to our problem; government is the problem."

There's a note of urgency in The Speech, which applies today as well. "Already the hour is late. Government has laid its hand on health, housing, farming, industry, commerce, education, and, to an ever-increasing degree, interferes with the people's right to know….Because no government every voluntarily reduces itself in size, government programs once launched never go out of existence. A government agency is the nearest thing to eternal life we'll ever see on this earth."

The Speech soars at the end in quintessential Reagan style: "You and I have a rendezvous with destiny. We can preserve for our children this, the last best hope of man on earth, or we can sentence them to take the first step into a thousand years of darkness. If we fail, at least let our children and our children's children say of us we justified our brief moment here. We did all that could be done."

Jim Miller served President Reagan as Chairman of the Federal Trade Commission (1981-1985) and as Director of the Office of Management and Budget and Member of his Cabinet (1985-1988).

First Inaugural Address by Ronald Reagan

January 20, 1981

Senator Hatfield, Mr. Chief Justice, Mr. President, Vice President Bush, Vice President Mondale, Senator Baker, Speaker O'Neill, Reverend Moomaw, and My Fellow Citizens:

To a few of us here today, this is a solemn and most momentous occasion; and yet, in the history of our nation, it is a commonplace occurrence. The orderly transfer of authority as called for in the Constitution routinely takes place as it has for almost two centuries and few of us stop to think how unique we really are. In the eyes of many in the world, this every-four-year ceremony we accept as normal is nothing less than a miracle.

Mr. President, I want our fellow citizens to know how much you did to carry on this tradition. By your gracious cooperation in the transition process, you have shown a watching world that we are a united people pledged to maintaining a political system which guarantees individual liberty to a greater degree than any other, and I thank you and your people for all your help in maintaining the continuity which is the bulwark of our Republic.

The business of our nation goes forward. These United States are confronted with an economic affliction of great proportions. We suffer from the longest and one of the worst sustained inflations in our national history. It distorts our economic decisions, penalizes thrift, and crushes the struggling young and the fixed-income elderly alike. It threatens to shatter the lives of

millions of our people.

Idle industries have cast workers into unemployment, causing human misery and personal indignity. Those who do work are denied a fair return for their labor by a tax system which penalizes successful achievement and keeps us from maintaining full productivity.

But great as our tax burden is, it has not kept pace with public spending. For decades, we have piled deficit upon deficit, mortgaging our future and our children's future for the temporary convenience of the present. To continue this long trend is to guarantee tremendous social, cultural, political, and economic upheavals.

You and I, as individuals, can, by borrowing, live beyond our means, but for only a limited period of time. Why, then, should we think that collectively, as a nation, we are not bound by that same limitation?

We must act today in order to preserve tomorrow. And let there be no misunderstanding—we are going to begin to act, beginning today.

The economic ills we suffer have come upon us over several decades. They will not go away in days, weeks, or months, but they will go away. They will go away because we, as Americans, have the capacity now, as we have had in the past, to do whatever needs to be done to preserve this last and greatest bastion of freedom.

In this present crisis, government is not the solution to our problem: government is the problem.

From time to time, we have been tempted to believe that society has become too complex to be managed by self-rule, that government by an elite group is superior to government for, by, and of the people. But if no one among us is capable of governing himself, then who among us has the capacity to govern someone else? All of us together, in and out of government, must bear the burden. The solutions we seek must be equitable, with no one group singled out to pay a higher price.

We hear much of special interest groups. Our concern must be for a special interest group that has been too long neglected. It knows no sectional boundaries or ethnic and racial divisions, and it crosses political party lines. It is made up of men and women who raise our food, patrol our streets, man our mines and factories, teach our children, keep our homes, and heal us when we're sick—professionals, industrialists, shopkeepers, clerks, cabbies, and truckdrivers. They are, in short, "We the people," this breed called Americans.

Well, this administration's objective will be a healthy, vigorous, growing economy that provides equal opportunity for all Americans, with no barriers born of bigotry or discrimination. Putting America back to work means putting all Americans back to work. Ending inflation means freeing all Americans from the terror of runaway living costs. All must share in the productive work of this "new beginning" and all must share in the bounty of a revived economy. With the idealism and fair play which are the core of our system and our strength, we can have a strong and prosperous America at peace with itself and the world.

So, as we begin, let us take inventory. We are a nation that has a government—not the other way around. And this makes us special among the nations of the earth. Our government has no power except that granted it by the people. It is time to check and reverse the growth of government which shows signs of having grown beyond the consent of the governed.

It is my intention to curb the size and influence of the federal establishment and to demand recognition of the distinction between the powers granted to the federal government and those reserved to the states or to the people. All of us need to be reminded that the federal government did not create the states; the states created the federal government.

Now, so there will be no misunderstanding, it is not my intention to do away with government. It is, rather, to make it work—work with us, not over us; to stand by our side, not ride on our back. Government can and must provide opportunity, not smother it; foster productivity, not stifle it.

If we look to the answer as to why, for so many years, we achieved so much, prospered as no other people on earth, it was because here, in this land, we unleashed the energy and individual genius of man to a greater extent than has ever been done before. Freedom and the dignity of the individual have been more available and assured here than in any other place on earth. The price for this freedom at times has been high, but we have never been unwilling to pay that price.

It is no coincidence that our present troubles parallel and are proportionate to the intervention and intrusion in our lives that result from unnecessary and excessive growth of government. It is time for us to realize that we are too great a nation to limit ourselves to small dreams. We are not, as some would have us believe, doomed to an inevitable decline. I do not believe in a fate that will fall on us no matter what we do. I do believe in a fate that will fall on us if we do nothing. So, with all the creative energy at our command, let us begin an era of national renewal. Let us renew our determination, our courage, and our strength. And let us renew our faith and our hope.

We have every right to dream heroic dreams. Those who say that we are in a time when there are no heroes just don't know where to look. You can see heroes every day going in and out of factory gates. Others, a handful in number, produce enough food to feed all of us and then the world beyond. You meet heroes across a counter—and they are on both sides of that counter. There are entrepreneurs with faith in themselves and faith in an idea who create new jobs, new wealth and opportunity. They are individuals and families whose taxes support the government and whose voluntary gifts support church, charity, culture, art, and education. Their patriotism is quiet but deep. Their values sustain our national life.

I have used the words "they" and "their" in speaking of these heroes. I could say "you" and "your" because I am addressing the heroes of whom I speak—you, the citizens of this blessed land. Your dreams, your hopes, your goals are going to be the dreams, the hopes, and the goals of this administration, so help me God.

We shall reflect the compassion that is so much a part of your makeup.How can we love our country and not love our countrymen, and loving them, reach out a hand when they fall, heal them when they are sick, and provide opportunities to make them self-sufficient so they will be

equal in fact and not just in theory?

Can we solve the problems confronting us? Well, the answer is an unequivocal and emphatic "yes." To paraphrase Winston Churchill, I did not take the oath I have just taken with the intention of presiding over the dissolution of the world's strongest economy.

In the days ahead I will propose removing the roadblocks that have slowed our economy and reduced productivity. Steps will be taken aimed at restoring the balance between the various levels of government. Progress may be slow—measured in inches and feet, not miles—but we will progress. It is time to reawaken this industrial giant, to get government back within its means, and to lighten our punitive tax burden. And these will be our first priorities, and on these principles, there will be no compromise.

On the eve of our struggle for independence a man who might have been one of the greatest among the Founding Fathers, Dr. Joseph Warren, president of the Massachusetts Congress, said to his fellow Americans, "Our country is in danger, but not to be despaired of…. On you depend the fortunes of America. You are to decide the important questions upon which rests the happiness and the liberty of millions yet unborn. Act worthy of yourselves."

Well, I believe we, the Americans of today, are ready to act worthy of ourselves, ready to do what must be done to ensure happiness and liberty for ourselves, our children and our children's children.

And as we renew ourselves here in our own land, we will be seen as having greater strength throughout the world. We will again be the exemplar of freedom and a beacon of hope for those who do not now have freedom.

To those neighbors and allies who share our freedom, we will strengthen our historic ties and assure them of our support and firm commitment. We will match loyalty with loyalty. We will strive for mutually beneficial relations. We will not use our friendship to impose on their sovereignty, for our own sovereignty is not for sale.

As for the enemies of freedom, those who are potential adversaries, they will be reminded that peace is the highest aspiration of the American people. We will negotiate for it, sacrifice for it; we will not surrender for it—now or ever.

Our forbearance should never be misunderstood. Our reluctance for conflict should not be misjudged as a failure of will. When action is required to preserve our national security, we will act. We will maintain sufficient strength to prevail if need be, knowing that if we do so we have the best chance of never having to use that strength.

Above all, we must realize that no arsenal, or no weapon in the arsenals of the world, is so formidable as the will and moral courage of free men and women. It is a weapon our adversaries in today's world do not have. It is a weapon that we as Americans do have. Let that be understood by those who practice terrorism and prey upon their neighbors.

I am told that tens of thousands of prayer meetings are being held on this day, and for that I am deeply grateful. We are a nation under God, and I believe God intended for us to be free. It would be fitting and good, I think, if on each inauguration day in future years it should be declared a day of prayer.

This is the first time in history that this ceremony has been held, as you have been told, on the west front of the Capitol. Standing here, one faces a magnificent vista, opening up on this city's special beauty and history. At the end of this open mall are those shrines to the giants on whose shoulders we stand.

Directly in front of me, the monument to a monumental man: George Washington, Father of Our Country. A man of humility who came to greatness reluctantly. He led America out of revolutionary victory into infant nationhood. Off to one side, the stately memorial to Thomas Jefferson. The Declaration of Independence flames with his eloquence.

And then beyond the Reflecting Pool the dignified columns of the Lincoln Memorial. Whoever would understand in his heart the meaning of America will find it in the life of Abraham Lincoln.

Beyond those monuments to heroism is the Potomac River, and on the far shore the sloping hills of Arlington National Cemetery with its row on row of simple white markers bearing crosses or stars of David. They add up to only a tiny fraction of the price that has been paid for our freedom.

Each one of those markers is a monument to the kinds of hero I spoke of earlier. Their lives ended in places called Belleau Wood, the Argonne, Omaha Beach, Salerno and halfway around the world on Guadalcanal, Tarawa, Pork Chop Hill, the Chosin Reservoir, and in a hundred rice paddies and jungles of a place called Vietnam.

Under one such marker lies a young man—Martin Treptow—who left his job in a small town barber shop in 1917 to go to France with the famed Rainbow Division. There, on the western front, he was killed trying to carry a message between battalions under heavy artillery fire.

We are told that on his body was found a diary. On the flyleaf under the heading, "My Pledge," he had written these words: "America must win this war. Therefore, I will work, I will save, I will sacrifice, I will endure, I will fight cheerfully and do my utmost, as if the issue of the whole struggle depended on me alone."

The crisis we are facing today does not require of us the kind of sacrifice that Martin Treptow and so many thousands of others were called upon to make. It does require, however, our best effort, and our willingness to believe in ourselves and to believe in our capacity to perform great deeds; to believe that together, with God's help, we can and will resolve the problems which now confront us.

And, after all, why shouldn't we believe that? We are Americans. God bless you, and thank you.

2. Ronald Reagan, "First Inaugural Address," January 20, 1981, in John Gabriel Hunt, ed., *The Inaugural Addresses of the Presidents* (New York: Gramercy, 1995), 471–78.

June 21, 2013 – Essay #90 – President Reagan's First Inaugural Address – Guest Essayist: The Honorable John Boehner, 53rd Speaker of the U.S. House of Representatives

The Lasting Impact of President Ronald Reagan's First Inaugural Address

The backdrop for President Reagan's inaugural on January 20, 1981 was unforgettable. The United States had endured a decade of decline in our economy at home and our prestige abroad. Some Americans feared our best days were behind us as they had struggled through years of staggeringly high inflation, persistent unemployment, and shrinking incomes. The gears of American industry were slowed by an ever-expanding barrage of high-handed bureaucracies and policies established by administrations dating back to the New Deal.

But on that cold January day, a special man and a big moment came together. In his inaugural address the new president offered a new direction, but one based on the clear, foundational principles of the U.S. Constitution.

In the address, Reagan described the nation's severe economic challenges, what he called "this present crisis," as well as his administration's objective—"a healthy, vigorous, growing economy." He then used some of the sharpest language of any modern president to underscore the Constitution's spirit of limited power guided by the people's approval. "We are a nation that has a government—not the other way around," he said. "Our government has no power except that granted it by the people. It is time to check and reverse the growth of government which shows signs of having grown beyond the consent of the governed."

At the time of this address, I was a young, small businessman in the plastics and packaging industry. Like many Americans, I was dealing with the effects of out-of-control taxation and regulation. To me, government was killing the goose that laid the golden egg.

To this day, the simplicity of Reagan's speech and his strong admonitions guides my work in the House of Representatives. He wanted government to "to stand by our side, not ride on our back." He established as "first priorities" the reawakening of America's manufacturing base and the reduction of punitive taxes.

The latter goal was accomplished seven months after his inauguration and five months after an assassination attempt. On August 13, 1981, President Reagan signed the Kemp-Roth tax cuts, which slashed tax rates for individuals and businesses, rates which had grown to as high as 70 percent. These tax cuts and other initiatives during Reagan's two terms led to an economic resurgence.

During the 1980s the economy grew by one-third. Seventeen million new workers were working longer hours per day. Household incomes rose. Unemployment dipped to the 5 percent range. Productivity and manufacturing surged, as did the savings rate. Inflation, once at double-digit levels, stabilized and decreased significantly. And interest rates, which had climbed to more than 18 percent in 1981, steadily fell during the Reagan era. It was, as described in the famous 1984 campaign ad, "morning in America."

But this economic rebound grew from a clear recognition that federal power is constitutionally limited and that ultimately the people make the wisest economic decisions, not bureaucracies in Washington. President Reagan faced his administration's challenges with this basic truth in mind. His first inaugural address made a transformational impact still remembered—and relevant—today as our nation faces big government power grabs such as ObamaCare.

If America's long tradition of enlightened self-government is to survive, the people must not only be acquainted with our founding documents; they must also understand the thinking that produced them. The Constitution is not only the starting point of the American republic, as President Reagan made clear; it is the culmination of several centuries of serious thinking about the role of individuals in relation to each other and the Creator, and the most helpful way for each of us to secure our God-given liberties. I want to thank Janine Turner and Cathy Gillespie. I am humbled by their invitation to appear as a guest essayist. Let me also thank everyone at Constituting America for their hard work to, as they put it, "make the Constitution cool" for kids and adults and accurately teach the history of our great nation.

The Honorable John Boehner represents the 8th Congressional District of Ohio, and is serving in the 113th Congress as the 53rd Speaker of the U.S. House of Representatives.