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Amendments to the Constitution of the United States: A Commentary

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Amendments to the Constitution of the United States: A Commentary*

*George Anastaplo***

Thus says the Lord of hosts, the God of Israel, "Amend your ways and your doings, and I will let you dwell in this place. Do not trust in these deceptive words: 'This is the temple of the Lord, the temple of the Lord, the temple of the Lord.' For if you truly amend your ways and your doings, if you truly execute justice one with another, if you do not oppress the alien, the fatherless or the widow, or shed innocent blood in this place, and if you do not go after other gods to your own hurt, then I will let you dwell in this place, in the land that I gave of old to your fathers for ever."

Jeremiah 7:3-7

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The Editors have complied with the author's stylistic preferences in this Article.—Ed.

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The author has prepared a similar Commentary on the United States Constitution. GEORGE ANASTAPLO, *THE CONSTITUTION OF 1787: A COMMENTARY* (1989). An earlier version of that book appears at 18 *LOY. U. CHI. L.J.* 15 (1986). For a complete bibliography of the author's books, articles, and lectures, see 2 *LAW AND PHILOSOPHY: THE PRACTICE OF THEORY; ESSAYS IN HONOR OF GEORGE ANASTAPLO 1073-1145* (John A. Murley, Robert L. Stone, and William T. Braithwaite eds., 1992).

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1. THE INTENTIONS OF THE FEDERAL CONVENTION OF 1787

I.

The greatest wars fought by the American people have been civil wars. The first was the struggle between Patriots and Loyalists from 1774 to 1781; the second was the struggle between Northerners and Southerners from 1857 to 1865.¹

The victors in both wars suppressed far-reaching claims by their rivals. No later British monarch ever plausibly aspired to the power in the British Empire that George III was believed to exercise between 1774 and 1781. No later State government ever again aspired to the power in the American Union that the Confederate

1. The Revolutionary War struggle can be said to have begun in 1774 with the first meeting of the Continental Congress. *See infra* Lecture No. 1, § II. The Civil War struggle can be said to have begun in 1857 with the remarkably divisive action by the United States Supreme Court in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). *See infra* Lecture No. 7, § III. The Civil War may have done for the American Republic what the killing by Junius Brutus of his sons did for the Roman Republic. *See* NICCOLO MACHIAVELLI, DISCOURSES ON THE FIRST DECADE OF TITUS LIVY III.3; *infra* note 260. For a helpful translation of Machiavelli, see the version forthcoming from Leo Paul S. de Alvarez (1993).

Two other great struggles on this continent, which have had some of the features of civil war, were the relentless campaigns against the indigenous tribes and the complicated efforts to deal properly with imported Africans and their descendants. *See infra* text accompanying notes 166, 177.

The hopes of the American enterprise are suggested *infra* note 134. Its risks and challenges are indicated *infra* notes 130-31.

States tried to exercise between 1860 and 1865. In each case the aspirants were confronted by armed responses rooted in the constitutional history of a people.

Civil wars tend to be exceptionally traumatic, partly because the cost for each victory is paid twice over: the victor suffers not only his own casualties but those of his fraternal opponent as well. The Patriots could refer, as in the 1776 Declaration of Independence, to their "British Brethren." And in the 1863 Gettysburg Address, the reference to the "brave men, living and dead, who struggled here" unites the desperate enemies of that battlefield.²

Extreme circumstances are very much in evidence in civil wars, so much so that people are often obliged to resort to constitutional irregularities in making the supreme efforts to which they dedicate themselves. Rules tend to be flexible in such extremities, with war seeming to dictate a "logic" of its own. This may be seen even in military build-ups, short of war, in troubled times. Such magnification of the national power can be difficult to reverse, however much military forces may be trimmed from time to time.

In both of the great North American civil wars, the long-established principles of the victors asserted themselves, whatever the formal constitution and laws of the day provided. And in both cases formal constitutional developments thereafter ratified what had been achieved by war. These constitutional developments included a determination not to permit everyday life to be governed routinely by the measures that had had to be resorted to in extreme cases.

Two dramatic constitutional developments among the Ameri-

2. The Declaration of Independence and the Gettysburg Address are among the items collected in the Appendices to GEORGE ANASTAPLO, *THE CONSTITUTION OF 1787: A COMMENTARY* 235-302 (1989) [hereinafter ANASTAPLO, *THE CONSTITUTION OF 1787*]. If any American or English constitutional document is quoted in the text of this Article without citation, it may be found either in the Appendices to ANASTAPLO, *THE CONSTITUTION OF 1787, supra*, or in the collection described *infra* note 3. The Appendices to ANASTAPLO, *THE CONSTITUTION OF 1787, supra*, include the following items: The Declaration of Independence (1776); The Articles of Confederation and Perpetual Union (1776-1781); Congressional Resolution Calling the Federal Convention (1787); The Northwest Ordinance (1787); The United States Constitution (1787); Resolutions of the Federal Convention Providing for Transmittal of the Proposed Constitution to the Confederation Congress (1787); Letter Transmitting the Proposed Constitution from the Federal Convention to the Confederation Congress (1787); Congressional Resolution Transmitting the Proposed Constitution to the States (1787); Congressional Act for Putting the Constitution into Operation (1788); Amendments to the Constitution of the United States (1791-1971); Proposed Amendments to the Constitution Not Ratified by the States (1789-1978); The Gettysburg Address (1863); and the Second Inaugural Address of Abraham Lincoln (1865). That volume includes discussions of various Amendments to the Constitution.

cans have come in the aftermath of their great civil wars—in the emergence of the Constitution and its Bill of Rights after the first civil war on this continent and in the emergence of the Thirteenth, Fourteenth, and Fifteenth Amendments after the second civil war. In neither case should these developments endure as disappointments for any of the parties engaged in those struggles: the people of Great Britain had their own liberties confirmed by the check placed upon ambitious royal power in North America; the people of the American South were liberated from crippling institutions that they had been saddled with by their imprudent ancestors more than a century before.

II.

We must set aside until Lecture No. 10 what happened, and did not happen, after 1857 in this Country. It is what happened, and did not happen, after 1774 that is our immediate concern.

The traditional, as well as the natural, rights and liberties of Englishmen were regularly invoked on this side of the Atlantic by the men and women who made the American Revolution. Those prerogatives of a self-governing people were enshrined in such constitutional testimonials as Magna Carta (in 1215), the Petition of Right (in 1628), and the English Bill of Rights (in 1689).³ In this sense, then, the American Revolution was a deeply conservative movement, however radical it has since been in its effects upon the rest of the world. The Declaration of Independence could be invoked by Vietnamese patriots against French colonialists in the

3. Magna Carta, the Petition of Right, and the English Bill of Rights are among the items collected in George Anastaplo, *The Making of the Bill of Rights, 1791* [hereinafter Anastaplo, *Making the Bill of Rights*], in 1991 GREAT IDEAS TODAY 323-75 (Encyclopaedia Britannica) [hereinafter GREAT IDEAS]. That collection includes the following constitutional items: Magna Carta (1215); Thomas More's Petition to the King on Parliamentary Freedom of Speech (1521); Petition of Right (1628); English Bill of Rights (1689); Resolutions of the Stamp Act Congress (1765); Declaration and Resolves of the First Continental Congress (1774); Constitution of North Carolina (1776); Virginia on Rights and Liberties: Virginia Declaration of Rights (1776) and Virginia Statute of Religious Liberty (1785); The Northwest Ordinance (1787); James Madison's Notes of Debates in the Federal Convention (1787); Selected Amendment Proposals by States' Ratifying Conventions: Virginia Convention (June 27, 1788) and New York Convention (July 26, 1788); Stages of the Bill of Rights in Congress: James Madison's Proposals to the House of Representatives (June 8, 1789), Amendments Reported by the House of Representatives' Select Committee (July 28, 1789), Amendments Passed by the House of Representatives (Aug. 24, 1789), Amendments Passed by the Senate (Sept. 9, 1789); Amendments Proposed by Congress for Ratification by the States (Sept. 25, 1789) and Amendments Ratified by the States (1791). This collection of documents will be drawn upon for the appendices to the book version of this Commentary on the Amendments to the Constitution.

1940s and by the students in Tiananmen Square against Chinese tyrants in the 1980s.

We can, for our immediate purposes, begin the story of the Constitution of 1787 and its amendment with standard accounts of what happened in the 1770s and thereafter. "On September 5, 1774," we are told,

delegates from the [American] colonies convened in Philadelphia in a "Continental" Congress, so called to differentiate it from local or provincial congresses. The First Continental Congress adopted a Declaration and Resolves to protest British measures and promote American rights; it also adopted the [Continental] Association.⁴

The Continental Association was the agreement "created by the First Continental Congress on October 18, 1774":

It was "a non-importation, non-consumption, and non-exportation agreement" undertaken to obtain redress of American grievances against the British Crown and Parliament. The Articles of Association were signed on October 20 by the representatives of twelve colonies, solemnly binding themselves and their constituents to its terms.

The Articles listed the most pressing American grievances (taxation without representation, extension of admiralty court jurisdiction, denial of trial by jury in tax cases), enumerated the measures to be taken (cessation of commercial ties to Britain), prescribed the penalty for noncompliance (a total breaking off of communication with offenders), and established the machinery for enforcement (through committees of correspondence).⁵

A knowledgeable scholar recently observed,

The Association was a major step toward the creation of a federal union of American states. It was the first prescriptive act of a national Congress to be binding directly on individuals, and the efforts at enforcement of or compliance with its terms certainly contributed to the formation of a national identity.⁶

This scholar concluded, "With but little exaggeration [it has been said], 'The signature of the Association [in 1774] may be considered as the commencement of the American union.'"⁷

The First Continental Congress dissolved four days after the signing of the Articles of Association, "having decided that the col-

4. Leonard W. Levy, *The Continental Congress*, in 2 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 493 (Leonard W. Levy et al. eds., 1986).

5. Dennis J. Mahoney, *The Association*, in 1 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION*, *supra* note 4, at 79.

6. *Id.*

7. *Id.*

onies should meet again if necessary on May 10, 1775. By that time, the colonies and Great Britain were at war."⁸ We conclude our reliance upon standard accounts of the Continental Congress with this report:

The Second Continental Congress adopted a Declaration of the Causes and Necessity of Taking Up Arms on July 6, 1775 and the Declaration of Independence a year later. The Congress appointed George Washington as commander-in-chief of its armies, directed the war, managed foreign affairs, and adopted a plan of union designated as the Articles of Confederation. After the thirteenth state ratified the Articles in 1781, the official governing body of the United States became known as "the Congress of the Confederation," but it was a continuation of the Continental Congress and was not reconstituted until 1789, when a Congress elected under the Constitution of the United States took office.⁹

Voting in the Continental Congress, as later in the Confederation Congress, was by Colonies (or States), with each of the thirteen having one vote.

III.

It is difficult to exaggerate the constitutional implications of the Declaration of Independence, which has long been set forth in the United States Statutes as the first of "the organic laws of the United States of America." Indicative of the fundamental character of this document is the practice of dating official papers from July 4, 1776.¹⁰ This mode of dating may be seen as well in the opening line of the Gettysburg Address, "Four score and seven years ago," with a Nation or Country (not a mere alliance, association, or confederation) having firmly taken root in July 1776.

Much of the constitutional system that we have long been accustomed to is already taken for granted in the Declaration of Independence, where grievances and remedies are routinely put in terms of the principles and history of the English-speaking peoples. The ends of government are indicated and the significance of the consent of the governed is affirmed. Various of the rights and liberties protected in our Constitution and its Bill of Rights are drawn upon in the grievances collected in the Continental Association, in the Declaration of Independence, and elsewhere.

The form of government implied in the Declaration of Indepen-

8. Levy, *supra* note 4, at 493.

9. *Id.*

10. Thus, the bicentennial of the December 15, 1791 ratification of the Bill of Rights occurred in the 216th year "of the Independence of the United States of America."

dence assumes a qualified separation of powers, reliance on representative assemblies, and access to independent courts. An executive power is recognized as legitimate, but only if kept within constitutional bounds which respect the prerogatives of legislatures in the making of laws. The supervisory authority of a national government is also recognized, but again only if kept within constitutional bounds which respect the prerogatives of local governments and ultimately of the people.

It should again be noticed that the Declaration of Independence does not purport to devise or invent new principles and forms. Rather, it uses long-established principles in identifying accumulated grievances and in responding to intolerable conditions.

The Declaration of Independence also leaves various questions open, such as the character that a people should have in order to make the best use of the rights and liberties invoked in the Declaration. Another way of putting this is to say that the Declaration of Independence does not address, in a systematic way, the perennial question of the political, social, and other arrangements that are most likely to secure the enduring happiness that human beings are naturally bound to pursue.¹¹

IV.

Vital to the affirmations of the Declaration of Independence is the self-evident truth that "all Men are created equal." The meaning and application of this principle have been major concerns of the American people for more than two centuries now. Precisely how the equality principle should be applied depends on circumstances, so much so that at times it can mean that all States (as the agents of diverse communities of men) should be treated the same and at other times it can mean that all persons should be treated the same.

That aspect of the equality of "all Men" which is expressed through the States may be seen in the Articles of Confederation in which the States had equal votes. It may still be seen in, among other places, the Senate of the United States under the Constitu-

11. See George Anastaplo, *American Constitutionalism and the Virtue of Prudence* [hereinafter Anastaplo, *Virtue of Prudence*], in ABRAHAM LINCOLN, THE GETTYSBURG ADDRESS AND AMERICAN CONSTITUTIONALISM 165-68 (Leo Paul S. de Alvarez ed., 1976); George Anastaplo, *Seven Questions for Professor Jaffa*, 10 U. PUGET SOUND L. REV. 507 (1987); Harry V. Jaffa, *Seven Answers for Professor Anastaplo*, 13 U. PUGET SOUND L. REV. 377 (1990); *infra* notes 131, 168. On Professor Jaffa, see GEORGE ANASTAPLO, HUMAN BEING AND CITIZEN: ESSAYS ON VIRTUE, FREEDOM, AND THE COMMON GOOD 61-73 (1975) [hereinafter ANASTAPLO, HUMAN BEING AND CITIZEN].

tion of 1787. This expression of equality through the States is further seen in the uniformity of constitutional obligations and restrictions imposed upon both the United States and the States in dealing with one another. That aspect of the equality of "all Men" which is expressed on behalf of persons may be seen, for example, in the extension of the vote to eighteen-year-olds by the Twenty-sixth Amendment. It may be seen as well in the divergent efforts made to extend constitutional protection both to fetuses virtually from the moment of conception and to pregnant women desiring abortions. It should be evident that the contending applications of the powerful equality principle have to be accommodated on the basis of an even-higher principle, a principle of excellence grounded in liberty that finds just expression through the dictates of prudence. Prudence, with its dependence on nature, is an underlying concern of these Lectures as it is of my Lectures on the Constitution of 1787.¹²

Prudence may be seen in the practices that a people resorts to as well as in the principles that it is guided by. Although the Articles of Confederation (first drafted by the Continental Congress in 1777) were not fully ratified until 1781, the Country was governed and a war was fought pursuant to the Articles well before their ratification. In fact, the Articles of Confederation themselves formalized, from 1777 on, what had been the practice of the Continental Congress even before Independence. The Articles, as the name suggests, had various features of a treaty relationship, with the law of nations influential in guiding the States in providing for their dealings with one another.

But the Articles of Confederation were somewhat irregular: they were never in conformity with the best constitutional thought of the day. The Constitution of 1787 is much closer to what a natural constitutionalism called for. This is testified to by what was done by the Confederation Congress sitting in New York while the Federal Convention was sitting in Philadelphia. That Congress produced the Northwest Ordinance which provides, for a territory comparable in size to the original thirteen States, a constitutional system much closer in form and in spirit to that found in the Constitution of 1787 than to that found in the Articles of Confederation.

The Confederation Congress was better able in the Northwest

12. On prudence, see generally GEORGE ANASTAPLO, *THE AMERICAN MORALIST: ON LAW, ETHICS, AND GOVERNMENT* at xvi, 618 (1992) [hereinafter ANASTAPLO, *AMERICAN MORALIST*].

Ordinance than the Federal Convention proved to be in the Constitution to apply the equality principle to a critical issue of that day, slavery. Congress provided in its Ordinance of '87 that there should be "neither slavery nor involuntary servitude in [the Northwest Territory] otherwise than in punishment of crimes whereof the party shall have been duly convicted."

It was this recourse to the equality principle in the Northwest Ordinance that may have been decisive to the fate of the Nation in the Civil War seven decades later. Because of that dramatic military vindication of the equality principle, on which the rule of law and hence our personal liberties and our rights to property depend, there were only victors, and no permanent losers, in the American Civil War.

V.

Problems with the Articles of Confederation were recognized from the outset, but the need to get on with the Revolutionary War precluded the political efforts and extended deliberation needed to move beyond this treaty-like arrangement. That something would have to be done eventually was implicitly recognized by the insistence in the Articles that the Union being provided for was "perpetual." It must have been obvious to most thoughtful observers, from 1777 on, that however "perpetual" the Union itself might be, the cumbersome constitutional arrangements that had to be resorted to during the war could not last long.

The complaints that accumulated about the Articles of Confederation began to rival in scope, although not in moral intensity, those that had been collected in the Declaration of Independence about how difficult it had become for the American people to be governed properly. The National Government, under the Articles, had no direct control over citizens, no source of revenues of its own, no independent executive, only one house in its legislature, no national judicial system, limited legislative powers (especially with respect to the commerce, or economy, of the Country), and no way of formally amending the Articles of Confederation without the unanimous consent of the thirteen States. Repeated efforts to make modest changes in the Articles of Confederation fell afoul of this unanimity rule. That led in turn to the 1787 Federal Convention with its proposal of a comprehensive reworking of the form of government so as to make it conform to generally-recognized principles, not least with respect to the mode of ratification and thereafter of amendment.

One of the things that the fettered Confederation Congress could manage to do was to call a Federal Convention to consider changes for the Articles of Confederation. This call led to that grand meeting in Philadelphia between May and September of 1787 which produced the Constitution we now have.

VI.

To speak as we sometimes do of the "intentions of the Federal Convention" suggests that that body had an overall purpose or plan. An overall plan tends to be lost sight of by those who emphasize the compromise, if not even the chance, aspects in the drafting of the Constitution of 1787.

Whether or not one considers the Constitution well-crafted affects how one attempts to read it and, indeed, whether it makes sense to try to *read* it at all. My own efforts to read the Constitution have been described as "based primarily on analysis of the original text of the Constitution."¹³

What, then, were the intentions of the Federal Convention? *If* the Framers knew what they were doing, *and if* they were pretty much able to get their way, then their intentions were to produce

13. This quotation is taken from the following passage by a respected constitutional scholar who is a United States Senior District Court Judge in Pennsylvania:

The author's comments [in his *Commentary*] are based primarily on analysis of the original text of the Constitution itself and reflections about it, with scant regard for "judicial and other official interpretations and applications of the Constitution." He proclaims at the outset (and often thereafter) his nationalistic orientation and recognition of the supremacy of the legislative branch, and he acknowledges the influence of his teachers William Winslow Crosskey and Leo Strauss. Another characteristic of his treatment is his frequently expressed appreciation of the skill and craftsmanship with which the Constitution is drafted. The author discusses the various parts of the Constitution in the sequence established by the document itself. He strives to discern a systematic scheme or pattern in which the parts coherently come together and to speculate about why a particular portion is placed where it is.

EDWARD DUMBAULD, *THE JOURNAL OF AMERICAN HISTORY* 290 (1990). Additional reviews of my commentary, *supra* note 2, are the following: J. Jackson Barlow, 18 *INTERPRETATION* 475 (1991); J. Braeman, 27 *CHOICE* 203 (1989); Milton Cantor, 114 *LIBRARY J.* 86 (1989); Thomas Engeman, 51 *REVIEW POL.* 612 (1989); Timothy Fuller, 18 *INTERPRETATION* 467 (1991); *LAW AND SOC. INQUIRY* 626 (1989); Robert A. Licht, 15 *LEGAL STUD. F.* 75 (1991); Robert C. Power, 84 *NW. U. L. REV.* 711 (1990); Glen E. Thurow, 20 *PUBLIUS* 15, 19 n.8 (1989); Jonathan K. Van Patten, 34 *S.D. L. REV.* 440 (1989); Ben Gelman, *Southern Illinoisan*, Carbondale, Ill., Sept. 10, 1989, at 42, *reprinted in Greek Star*, Chi., Ill., Oct. 5, 1989, at 5.

My comments on the work of William W. Crosskey and Leo Strauss include the following: George Anastaplo, *Mr. Crosskey, the American Constitution, and the Natures of Things*, 15 *LOY. U. CHI. L.J.* 181 (1984); GEORGE ANASTAPLO, *THE ARTIST AS THINKER: FROM SHAKESPEARE TO JOYCE* 249 (1983) [hereinafter ANASTAPLO, *THE ARTIST AS THINKER*]. See *infra* note 52.

substantially the document that came out of the Convention on September 17, 1787. Three departments, or branches, of government are set forth, with the Congress clearly in charge; plenary powers are provided the National Government with respect to commerce, war, and the foreign affairs of the Country; adequate revenue powers are also provided; significant restraints are placed upon the States, with a supervisory power entrusted to the General Government with respect to both the conduct and the creation of States.

The Framers were particularly concerned that there be a pervasive rule of law in the United States. This concern is reflected not only in the superiority assigned by them to the legislative branch, but even more in the serious reliance by a people upon a constitution. Congress itself is restrained in critical respects, especially with a view to insuring that it is primarily by laws that Congress exerts itself, as may be seen in the detailed provisions about how a law is enacted and in the prohibitions upon *ex post facto* laws and bills of attainder.

Does not my approach to the Constitution look to an overall constitutional development that should continue to work its way out, if things go well, until the promises of the Declaration of Independence are substantially realized for the "new nation" there "set forth"? We will be obliged to consider, as we review the twenty-six Amendments that have been added to the Constitution of 1787, what remains to be changed either informally through adaptations in practices or formally through the amendatory processes set forth in Article V of the Constitution.

VII.

Before we turn to the background and development of the Amendments to the Constitution known as the Bill of Rights, it is important to recognize that the talented men who arranged for and finally controlled the Federal Convention of 1787 managed thereafter to get the Constitution ratified in the States. They then managed to secure control not only of the Presidency but also of the First Congress in which the Bill of Rights was drafted. It should not surprise us, therefore, that the Bill of Rights of 1789-1791 accepted both the understanding of the Union and the extent of the government evident in the Constitution of 1787.

It is generally known that the First Congress refused, in the Amendment now known as the Tenth, to limit the Government of the United States only to powers that had been "expressly dele-

gated" to it. That amendment reads, "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." The term *expressly* had been used in like circumstances in Article II of the Articles of Confederation, where it is provided, "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." Instead of such a limitation, the Constitution of 1787 provides that Congress should have power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof." The efforts made by a lively minority in the First Congress to curtail the implied powers of Congress were soundly defeated. This, as I have said, is generally known.

What is not generally known is that although the Articles of Confederation had presented the powers of the National Government as coming from the States, the Constitution of 1787 assumes that those powers come not from separate and somehow independent States, but rather from the People of the United States, the "perpetual union" of which is made "more perfect" by that constitution. We shall see in Lecture No. 8 that the authority of the "one People," recognized both at the outset of the Declaration of Independence and at the outset of the Preamble to the Constitution of 1787, is further recognized in the Tenth Amendment, something that comes as a surprise to the typical States' Rights advocate.

In these matters, however, the major surprises lie not in the information that is made use of by students of the Constitution, but rather (if at all) in how that information is interpreted. After all, the documents and other materials from which relevant information about the Constitution is drawn have long been known to students of American constitutional developments. Also once known, but largely lost sight of these days, is how much can be gotten from a proper assessment of the information long available about our remarkable constitutional system.

2. THE FEDERAL CONVENTION AND A BILL OF RIGHTS

I.

Proposals were made from time to time during the Federal Convention of 1787 for a systematic protection of rights to be included in the instrument that was being prepared. Some individual rights

are provided for in the Constitution that came out of that Convention on September 17, 1787.

Those rights are usually dealt with in the Constitution of 1787 because of powers granted to the Government of the United States. Thus, in Article I, limitations are placed upon the power that the Congress might otherwise have (naturally?) had to suspend the privilege of the writ of habeas corpus. Also, in Article III, limitations are placed upon the power that the Courts had traditionally had to punish the crime of treason.

It was argued, however, that there was no need to provide various other guarantees, because the powers of Congress did not extend to putting *those* rights in jeopardy. For example, it was said during the Ratification Campaign that there was no need to provide for liberty of the press because Congress was not given any power to regulate the press.¹⁴

Even so, there are numerous rights recognized in the Constitution of 1787, in addition to the habeas corpus and treason guarantees. These include assurances with respect to elections, the subordination of the military to civilian control, bills of attainder, ex post facto laws, legislative immunity, impeachment of civil officers, trial by jury in criminal cases, and life tenure for judges. Overarching all of these may be said to be the guarantee by the National Government of a Republican Form of Government in each State.

II.

There was considerable demand during the Ratification Campaign of 1787-1788 for a Bill of Rights. Perhaps the demand would have been moderated if the dozen or so guarantees in the body of the Constitution had been collected by the Convention in one place rather than left scattered throughout the document. But this would have obscured the instructive organization of the Constitution, an organization that is reflected in the placement therein of various rights.

The demand for a Bill of Rights was anticipated, although rather casually, during the Convention itself. There were only three occasions, so far as we know, on which something substantial was said about including a bill of rights in the constitution that was being prepared that summer. These occasions were on August 20, Sep-

14. See, e.g., THE FEDERALIST No. 84.

tember 12, and September 15, 1787.¹⁵

The most systematic effort recorded with respect to a bill of rights was that made by Charles Pinckney of South Carolina on August 20. Bill-of-rights proposals were included by him among the dozen propositions he submitted to the Convention on that occasion.¹⁶ Or, as Madison first put it in his *Notes* for that date:

15. The Convention, we recall, began on May 25 and ended on September 17.

16. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 341-42 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND]. James Madison's *Notes of Debates in the Federal Convention of 1787*, found in the first two Farrand volumes, is available in paperback from the Ohio University Press. The bill of rights proposals suggested by Charles Pinckney provided:

Each House shall be the Judge of its own privileges, and shall have authority to punish by imprisonment every person violating the same; or who, in the place where the Legislature may be sitting and during the time of its Session, shall threaten any of its members for any thing said or done on the House—or who shall assault any of them therefor—or who shall assault or arrest any witness or other person ordered to attend either of the Houses in his way going or returning; or who shall rescue any person arrested by their order.

Each branch of the Legislature, as well as the Supreme Executive shall have authority to require the opinions of the supreme Judicial Court upon important questions of law, and upon solemn occasions.

The privileges and benefit of the Writ of Habeas corpus shall be enjoyed in this Government in the most expeditious and ample manner; and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding — months.

The liberty of the Press shall be inviolably preserved.

No troops shall be kept up in time of peace, but by consent of the Legislature.

The military shall always be subordinate to the Civil power, and no grants of money shall be made by the Legislature for supporting military Land forces, for more than one year at a time.

No soldier shall be quartered in any House in time of peace without consent of the owner.

No person holding the office of President of the U.S., a Judge of their supreme Court, Secretary for the department of Foreign Affairs, of Finance, of Marine, of War, or of —, shall be capable of holding at the same time any other office of Trust or Emolument under the U.S. or an individual State.

No religious test or qualification shall ever be annexed to any oath of office under the authority of the U.S.

The U.S. shall be for ever considered as one Body corporate and politic in law, and entitled to all the rights privileges, and immunities, which to Bodies corporate do or ought to appertain.

The Legislature of the U.S. shall have the power of making the great Seal which shall be kept by the President of the U.S. or in his absence by the President of the Senate, to be used by them as the occasion may require.—It shall be called the great Seal of the U.S. and shall be affixed to all laws.

All Commissions and writs shall run in the name of the U.S.

The Jurisdiction of the supreme Court shall be extended to all controversies between the U.S. and an individual State, or the U.S. and the Citizens of an individual State.

Mr. Pinkney submitted sundry propositions—1. authorizing the Legislature to imprison for insult. 2. to require opinion of the Judges. 3. securing the benefit of the habeas corpus. 4. preserving the liberty of the press. 5. guarding agst billeting of soldiers. 6. agst. raising troops without the consent of the Legislature. 7. rendering the great officers of the Union incapable of other offices either under the Genl Govt. or the State Govts. 8. forbidding religious tests. 9. declaring the U. States to be a body politic and corporate. 10. providing a great seal to be affixed to laws &c. 11. extending the jurisdiction of the Judiciary to controversies between the United States & States or individuals.¹⁷

Madison adds that “these were referred to the Committee of detail for consideration & report.”¹⁸ Various of these propositions, such as the habeas corpus guarantee, found their way into the Constitution, but the Pinckney collection as such was not reported back to the Convention by the Committee of Detail. Elsewhere, Pinckney refers to three rights (two of them in his list of August 20) as “essential in Free Governments”: “the privilege of the Writ of Habeas Corpus—The Trial by Jury in all cases, Criminal as well as Civil—The Freedom of the Press.”¹⁹ A fourth provision (also in his list), “the prevention of Religious Tests, as qualifications to Offices of Trust or Emolument,” he speaks of as “a provision the world will expect from [the Federal Convention], in the establishment of a System founded on Republican Principles, and in an age so liberal and enlightened as the present.”²⁰

There is no discussion of the Pinckney propositions recorded in the entry for August 20 or any other time during the life of the Convention.

III.

Not mentioned by Pinckney on August 20, but mentioned on September 12, is the right to trial by jury in civil cases (that is, in suits at Common Law). By this time, the Constitution included a guarantee of trial by jury in criminal cases.

Madison's *Notes* for September 12 include this exchange prompted by the suggestion that civil juries be guaranteed:

Mr. Williamson, observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it.

2 FARRAND, *supra*, at 341-42.

17. 2 FARRAND, *supra* note 16, at 340 n.4.

18. 2 *id.* at 341 n.4.

19. 3 *id.* at 122.

20. 3 *id.*

Mr. Gorham. It is not possible to discriminate equity cases from those in which juries are proper. The Representatives of the people may be safely trusted in this matter.

Mr. Gerry urged the necessity of Juries to guard agst corrupt Judges. He proposed that the Committee last appointed should be directed to provide a clause for securing the trial by Juries.

Col. Mason perceived the difficulty mentioned by Mr. Gorham. The jury cases cannot be specified. A general principle laid down on this and some other points would be sufficient. He wishes the plan [the Constitution] had been prefaced with a Bill of Rights, & would second a Motion if made for the purpose—It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours.

Mr. Gerry concurred in the idea & moved for a Committee to prepare a Bill of Rights. Col: Mason 2ded the motion.²¹

Thereafter, the Bill of Rights proposal was voted down, 10-0, with Gerry's Massachusetts delegation abstaining.²²

Juries were looked to in civil as well as criminal cases as a guard against corrupt judges. The people, acting through the juries that they make up, were depended on to help keep the judges in line. George Washington, in a letter to the Marquis La Fayette the following April, recalled this reason why the civil jury guarantee was not provided by the Convention:

[I]t was only the difficulty of establishing a mode which should not interfere with the fixed modes of any of the States, that induced the Convention to leave it, as a matter of future adjustment [that is, by the Legislature].²³

What is the significance of variations from State to State in these matters? It seems that what some rights included had always depended, in part, on local practice, whether in North America or in Great Britain. It was not exclusively a natural right or something developed by reason alone. What people are accustomed to does

21. 2 *id.* at 587-88. Mason had been the author of the Virginia Declaration of Rights in 1776. The Declaration of Rights is one of the documents provided in the collection listed *supra* note 3.

22. It is unclear the extent to which the debate between Mr. Sherman and Colonel Mason influenced the unanimity of this vote. See *infra* text accompanying note 25. The New York delegation in the Federal Convention no longer had a quorum, two of its three members having gone home (evidently because they did not like the course that the Convention was following). The third New York member, Alexander Hamilton, could speak but could not cast his State's vote. See SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON 124 (Morton J. Frisch ed., 1985); 3 FARRAND, *supra* note 16, at 367, 448, 474, 521, 529-31, 537. Rhode Island never sent a delegation to the Convention.

23. Letter from George Washington to La Fayette (Apr. 28, 1788), reprinted in 3 FARRAND, *supra* note 16, at 298.

matter, and that *can* vary from place to place, especially if there are no supervisory legislatures and courts to sort out local variations. It seems to have been agreed that variations with respect to civil trial practice made it prudent to leave this matter to the new government to experiment with, rather than to settle permanently upon a single mode in the Constitution.

There were those who preferred to allow local variations to develop as they would, altogether free from any interference by the National Government. The courts provided for by the Constitution threatened to interfere so much with State judicial practices that George Mason could protest in the Convention on September 15:

The Judiciary of the United States is so constructed and extended, as to absorb and destroy the judiciaries of the several States; thereby rendering law as tedious, intricate and expensive, and justice as unattainable, by a great part of the community, as in England, and enabling the rich to oppress and ruin the poor.²⁴

Even so, the Convention (but not Mason) went on, two days later, to sign the proposed Constitution, imperial judiciary and all.

IV.

We have seen that the raising of the civil jury issue on September 12 led to George Mason's expressing the wish for a bill of rights. We have also seen that Elbridge Gerry concurred and moved that a committee be assigned to prepare a bill of rights. We have seen as well that not a single State delegation voted to establish such a committee. So far along were the proceedings by this time that a draft of the Constitution was reported that day by the Committee of Style, a draft that looks much like the Constitution that was finally approved. (These futile efforts to get a bill of rights were by two of the three delegates who were to refuse their signatures to the Constitution the following week). This September 12th action seems to have been the only direct vote in the Convention on the question of a bill of rights.

Roger Sherman, arguing against recourse to a bill of rights, said that he "was for securing the rights of the people where requisite." But he added, "The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient." Mason replied to Sherman, "The Laws of the U.S. are to be paramount to State Bills of Rights."²⁵

24. 2 FARRAND, *supra* note 16, at 638.

25. 2 *id.* at 588.

It was again and again insisted upon, even more during the Ratification Campaign than during the Convention, that the rights of the people were not in jeopardy and hence no bill of rights was needed. What are we to make of Sherman's suggestion that the States' recognition of these rights sufficed? He seemed to believe that the State bills of rights were not to be treated as laws; if that is what they were, then Mason's response would have been decisive. Rather, the Sherman approach indicates, the States' declarations served to recall the rights that the English-speaking peoples had long had and were still developing. It was also pointed out during the Ratification Campaign that the security of these rights in the States themselves did not depend on bills of rights, since half of the States had no such bills in their own constitutions.

We have noticed that the great rights of the English-speaking peoples are not simply natural rights. They depend, for their precise forms and effects, on historical (or accidental) developments from place to place. This suggests that these rights, except for those directing judicial proceedings, do not necessarily depend on the Courts for their enforcement against the Legislature and the Executive.

The important thing here, Sherman seems to say, is that these rights be recognized by the American people, not that they should be added to the Constitution of the United States. In fact, it can be argued, their being added to the Constitution in the Bill of Rights in 1791 may have tended to eclipse the State bills of rights, obscuring from view some of the rights found there but not in the 1791 Bill of Rights.

V.

On September 15, the next-to-last meeting of the Convention, various odds and ends were dealt with by the delegates. Gouverneur Morris, for example, was concerned that the pardoning power *not* be lodged with the legislature.

Pinckney and Gerry took the opportunity of this final review of the draft to suggest that the following provision be added to the Judiciary Article, "And a trial by jury shall be preserved as usual in civil cases." But it was again argued in response, "The constitution of Juries is different in different States and the trial is *usual* in different cases in different States."²⁶ The proposal was voted down once again. But this proposed addition did bear fruit eventually,

26. 2 *id.* at 628.

since it was used, but without the "usual," in the Seventh Amendment.

Further on, Madison warned that if special provisos were permitted at that final stage of the proceedings, "every State will insist on them, for their boundaries, exports &c."²⁷ The three dissenters (Elbridge Gerry, George Mason, and Edmund Randolph) made a last-ditch effort to have a second convention called at which delegates could review the responses of the people to the constitution that had been prepared. The last major comment recorded on that occasion was that made by one of the three holdouts, a delegate from Massachusetts:

Mr. Gerry, stated the objections which determined him to withhold his name from the Constitution. 1. the duration and re-eligibility of the Senate. 2. the power of the House of Representatives to conceal their journals. 3. —the power of Congress over the places of election. 4. the unlimited power of Congress over their own compensations. 5. Massachusetts has not a due share of Representatives allotted to her. 6. 3/5 of the Blacks are to be represented as if they were freemen. 7. *Under* the power over commerce, monopolies may be established. 8. The vice president being made head of the Senate. He could however he said get over all these, if the rights of the Citizens were not rendered insecure 1. by the general power of the Legislature to make what laws they may please to call necessary and proper. 2. raise armies and money without limit. 3. to establish a tribunal without juries, which will be a Star-chamber as to Civil cases. Under such a view of the Constitution, the best that could be done he conceived was to provide for a second general Convention.²⁸

Gerry expresses a concern about the lack of protection for "the rights of the Citizens." The problem of no bill of rights is again alluded to, even though only three matters are listed thereafter, concluding with the lack of a guarantee of trial by jury in civil cases, which Gerry saw as permitting "a Star-chamber as to Civil cases."

We should notice another concern, expressed again and again not only by those who lamented the lack of a bill of rights, the concern lest the military (or the Executive as commander-in-chief) get out of control. Several provisions in the Constitution, including the grant to Congress of the power to declare war, speak to this

27. 2 *id.* at 630. Madison's warning anticipated the concern of the Federalists throughout the Ratification Campaign about re-opening matters already settled by the Convention.

28. 2 *id.* at 632-33.

concern. This problem is still with us today, as we can see in the free hand the President insisted upon in the Persian Gulf despite constitutional provisions which seem to provide for his ultimate subordination in such matters to Congress. The traditional concern about proper political supervision of the military may be seen in how our Persian Gulf allies took all this: *they* insisted upon directions from the United Nations Security Council before force was resorted to by the United States against Iraq. Thus, a political or legislative judgment was to be relied upon more than the President was inclined to recognize. It was a curious state of affairs which found the Russians and others providing us with models of moderation.

VI.

One of the changes proposed and accepted on September 15, 1787 was with respect to the sensitive issue of slavery. The Fugitive Slave provision in Article IV now reads:

No Person held to Service or Labour 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 Labour, but shall be delivered up on claim of the party to whom such Service or Labour may be due.

We are told by Madison that on September 15 "the term 'legally' was struck out, and 'under the laws thereof' inserted after the word 'State,' in compliance with the wish of some who thought the term 'legal' equivocal, and favoring the idea that slavery was legal in a moral view."²⁹

We can see here, as elsewhere, an awareness of the moral principles on which the proposed constitutional system depends. This is reflected in, among other places, the Common Law which serves as the foundation of the system. However important morality was taken to be, certain proposed efforts on its behalf were more drastic than the Convention wished to write into the Constitution. Consider the concern about the kind of character that republican institutions require. Plutarch, for example, tells us that Mark Antony was criticized, in a troubled Rome which still had republican aspirations, for his "impudent luxury."³⁰ It is in this spirit, perhaps, that Mason proposed (on August 20) that Congress be empowered

29. 2 *id.* at 628. This was immediately after the civil jury proposal was dealt with. The tenor of the remark recorded here, by Madison, a Virginian, indicates how slavery could then be talked about, even among Southerners.

30. 6 PLUTARCH, LIVES 1110; (John Dryden & Rev. Arthur Hugh Clough trans., Modern Library ed. 1932) (*Antony*, IX); see also MACHIAVELLI, *supra* note 1, at II.19

to enact sumptuary laws. Three State delegations (Delaware, Maryland, and Georgia) supported him after a discussion which is recorded in this fashion:

Mr. Mason moved to enable Congress "to enact sumptuary laws." No Government can be maintained unless the manners be made consonant to it. Such a discretionary power may do good and can do no harm. A proper regulation of excises & of trade may do a great deal but it is best to have an express provision. It was objected to sumptuary laws that they were contrary to nature. This was a vulgar error. The love of distinction it is true is natural; but the object of sumptuary laws is not to extinguish this principle but to give it a proper direction.

Mr. Elseworth, The best remedy is to enforce taxes & debts. As far as the regulation of eating & drinking can be reasonable, it is provided for in the power of taxation.

Mr. Govr. Morris argued that sumptuary laws tended to create a landed Nobility, by fixing in the great-landholders and their posterity their present possessions.

Mr. Gerry, the law of necessity is the best sumptuary law.³¹

This issue was returned to by Mason on September 13:

Col. Mason—He had [on August 20] moved without success for a power to make sumptuary regulations. He had not yet lost sight of his object. After descanting on the extravagance of our manners, the excessive consumption of foreign superfluities, and the necessity of restricting it, as well with oeconomical as republican views, he moved that a Committee be appointed to report articles of Association for encouraging by the advice the influence and the example of the members of the Convention, economy frugality and american manufactures.

Docr. Johnson 2ded the motion which was without debate agreed to, nem: con: and a Committee appointed, consisting of Col: Mason, Docr. Franklin, Mr. Dickenson, Docr. Johnson, and Mr. Livingston.³²

The committee of the more elderly delegates to which the Mason proposal was assigned is not recorded as ever having returned to the Convention with a report. Perhaps we should consider the question still open, especially as today we see among us more and more luxury and a perhaps related increasing privatization of everyday life.

("[A]cquisitions, in republics which are not well-ordered and which do not proceed according to Roman virtue, are to their ruin and not to their exaltation."); *infra* note 130.

31. 2 FARRAND, *supra* note 16, at 344.

32. 2 *id.* at 606-07.

It seems to have been recognized in the exchange on August 20 that the commerce power and the taxation power could properly be used to advance ends having to do with the moral character of the people, something to be kept in mind when we hear it argued either that moral standards are "relative" or that morality cannot (perhaps should not) be legislated. Whatever the reservations the Convention may have had about the more rigorous Mason approach, it evidently did not believe that moral training was beyond either the scope or the competence of American legislatures, especially if the people were to be able to use sensibly the rights to which they had long been entitled.

VII.

We must wonder, then, what moral character is required to make the Constitution work, especially if enforcement of and respect for rights depend on the people's vigilance (but not the people's hysteria). What the people can do in such matters may be seen in the recent experience in Great Britain with the "poll tax." The anti-poll tax measures resorted to there were political, not judicial: something old and feared, or detested, could be conjured up, and a formidable resistance developed, whether or not justified.

Another initiative of August 20 with respect to morality came from Pinckney and the hardheaded Morris. It was suggested by them that the duties of the Chief Justice include recommending "such alterations of and additions to the laws of the U.S. as may in his opinion be necessary to the due administration of Justice, and such as may promote useful learning and inculcate sound morality throughout the Union."³³ Thus, morality was not considered only a State-by-State concern but rather was national in scope.

Fundamental to a proper inculcation and preservation of morality, the Framers obviously believed, was the establishment and perpetuation of a proper national government for the people of the United States. Effective government means, by the way, that *ex post facto* laws might have to be resorted to in civil matters, something which Mason was concerned that the Constitution *not* forbid, lest the impossibility of complying with such an absolute prohibition lead to the habit of disregarding the Constitution.³⁴

Proper government means, among other things, an enduring rule of law, which in turn depends on (and promotes) liberty and the rights of citizens, such rights as are sought to be protected by bills

33. 2 *id.* at 342.

34. *See, e.g.*, 2 *id.* at 617.

of rights. So it could be insisted, during the Ratification Campaign of 1787-1788, that the Constitution itself was a bill of rights. Proper government also presupposes a general understanding of what constitutes the Country with which a government should be concerned. The American Civil War attempt at redefinition of the extent of the Country began, it will be recalled, in South Carolina. It should also be recalled that the bill of rights and other propositions submitted to the Convention on August 20 by a *South Carolinian*, Pinckney, included this provision: "The U.S. shall be forever considered as one Body corporate and politic in law, and entitled to all the rights privileges, and immunities, which to Bodies corporate do or ought to appertain."³⁵ We hear echoes here of the opening and closing lines of the Declaration of Independence. We hear also a reaffirmation, as in the Declaration, of the people from whom all powers flow and to whom various rights belong, whether or not those powers and rights happen to be acknowledged by any particular document.

3. PREDECESSORS TO THE AMERICAN BILL OF RIGHTS

I.

The Bill of Rights of 1791 does not come out of nothing. For one thing, it is vital, for an effective bill of rights, that the rule of law already be established in a community. A bill of rights may guide and refine that rule of law; it cannot create or do without it.

This rule-of-law background bears on what can be done with declarations of rights in a variety of regimes all over the world. Without a proper, and reliable, rule of law, there is not likely to be either the secure civil liberties a people yearn for or the reliable economic development that stable government depends on. All this bears upon whether our civil liberties can be exported and whether the many economic and social bills of rights of the Twentieth Century make much sense.

If there is an established rule of law it is awkward for a government to be oppressive towards minorities. A rule of law tends toward a respect for general principles, which means that a government cannot easily harm a minority without running the risk of at least inconveniencing the majority as well. This is not to

35. 2 *id.* at 342; see *supra* note 16. For the epitaphic tribute to James Louis Petigru, a Charlestonian lawyer, a Unionist who opposed Secession, and a Constitutionalist who opposed Nullification, see George Anastaplo, *We the People: The Rulers and the Ruled*, in 1987 GREAT IDEAS, *supra* note 3, at 72.

deny that affirmative action on behalf of a minority may have to be considered to remedy old abuses.

Underlying the rule of law in the United States is the Common Law of England which was established here in Colonial days. The Common Law, in its broadest sense, is critical to the rule of law for the English-speaking peoples, reflecting and reinforcing as it does a general constitutional system.³⁶

The Common Law, with its application of reason to the implementation of generally-accepted moral standards in a variety of circumstances, provides the legal underpinnings of the Constitution of 1787. Most of the guarantees found in the Bill of Rights of 1791 had been developed by and incorporated in the Common Law process in England long before American independence, a process which was grounded in a natural-right tradition.

The people who demanded a bill of rights for the Constitution of 1787 drew upon an approach to these matters that had been established for centuries. These demands began, as we have seen, in the Federal Convention that drafted the Constitution. Thus, it will be instructive to review, however briefly, some of the predecessors to the bill of rights that was drafted by Congress in 1789 and ratified by the States in 1791.

II.

A good place to begin with any inventory of predecessors to the Bill of Rights is Magna Carta, the Great Charter exacted from King John in 1215 by the barons at Runnymede, "sword in hand." This charter, revised on several occasions during subsequent reigns, stands for an affirmation of the principle that even the King is bound by the law of the land.

It is obvious that a number of rights, especially with respect to property, were already familiar enough to be invoked in 1215. This particular charter was preceded by such instruments as the Constitutions of Clarendon.³⁷ The fourth version of Magna Carta, issued in 1225 during the reign of Henry III, is said to be still the law of England, except as it has been repealed.³⁸ We are told that "it now stands on the statute books of common law jurisdiction [as] a sober, practical, and highly technical document."³⁹

36. See, e.g., ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 124-48.

37. THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 17 (5th ed. 1956).

38. *Id.* at 22-23.

39. *Id.* at 23.

This instrument (called, in the 1628 Petition of Rights, "The Great Charter of the Liberties of England") began its glorious career as an effort on the part of the barons to assert *their* rights. But it is hard to state principles on one's own behalf without allowing them to be extended to others eventually. This may be a natural tendency, reflecting a sense of natural justice among a people. Positions advanced only for partisan purposes have a way of meaning more than was originally anticipated. This can be seen closer to home by Americans who appreciate how the "created equal" language subscribed to by slave-holders in the Declaration of Independence eventually helped to undermine the long-established system of slavery in this Country.

Fundamental to Magna Carta is the respect seen throughout that instrument for family relations. Much of the property of the day was linked to inherited establishments; changes in the allocations or uses of property often followed upon changes in family circumstances. The King, in licensing the barons to take corrective measures against him in the event of default on his part, exempts in Magna Carta his *family* from their measures: "saving our person and that of our queen, and those of our children."

It has been said that "the whole of English constitutional history is a commentary upon the Great Charter."⁴⁰ It is also said that there may be something mythical, however salutary, in the place now accorded to the Great Charter. But it is no myth that the Great Charter taught people how important such documents can be. Nor is it a myth that there are provisions in the Great Charter of 1215 that have come ringing down across the seven centuries since, such as the famous assurance: "No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land."⁴¹

III.

The next great document in our inventory appeared four centuries later in the form of the Petition of Right issued by Parliament in 1628. In the meantime, of course, the Common Law of England

40. *Id.* at 25. Magna Carta is one of the documents provided in the collection listed *supra* note 3.

41. The original, Latin version of this chapter, the 39th chapter of Magna Carta, reads: "*Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mitemus, nisi per legale iudicium parium suorum vel per legem terrae.*" See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *129-36.

had been steadily developed by the judges in collaboration with Parliament.

Various long-familiar rights of the English people were reaffirmed in the Petition of Right, including the potent "law of the land" guarantee from Magna Carta. It is important to notice that these rights were, for the most part, already well established by 1628.

Among the complaints registered in the 1628 Petition of Right were those that spoke of royal usurpations with respect to the mode of taxation, the basis for imprisonment, the quartering of soldiers in private homes, and the use of martial law against civilians. These and other complaints are reflected in the summary prayers by Parliament with which this petition ends:

X. They do therefore humbly pray your most excellent Majesty, That no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such-like charge, without common consent by act of parliament; (2) and that none be called to make answer, or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same, or for refusal thereof; (3) and that no freeman, in any such manner as is before-mentioned, be imprisoned or detained; (4) and that your Majesty would be pleased to remove the said soldiers and mariners, and that your people may not be so burthened in time to come; (5) and that the aforesaid commissions, for proceeding by martial law, may be revoked and annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesty's subjects be destroyed, or put to death contrary to the laws and franchise of the land.

XI. All which they most humbly pray of your most excellent Majesty as their rights and liberties, according to the laws and statutes of this realm; and that your Majesty would also vouchsafe to declare, That the awards, doings and proceedings, to the prejudice of your people in any of the premisses, shall not be drawn hereafter into consequence or example; (2) and that your Majesty would be also graciously pleased, for the further comfort and safety of your people, to declare your royal will and pleasure, That in the things aforesaid all your officers and ministers shall serve you according to the laws and statutes of this realm, as they tender the honour of your Majesty, and the prosperity of this kingdom.

It was important on that occasion in 1628 that there be an insistence that the writ of habeas corpus be respected by the King, his subordinates, and the courts. Habeas corpus means that govern-

ment, among others, has to justify holding someone: an explanation grounded in some law is required whenever a challenge is made in an appropriate court to any detention. Here is how this complaint reads in the Petition of Right:

III. And where also by the statute called *The great charter of the liberties of England*, it is declared and enacted, That no free-man may be taken or imprisoned, be disseised of his freehold or liberties, or his free customs, or be outlawed or exiled, or in manner destroyed, but by the lawful judgment of his peers, or by the law of the land.

IV. And in the eight and twentieth year of the reign of King Edward the Third, it was declared and enacted by authority of parliament, That no man of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disherited, nor put to death without being brought to answer by due process of law:

V. Nevertheless against the tenor of the said statutes, and other the good laws and statutes of your realm to that end provided, divers of your subjects have of late been imprisoned without any cause shewed; (2) and when for their deliverance they were brought before your justices by your Majesty's writs of *habeas corpus*, there to undergo and receive as the court should order, and their keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained by your Majesty's special command, signified by the lords of your privy council, and yet were returned back to several prisons, without being charged with any thing to which they might make answer according to the law

The right of habeas corpus was reinforced by the Habeas Corpus Act of 1679,⁴² confirming what the judges had developed and what the Petition of Right and other statements had insisted upon.⁴³

In the meantime, however, England had undergone a bloody revolution. Charles I, only three years on the throne in 1628 (he was born in 1600), had been obliged to consent to the Petition of Right. But from 1629 to 1640, he contrived to rule without calling a Parliament. This eventually led to the Civil War, the climax of which was the execution of Charles I in 1649. There were then eleven years of Republican rule, ending with the Restoration and Charles II in 1660. But things were never to be the same thereafter

42. Habeas Corpus Act, 1679, 31 Car. 2, ch. 2 (Eng.); see also Star Chamber Act, 1641, 16 Car. 1, ch. 10 § 8 (Eng.).

43. 1 BLACKSTONE, *supra* note 41, at *129-38; see also PLUCKNETT, *supra* note 37, at 57-58 (discussing the Habeas Corpus Act).

in the constitutional arrangements in England.⁴⁴

IV.

Here is how one legal historian describes what happened after the restoration of the monarchy in 1660:

The reign of Charles II saw the re-establishment in a harsher form of the Church of England, and the short reign of James II witnessed a rapid crisis. The determination of that monarch to pursue a religious policy which was contrary to that solemnly laid down by Parliament in a long series of statutes was the immediate cause of his fall. It may have been that his project of complete toleration for Roman Catholics as well as Dissenters was intrinsically an advance upon the partisanship of the Church as represented in Parliament. But it is impossible to discuss the merits of the policy when the methods of its promotion were so drastic and so completely contrary to the spirit of contemporary institutions. James II claimed that by his prerogative he could dispense individual cases from the operation of a statute; more than that, he even endeavoured to suspend entirely the operation of certain of the religious laws. Upon this clear issue the conflict was fought out. After an ineffective show of military force James II retired to France, William III of Holland was invited by Parliament to become joint ruler with his wife, Mary II, James's daughter, and so "the great and glorious revolution" was accomplished. The terms of the settlement were embodied in *the last great constitutional documents in English history*, the Bill of Rights (1689) and the Act of Settlement (1701).⁴⁵

We shall consider the Bill of Rights of 1689 after this brief notice of the Act of Settlement of 1701:⁴⁶

After the death of Queen Mary (1694), William III ruled alone, until he in turn was succeeded by her sister, Anne (1702-1714), who was therefore the last of the reigning Stuarts; in order to secure the succession, the Act of Settlement was passed . . . which not only limited the descent of the Crown (in accordance with which the present royal family reigns) but also added a few constitutional provisions supplementary to those of the Bill of Rights.⁴⁷

44. PLUCKNETT, *supra* note 37, at 53-55.

45. *Id.* at 59 (emphasis added). The Bill of Rights (1689) is one of the documents provided in the collection listed *supra* note 3. The care with which President Lincoln developed his policy of emancipation testifies to his awareness of the fact that it does not suffice to promote a policy which is "intrinsically an advance" if the way has not been prepared for it. *See infra* Lecture No. 11.

46. Act of Settlement, 1701, 12 & 13 W. & M., ch. 2.

47. PLUCKNETT, *supra* note 37, at 60.

The English speak of "the great and glorious revolution" which culminated in the "abdication" of James II and the installation of William and Mary according to the terms of the Bill of Rights of 1689. That Bill of Rights is not simply a collection of guarantees of rights, which is how Americans understand bills of rights today. Rather, it is even more important in confirming the rule of law and the general constitutional system by which the English are to be governed. And so the 1689 Bill of Rights came to be regarded as the "second Magna Carta."

The demand for a bill of rights to be added to the Constitution, which was heard in the United States during the 1787-1788 Ratification Campaign, was in some ways curious. The Constitution of 1787, which included (as we have seen) various guarantees of rights, was itself similar in critical respects to the English Bill of Rights of 1689 in that both documents defined a new constitutional order. But the very name, *Bill of Rights*, had become potent by this time, and so a separate document was called for, something that had already been supplied (as a list of rights guaranteed) for some of the State Constitutions before 1787. The demand for a bill of rights depended, at least in part, on a misunderstanding in this Country of what the English Bill of Rights was and did. Today calls can be heard in Great Britain for an American-style bill of rights, which are calls for a more elaborate collection of guarantees of rights than are found in the 1689 Bill of Rights. In political matters, we should thereby be reminded, opinion can be decisive or at least has to be reckoned with, even when it is not fully informed.

V.

When the First Congress came to draft a national bill of rights in 1789, it had not only various English predecessors to draw upon but also innumerable American instruments and the experience of the Federal Convention of 1787. I have already referred to various State bills of rights, which had been preceded by Colonial guarantees in charters and statutes. Perhaps the most illustrious of the State bills of rights at that time was the Virginia Declaration of Rights of 1776.

Innumerable speeches had also helped shape American opinion about the liberties of citizens. In 1761, James Otis had stirred up New England against writs of assistance (general search warrants); later, Patrick Henry had proclaimed to a receptive Virginia, "Give me liberty, or give me death!" Authoritative statements on behalf of American prerogatives were issued by the Continental Congress.

Consider, for example, the Declaration and Resolves of the First Continental Congress (of October 14, 1774).

The complaints in the Declaration and Resolves do not speak of misconduct by the King (which was the thrust of the Declaration of Independence two years later) but rather of misconduct by Parliament. It was still assumed in 1774 that Americans would continue to be, and to enjoy the privileges of, Englishmen, with an allegiance running to the King, not to a Parliament that could not properly govern them since Americans could not be properly represented there.

Perhaps the most critical constitutional issue of that day, related to the claims of Parliament, may be seen in the fourth resolution agreed to by the Continental Congress in this 1774 document:

Resolved, 4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled 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, subject only to the negative of the sovereign, in such manner as has been heretofore used and accustomed: But, from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such acts of the British parliament, as are bona fide, restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation internal or external, for raising a revenue on the subjects, in America, without their consent.

The following two 1774 resolutions remind us of what Americans had to build upon in their own constitutional development:

That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

That they are entitled to the benefit of such of the English statutes, as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances.

The emphasis throughout the 1774 document seems to be far more on the political rights (if not power) of a community or people than on the personal rights of individuals.

Political rights, going back to the Glorious Revolution in England a century before, are reaffirmed in the third article of the Virginia Declaration of Rights (of June 12, 1776):

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 publick weal.

The following month the Continental Congress issued the Declaration of Independence.

VI.

The Declaration of Independence, still another of the predecessors to the Bill of Rights of 1791, is to the American system what Magna Carta has been to the English system. Winston Churchill could even describe the Declaration of Independence as a restatement of the principals of the Whig Constitution developed in England since Magna Carta.⁴⁸

The Declaration of Independence restates general principles which found expression in particular rights that were, we have seen, so settled and known that they could be readily invoked in the long array of grievances collected in the Declaration. Guarantees with respect to various of these rights may be found both in the Constitution of 1787 and in the Bill of Rights of 1791. But, it must be said again and again, those rights were not created by the Declaration of Independence, the Constitution, or the Bill of Rights.

If there is any major constitutional principle that is somewhat distinctive to the American development, it would be found in the radical implementation of the insistence in the Declaration of Independence that all men are created equal. Equality before the law is also important in English constitutional history, not least in the famous assurance in Magna Carta that no free man should be acted against by government "except by the legal judgment of his peers or by the law of the land." But it is liberty that seems critical to

48. 3 WINSTON CHURCHILL, *A HISTORY OF THE ENGLISH-SPEAKING PEOPLES* 156 (1956-58).

the British constitutional development, a liberty that is grounded in the rule of law.

Implementation of the equality principle seems to go further in this Country than in Great Britain, and not only in that it nullifies the hereditary distinctions that remain important in the British constitutional system. The equality principle was vital to the American Civil War and to the three Amendments (the Thirteenth, Fourteenth, and Fifteenth) which confirmed in the Constitution what had been done on the battlefields of that war. That principle may be seen as well in the provision in the Constitution for the exercise of ultimate authority by the people and in the provisions in various amendments (among others) for women's suffrage, against the poll taxes, and for the vote of eighteen year olds.

A particularly significant expression of the equality principle may be found in the concluding article of the Northwest Ordinance of 1787, where it is laid down that there would be no slavery in the Northwest Territory. This article, it bears repeating, proved to be critical to the development of the United States and to the outcome of the Civil War.

That this article in the Northwest Ordinance also included a fugitive-slave provision should remind us of the necessity for community and hence mutual accommodation on which an eventual full realization of a high principle can depend.

VII.

Our final great predecessor to the Bill of Rights of 1791 is the Constitution of 1787. This was preceded by the Articles of Confederation of 1777-1781. The American constitutional system evident from 1777 on is, in its pervasiveness, something like the Common Law in England.

We have seen that the Constitution of 1787 does recognize various rights in the body of the original instrument, such rights as those to the privilege of the writ of habeas corpus, the right of trial by jury, and the right of the people in every State to a Republican Form of Government. Restrictions are placed upon the control of the armed forces, the declaration of war, ex post facto laws, bills of attainder, and treason trials. Assurances are given about the revenue powers of the House of Representatives, about the suffrage of the people, about life tenure for judges, and about the ultimate subordination of both the President and the Courts to the Congress. These rights may be more important than most, if not all, of the rights collected in the Bill of Rights of 1791.

Perhaps most important for the origins of the Bill of Rights was the Constitution's reinforcement of the rule of law, with the supreme power recognized to be that of the people. The people ordain through the Constitution what government may do and how it may do it. The emphasis there is on what is needed to make good governance most likely, with the protection of individual rights a secondary concern.

I have suggested the background against which the Bill of Rights should be read, a background that unfortunately is not available to most peoples on this earth. We have noticed that, however important a formal recognition of rights and liberties may be, they do depend for their preservation and effective realization on a well-ordered community.

This in turn depends on a disciplined people. Such discipline is manifested in the craftsmanship with which the Constitution of 1787 was drafted, a discipline that is required in turn of every citizen who wants to understand and hence truly defend that remarkable document.

Only a disciplined people—a people that has been habituated to moderation in word as well as in deed—is apt to be able to make fruitful use, year in and year out, of the great guarantees enshrined in the Constitution of 1787 and its Bill of Rights.

4. THE PURPOSES AND EFFECTS OF THE BILL OF RIGHTS OF 1791

I.

The Bill of Rights, which is the name by which we know the first ten Amendments to the Constitution of 1787, was drafted in the very first Congress that met pursuant to the Constitution. The role of James Madison of Virginia in the development of these Amendments in the First Session of the First Congress is generally recognized. Madison is often called "The Father of the Constitution"; he could much more accurately be called "The Father of the Bill of Rights."

The records we have of Congressional deliberations and actions with respect to the drafting of the Bill of Rights are incomplete. We get some idea of what happened in the House of Representatives, where Madison introduced his Bill of Rights resolution on June 8, 1789. But, we have only the sketchiest notion of what happened in the Senate before the Bill of Rights resolution was returned to the House of Representatives for House acceptance of

the changes made by the Senate. No records were made of the discussion, but only of the actions taken, in the Senate, which sat in executive session in the first decade of its existence.

We are reminded, by the sketchiness of the records here, of the limited record we also have of the framing of the Constitution at Philadelphia in 1787. In both cases, then, we are obliged to address the text itself—the Constitution, on one hand, the Bill of Rights, on the other hand—in order to understand what was said and done. One advantage we have in reading the Constitution of 1787 is that it is a remarkably well-crafted text which does invite thinking about it. The Bill of Rights is more “episodic” and hence less obviously coherent in character, but even so it does draw upon assertions of rights taken from that Anglo-American constitutional history which had been refined over the centuries by the English-speaking peoples. About the Bill of Rights, too, we are obliged to think if we are to figure out what was intended and not intended, what was done and not done.

The resolution setting forth the amendments proposed by Congress was completed by the House of Representatives on September 24, 1789 and sent to the States for ratification by their legislatures. All of the amendments proposed by Congress during the past two centuries, except one, have been sent to the State legislatures for ratification. Whatever the mode of ratification, the assent of three-fourths of the States is required.

Virginia completed ratification of the Bill of Rights on December 15, 1791.⁴⁹ Twelve amendments had been proposed by Congress in 1789. The first two of these failed to get enough State legislatures to ratify them: one addressed the ratio of representation in the House of Representatives, the other the compensation of Members of Congress.⁵⁰

Ratification of the Constitution of 1787 by the original States had taken less than two years (except for North Carolina, which ratified the Constitution in November 1789 after the Bill of Rights was proposed by Congress and, Rhode Island, which ratified in 1790 after it became apparent that things could go on quite well

49. That Virginia's vote happened to be the final one required was fitting in light of the key role played by Madison in the Congressional framing of the amendments. Three-quarters of a century later, Lincoln considered it worthy of notice that his State, Illinois, had been the first to ratify the proposed Thirteenth Amendment. *See infra* note 193.

50. These two proposed amendments are among the seven proposed amendments to the Constitution not ratified by the States. For the complete text of the two 1789 proposals that failed, see *infra* Lecture No. 5, § III. *See also infra* note 64. All seven failed proposals are provided in the collection listed *supra* note 2.

without her). Ratification of the Bill of Rights took more than two years. The fact that it took longer to ratify these Amendments than it did to ratify the Constitution itself suggests that there was less of a pressing need perceived for a bill of rights. In part this was, as we have seen, because it was generally recognized that American governments could be depended on to continue to respect, as they had for some time, the rights and liberties of citizens.⁵¹

We shall see that what was done in providing for the Bill of Rights of 1791 was far less of a departure from established institutions, and hence far less controversial, than what had been done in providing for the Constitution of 1787. We shall also see that the generally-accepted account of the way that the Bill of Rights came about is something of a myth, albeit (as in the case of Magna Carta also) perhaps a somewhat salutary myth.

II.

If the Bill of Rights was indeed less controversial than the Constitution, one might again wonder, why was there not a bill of rights provided by the Federal Convention with the original text of the Constitution it produced in 1787? One obvious answer is that the Convention was too busy devising what almost all of the delegates believed was needed in fundamental constitutional reform to take time also to devise what was not perceived by most of them to be needed. Besides, as we have seen, a bill of rights was regarded by many of the delegates to the Federal Convention as doing little more than reaffirming rights long secured and daily being exercised all over the Country.

Since what the form of the new national government should be, and how powers should be allocated among the departments of that government, had been controversial for some time before 1787, it was no surprise that the Federal Convention devoted most of its time to these issues. The effect of demands, upon an assembly, of other matters than the cause of civil liberty could later be seen as well in the First Congress, where Madison tried repeatedly to get the House of Representatives to set aside what it considered

51. The rate of ratification did depend on when State legislatures would be meeting. But that had been true also when the proposed Constitution was ratified. On that occasion, not only had State legislatures had to meet in 1787-1788, but also, thereafter, the State Ratifying Conventions first had to be provided for by the State legislatures. This makes the speed with which the Constitution was ratified, as compared to the Bill of Rights, even more striking.

more pressing business (particularly provisions for taxes and for executive departments) in order to frame a Bill of Rights proposal.

This is not to deny, however, that if the Framers of the Constitution had anticipated how much some opponents of the proposed Constitution would make of its lack of a bill of rights during the Ratification Campaign, they probably would have found time to draft a plausible declaration of rights. Even so, it seemed to many friends of the Constitution that much of the talk about such a lack came from critics who were far more troubled by the new allocations of powers by the proposed Constitution than by the lack of a bill of rights. It must have been evident to many of these critics that attacks on the proposed form of government itself were not likely to be popular, especially considering sponsors of it such as George Washington and Benjamin Franklin. Accordingly, there was a shift by these critics in the second half of the Ratification Campaign to the bill-of-rights theme as the major objection to the proposed constitution. On its merits alone, the proposed Constitution was quickly ratified in one State after another in the early months of its being considered. The demand for a bill of rights was dramatized, perhaps deliberately if not cynically, as a way of sidetracking further consideration of the document on its merits. This was countered by friends of the Constitution with promises that a bill of rights would be taken up during the First Congress. The sincere advocates of a bill of rights tended to be reassured by these promises, while the opponents of the Constitution recognized that this would leave them unsatisfied with respect to the one issue they were really troubled by, the radical restructuring of government under the new Constitution.

Half of the State Ratifying Conventions in 1787-1788 proposed amendments to be considered by the First Congress. The preamble provided with the Bill of Rights proposal when it was sent by Congress to the States began by reciting that “[t]he conventions of a Number of the States ha[d], at the Time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added” to the new Constitution. It was then intimated that the amendments prepared by Congress were being submitted to the States because it was truly believed that “extending the ground of public confidence in the government [would] best insure the beneficent ends of its institution.”⁵² We shall see that the only

52. On the importance of preambles, see 1 WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 370-79, 391, 394, 399,

truly "restrictive clauses" among the twelve amendments proposed by Congress in 1789 may have been in the two amendments not ratified by the States.

III.

Madison pressed for amendments in the First Congress in large part because he had promised his Virginia constituency that he would do so, a constituency in which there were (as elsewhere) sincere advocates of a bill of rights as well as some who were merely using this issue as a respectable way of resisting the empowerment of a new national government. In his First Inaugural Address, President Washington had recognized a demand among the public at large for a bill of rights.⁵³

A bill of rights was drafted in the First Congress in part to head off demands heard in some quarters during the Ratification Campaign for another Federal Convention, which would put the Country at risk of wide-ranging changes to the body of the Constitution as well. We can be reminded of this concern when we notice the warnings today that any assembly called on demand by the States to consider, say, a balanced-budget amendment might turn into a "runaway" convention which would consider much more than that.⁵⁴

Dozens of amendment-suggestions had come out of the State Ratifying Conventions, suggestions that were usually collected in those conventions by the minorities that had opposed ratification of the Constitution. But Madison assured the First Congress that the amendments he was proposing would "make such alterations in the Constitution as will give satisfaction, without injuring or destroying any of its vital principles."⁵⁵ The rigorous sifting of the proposed amendments by Congress in 1789 shows that there was to be, at least by way of formal constitutional amendments, no fundamental change in relations between the United States and the States or in the powers of the Government of the United States.

400 (1953); ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 13-25. The preamble provided with the Bill of Rights-proposal when it was sent by Congress to the States is included in the collection listed *supra* note 3.

53. See, e.g., SAMUEL E. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 319 (1972).

54. See ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 183.

55. BERNARD SCHWARTZ, *5 THE ROOTS OF THE BILL OF RIGHTS 1065* (1971) (quoting *THE HISTORY OF CONGRESS EXHIBITING A CLASSIFICATION OF THE PROCEEDINGS OF THE SENATE AND HOUSE OF REPRESENTATIVES FROM MARCH 4, 1789 TO MARCH 4, 1793* 152-55 (1843)); see also ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 52, 60, 67, 229.

We have also noticed the frustrations endured by those who tried to get the term *expressly* into what is now the Tenth Amendment. It soon became apparent to opponents of the new Constitution in the First Congress that they were not going to get what they really wanted, so much so that they had to be urged by Madison to take any interest at all in the development of the bill of rights they had once made so much of. What the opponents of the Constitution were interested in, instead, is suggested by one of the amendments proposed by Anti-Federalists in the First Congress:

That the General Government of the United States ought never to impose direct taxes, but where the moneys arising from the duties of impost and excise are insufficient for the public exigencies, nor then, until Congress shall have made a requisition upon the States to assess, levy, and pay their respective portions of such requisitions; and in case any State shall neglect or refuse to pay its proportion, pursuant to such requisition, then Congress may assess and levy such State's proportion, together with interest thereon, at the rate of six per cent, per annum, from the time of payment prescribed by such requisition.⁵⁶

This proposal, representative of many that had come from opponents of the Constitution in the State Ratifying Conventions, was soundly rejected in the House of Representatives. No doubt, it smacked too much of the Articles of Confederation which the Nationalists who controlled the First Congress had been determined to change radically in the Federal Convention.

A persistent desire of the opponents of the Constitution was that the States not be controlled very much, if at all, either by the Constitution of 1787 or by the National Government established by that Constitution. Those States' Rights advocates recognized, more than many judges and legal scholars since then, the significant restraints placed upon the States by the Privileges and Immunities Clause and the Republican Form of Government Guaranty in Article IV and by the Supremacy Clause in Article VI of the Constitution. All of this is reinforced by the Necessary and Proper Clause of Article I.

Still, we have noticed, none of the amendments proposed by the First Congress and ratified by the States cuts down any of the substantive powers of the Government of the United States provided by the Constitution of 1787. We should further notice that no amendment to the Constitution since the Bill of Rights has ever

56. See BENNETT B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 215 (1955).

taken away from the Government of the United States any power that the Framers intended it to have. In fact, we may also wonder whether any amendment has ever *given* to that Government any power that the Framers of 1787 did not want it to have. Some will argue that there has been an extra-constitutional, if not unconstitutional, growth of powers in the National Government as a result of legislative and judicial interpretations. But this argument may depend, in large part, on a failure to see how broad the original powers are that were established by the Federal Convention for Congress under the Constitution. It may well be that what the Courts have done in the Twentieth Century is to recognize for Congress much of the power originally intended by the Framers of the Constitution.

Does not the absence, from the twenty-six Amendments we have had thus far to the Constitution, of any major curtailments in the powers of the National Government testify to the remarkable work done by the Federal Convention in 1787? It may also testify to the shaping of the American people and of their political life to conform to the Constitution, so much so that fundamental changes have become almost unthinkable.

IV.

All kinds of arguments by proponents of the proposed Constitution had been used during the Ratification Campaign of 1787-1788 as to why no national bill of rights was needed. Of these arguments, some were spurious, some had merit. (Much the same can be said about the arguments for why a bill of rights *was* needed.) A case was made against a bill of rights, I have indicated, partly because advocates of the Constitution believed that they could not afford to make concessions during the Ratification Campaign, but only promises as to what the First Congress might do.

I have also suggested that if the Framers of the Constitution had anticipated the objections that were made about the lack of a bill of rights, they probably would have drafted something appropriate in the Federal Convention. Or were the Framers so shrewd as to figure that it would be safer to have the opponents of the Constitution complain about the lack of a bill of rights than to have them conjure up other "defects" of the proposed Constitution? If those opponents could be busied with the bill of rights problem, they would be diverted from other problems. Also, this "defect" could be much more easily remedied thereafter without damaging the Con-

stitution that the Framers wanted and without compromising the reasons why they had wanted it.

Furthermore, friends of the Constitution might have sensed that critics who made much of the lack of a national bill of rights could not be taken too seriously by the people at large who knew that various of their rights were safe, whether or not the United States or a State had a bill of rights. Friends of the Constitution pointed out that critics of the proposed Constitution were not disturbed that half of the States had no bill of rights in their State Constitutions, even though the domestic powers of those State governments had been considered virtually unlimited under the Articles of Confederation while those of the National Government could be said to be limited to what had been "enumerated."

The genuine popular demand there happened to be for a bill of rights was lent support by the august place in British constitutional history of the 1689 Bill of Rights. We have seen that that constitutional document, one of several *written* parts of the British Constitution, had defined and limited the prerogatives of the Crown, had insisted upon the prerogatives of the Parliament, and had affirmed various other rights of the people. In this sense, it was pointed out, the entire Constitution of 1787 served the purpose of the 1689 Bill of Rights. But until there was something on paper which could be separately identified (however misleadingly) as a Bill of Rights, reservations would persist about the new Constitutional system, and this the friends of the Constitution undertook to provide in the First Congress under Madison's leadership.

Just as the name of a document could matter, so had the name of the party advocating ratification of the Constitution in 1787-1788, which took for itself the name of Federalists, even though the opponents of the Constitution (the "anti-Federalists") may have had the better claim to that evidently attractive name. The Federalists in the First Congress, we have seen, did not want the powers of the National Government reduced or hampered by any amendments (certainly none of a "federalizing" character) to the Constitution of 1787.

The more thoughtful of the Federalists might have been concerned as well about any shift from a primary concern with the powers and ends of government to a primary concern with the rights of individuals. The Constitution of 1787 looks in one direction, the Bill of Rights of 1791 looks somewhat more in another direction. The shift which we *have* in part seen since 1787 *is* from a concern principally with political interests to a concern with indi-

viduality, a shift from the primacy of the citizen to the primacy of the private person, even while the National Government has reinforced its constitutional powers vis-a-vis the States.

Whatever the limitations in 1787-1789 of the case *for* a bill of rights, it is now salutary to consider the Bill of Rights of 1791 as the virtual completion of the constitutional framing that had begun in 1776.⁵⁷ Certainly, the Bill of Rights cannot now be eliminated without ominous implications and without an unhealthy effect on citizen morale in this Country. Even tampering with it, as in response to such unfortunate provocations as the Flag Burning cases, should be approached with the greatest caution.

Thus, because of the powerful rhetorical presence and considerable political as well as judicial effects of the Bill of Rights, it is needed much more now than it was in 1789-1791. Or, put another way, one consequence of adding the first ten Amendments to the Constitution, even though they may not have been needed, was to make the Bill of Rights necessary ever since.

V.

I have several times suggested that the Bill of Rights of 1791 does not change anything essential. The Government of the United States could still concern itself after the Bill of Rights with the vital matters that it could concern itself with before the Bill of Rights, and could do so with its substantive powers unimpaired.

On the other hand, the Framers of the Constitution of 1787 did not establish the new government they did in order to abridge various long-recognized rights of the American people. In fact, they argued, only a national government with adequate powers could promote the stability and prosperity necessary for a sustained flourishing of those rights.

Just as no recognized rights of the American people were subverted by the Constitution of 1787, no rights were created by the Bill of Rights of 1791, however much some of them were adapted to republican circumstances and to the diversity among American States (as we shall see when we examine the First Amendment in my next lecture). Consider, as illustrative of the republican character of the American people well before Independence, what could be said to have made the farmers fight in 1775. One of those

57. See ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 24. We shall see that the Eleventh and Twelfth Amendments can also be considered part of the post-Convention effort at completion represented by the first ten Amendments. See *infra* Lecture No. 8.

men answered this question, years later, in this fashion: "We always had governed ourselves, and we always meant to. They [the British] didn't mean we should."⁵⁸ A more personal if not individualistic, or less political, way of putting this position can be seen in the militia man who went with his musket to confront the British, saying, "We'll see who's goin' t'own this farm!"⁵⁹

It is not generally appreciated that the American Constitution, including its Bill of Rights, has worked as well as it has from the beginning in large part because so much of it was already being used, among the States if not nationally, when it was formally adopted in the late Eighteenth Century.⁶⁰ Nor is it generally appreciated that the Bill of Rights, in declaring and reaffirming those rights in 1791, does not in any way suggest that any new remedy is available to secure these rights.

The notion that courts would be looked to in order to enforce the Bill of Rights (and all other rights in the Constitution of 1787) did not take firm hold until well into the Nineteenth Century. This notion spilled over into the use of courts to police applications of various provisions of the Constitution as well. In fact, the first act of Congress declared unconstitutional by the Supreme Court, in *Marbury v. Madison*,⁶¹ did not run afoul of the Bill of Rights but rather of a technical jurisdiction-allocation provision in Article III of the Constitution. It is far from clear that this kind of judicial supervision of Congress was intended by the Framers with respect to either the Constitution or the Bill of Rights. This is not to deny, as we shall see in Lecture No. 7, that many of the guarantees in the Bill of Rights were meant to be binding on the courts.

VI.

That few, if any, of the rights listed in the Bill of Rights of 1791 were new, however much some of them (such as the freedom of speech and of the press provisions in the First Amendment) took

58. MORISON, *supra* note 53, at 213.

59. *Id.* at 227-28.

60. On the quite different prospects in Eastern Europe today, see ANASTAPLO, *AMERICAN MORALIST*, *supra* note 12, at 555-69.

61. 5 U.S. (1 Cranch) 137 (1803). For the most challenging study of this much-discussed case, see 2 CROSSKEY, *supra* note 52, at 978, 1035-46, 1327. On judicial review, see ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 124-48. For questionable applications of the doctrine of judicial review, see *Powell v. McCormack*, 395 U.S. 486 (1969), and *United States v. Nixon*, 418 U.S. 683 (1974). Reservations about judicial review are indicated in the course of the discussion in the Senate, on January 31, 1803, of a petition submitted by William Marbury and others. See 12 *ANNALS OF CONG.* 34-50 (1803).

on new dimensions in the United States, is further testified to by the lack of difficulty in the First Congress in understanding what most of the proposed amendments meant.

It did not matter, in how citizens generally conducted themselves, what State they were in or whether that State had a bill of rights in its own State constitution. Americans tended to act the same wherever they were, so far as they were concerned about the responses of government to their conduct, just as today most Americans do not stop to notice what State they happen to be in before they do what they do, for example, in their treatment of children, in their business transactions, or in their sexual practices, however much the rules on the books may vary from State to State with respect to these matters.

An enterprising student of American constitutionalism could illuminate these matters further by investigating whether the States that had no bill of rights in their State constitutions conducted themselves differently on various occasions from the States that did: in the Federal Convention, in the State Ratifying Conventions, or in the First Congress when a bill of rights was being considered. The mobility of the American people from one State to another, a mobility taken for granted in the Federal Convention, makes it unlikely that things would be done or thought of differently from one part of the Country to another, except perhaps when such a controversial institution as slavery intervened to color everything that was thought, said, and done.

It is useful to ask, in order to appreciate the sources of political liberty in the modern world, why various of the rights we deem important have been long protected in Canada and Great Britain without the kind of bill of rights we have, whatever is being done now in both countries to develop additional written guarantees. Have not many of those rights been protected there for the same reasons that all of the States were equally respectful of rights in 1789, whether or not they had a bill of rights in their State Constitutions? The invocation of such rights in the Declaration of Independence testifies to how well-established these rights were independent of a formal bill of rights. Even outside the immediate influence of the English-speaking tradition, considerable respect for such rights may be seen, as in France and the Scandinavian countries, and this despite somewhat different constitutional systems. On the other hand, there are all too many countries in the world today that have fancy bills of rights (and even copies of ours) that do little to prevent tyranny.

Although the Bill of Rights might have done little to secure the long-established rights it enumerated, it may well have jeopardized somewhat the standing of other long-established rights that it ignored. Had this already been done, for the rights later listed in the Bill of Rights, by the Framers' mentioning so few rights in the Constitution of 1787, unless it could be shown that there were reasons for listing *those* rights there? We shall see, in Lecture No. 8, how the Ninth Amendment was used to try to head off the unwelcome implications of such neglect.

There is, in Article IV of the Constitution of 1787, a Privileges and Immunities Clause, which *could* (on its face) be taken to assure, or at least to remind, citizens of the United States about long-established fundamental rights to which they were entitled, no matter where they happen to be in this Country. Did the listing of so many rights in the Bill of Rights tend to diminish the importance of the Privileges and Immunities Clause, especially with respect to the States, something that was attempted to be remedied in the Fourteenth Amendment?

Still another possible effect of enumerating so many rights in the Bill of Rights should be noticed: did *enumeration* of rights in this fashion make more of enumeration as well of the *powers* of Congress in Section 8 of Article I? Just as only those rights which are expressly enumerated have been made much of over the years by the courts and others, so only those powers which are expressly enumerated have been assigned to Congress without question. In both cases, the general spirit of the constitutional arrangement sometimes tends to be lost sight of. This too can mean a shift from politics and the common good to legality and individualism as the prevailing mode of our common life.

VII.

To emphasize *legalism* is to encourage a positivistic approach to law and to constitutional determinations. Law thus can come to be seen as the product of a sovereign, not as the emanation from some enduring standard of right and wrong. For example, a preference for authority instead of reason may be seen in disparagements in some circles today of the significance of international law, which does depend on longstanding traditions and a body of reasoning about the proper relations between nations in the civilized world.

One consequence of positivistic developments in the United States is the steady depreciation of the status of the Common Law, which traditionally included an awareness of the spirit and ends of

law for the English-speaking peoples. Thus, the Common Law could once be depended on, emerging through the discoveries of judges under the guidance of the legislature, to develop (in a sound and generally-acceptable way) various relations and rights implicit in the prevailing political and social system. When the Common Law discipline comes to be neglected, the interventions of judges become suspect, as may be seen in responses to the uses of the Ninth and Fourteenth Amendments in developing the right to privacy. The political repercussions here can be serious, especially if the development is seen to take on the appearance of judicial usurpation.

It is not generally appreciated how much most of the guarantees in the Bill of Rights were imbedded in the Common Law. This makes it difficult for us to appreciate the arguments of those in 1787-1789 who insisted that the most critical rights of Americans were already fully protected without a bill of rights, and this without any substantial experience of reliance theretofore upon courts to assess legislative acts for their constitutionality.

Most constitutional law scholars do not seem even to be aware of the problems posed by what has been happening to the Common Law in this Country. To the extent that the Bill of Rights contributed to a more positivistic mode in the law, one can doubt whether the first ten Amendments were in fact *amendments*, that is, improvements.⁶²

To become more positivistic in our approach to law tends to affect the status of natural right and reliance upon enduring standards. This in turn tends to encourage individuality, or "doing one's own thing," and other forms of hedonism. We can see positivistic assumptions in the arguments put forward from time to time by United States Supreme Court Justices and others to the effect that only enumerated fundamental rights, made explicitly applicable to State government, can be brought to bear upon what is done by State governments.

62. The decline of the Common Law may be seen in the resort to comprehensive codification, which perhaps was stimulated by what was becoming of the Common Law. (Did not Justinian try to do the same, also with mixed results?) On the merits of the Common Law approach rather than codification, see *John Winthrop's Journal (Sept. 1639)*, reprinted in 7 ORIGINAL NARRATIVES OF EARLY AMERICAN HISTORY 323-24 (James K. Hosmer ed., 1908), and EDMUND S. MORGAN, THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP 167-68 (1958). Is there something positivistic, or at least the beginning of a turn away from a grander form of expression, in the shift in the Bill of Rights from the extensive mode of capitalization (with its implicit respect for substantives) employed in the Declaration of Independence and in the Constitution of 1787? This, at least, was a "constitutional" innovation.

An emphasis upon making things explicit tends to undermine reliance on, if not the majesty of, the Common Law. Does an explicit Bill of Rights tend to make the Common Law process seem less important? Does it shift the attention of judges away from what is right to what is legal (or laid down)? And does it tend to make judicial review more likely, if only because it can help obliterate the natural difference between legislation and adjudication?

But however positivistic we become, and however much the demands of nature are disparaged, some standard beyond law and Constitution is implied in a provision for amendments such as that found in Article V. Some enduring standard is implied as well by the distinctively American assumption that a choice should be made by the people as to what constitution they want. A people cannot select or correct, to say nothing of being able to understand, their institutions without some awareness of nature and the truth about things. Intimations of the best possible regime, to which natural right looks, have to be drawn upon if the people are to be properly trained and sensibly guided.

Natural right means, among other things, that in the greatest emergencies even the most venerable constitutional arrangements can be temporarily suspended, as was done between 1774-1781 and between 1861-1865. A sensitivity to the demands of natural right also means, however, that far less threatening circumstances can be recognized and assessed for what they are, allowing our constitutional processes to work. This leaves the people free to make prudent use of their prerogatives in governing themselves.

When all is said and done, the Bill of Rights we happen to have may now be good for our political morale, if only because it can take the place of other creeds or institutions in countries with a longer and deeper history than our own, institutions which also suggest enduring standards and encourage a fitting political restraint. Besides, people sometimes need to have available for veneration physical manifestations of their most elevated aspirations, and these the Constitution of 1787 and its Bill of Rights seem to provide for many. The Bill of Rights, properly understood, promotes restraint (or civilization), liberty, and equal justice under law.

5. AMENDMENT I

I.

The amendments to the Constitution of 1787 that we know as the Bill of Rights were first proposed in the House of Representa-

tives on June 8, 1789. At that time, and for two months thereafter, while the proposals were being debated and revised, the amendments we now have were slated for insertion at specified places in the original Constitution. If the ratified amendments had remained scattered in the body of the Constitution at the places originally designated for them, it would have been obvious that all of the restrictions set forth in these amendments were directed against the Government of the United States, not against the States.

Some have argued, however, that the generality of the language of the restrictions in most of the Bill of Rights amendments, especially now that they stand alone in the collection of amendments appended to the Constitution, mean that they should be applicable to all governments in the United States, not just to the National Government. But it is difficult to find evidence to support the proposition that the shift in placement of the proposed amendments was intended to include the States within the sweep of these amendments, especially since there remained at one stage, even after the shift in placement, a proposed amendment that was clearly directed against State governments. This separate proposed amendment, which was approved by the House of Representatives on August 24 but eliminated thereafter by the Senate, would not have been resorted to if the other proposed amendments had been thought of as having a comprehensive application.

It can be argued that putting most of the amendments in general terms, treating them as an appendix to the Constitution, and eliminating the one amendment explicitly designed for the States had the (perhaps unintended) effect of making most of the amendments comprehensive in their effects, restraining thereby the States as well as the National Government. But that would ignore the evident intentions and widely-known understanding of the people involved in the shaping and ratification of these amendments. In such matters, common sense should be given its due.⁶³

Very little is said in the available records as to why it was decided by the House of Representatives not to insert amendments into the body of the Constitution. The placement issue had been raised early in the amendment-preparation process in the summer

63. Both the Common Law system and the natural right tradition, by which the Common Law system is nourished, respect common sense. There is something commonsensical (and hence Aristotelian) about a common refrain in the ancient Buddhist text, *Questions of Milinda*: "That man might say whatever he would, but all the same," as in "That man might say whatever he would, but all the same, that grown woman came straight from that young girl." See George Anastaplo, *An Introduction to Buddhist Thought*, in 1992 GREAT IDEAS, *supra* note 3, at n.45.

of 1789, with concern expressed about changing in any way the text of the document from what it had been when its distinguished Framers had affixed their names to it. No change was made at that stage of the deliberations in the House of Representatives. Then, two months later, as the process was drawing to a close in that House, which was before any draft was sent to the Senate for its initial consideration of amendments, the shift in placement was made without much debate or explanation.

One effect of appending all amendments to the Constitution then and since *has* been to keep the 1787 document intact, preserving down to our day the integrity of its original appearance. This should have been particularly welcomed by those who did not regard the Constitution to have been amended in any critical respect by the Bill of Rights.

Another effect of the shift in position for the amendments drafted in 1789 is that it made the Bill of Rights, ratified in 1791, seem like a separate instrument, even like a kind of constitution itself. We can still see reproduced and displayed the Congressional resolution on twelve proposed amendments that was sent to the States for ratification, a document with its own preamble and signatures. This instrument has been invested with a special mystique as it stands somewhat in collaboration and somewhat in tension with the Constitution of 1787. The Constitution reflects more what can be called natural sociability and the need for sound government; the Bill of Rights, with a somewhat different approach to perhaps the same ends or principles as the Constitution itself, reflects more the natural rights and civil liberties of a people.

The Bill of Rights of 1791 as a separate document invites study of its organization, just as does the Constitution of 1787. It is evident in each case that care was taken in determining the arrangement settled upon. I have suggested in my Commentary on the Constitution of 1787 how that instrument is put together. I suggest, at the outset of my next Lecture, how the Bill of Rights is put together. Such a study of the Bill of Rights should be useful as well for the light it can shed on the Constitution as a whole.

II.

In a sense, virtually all of the Bill of Rights provisions represent restraints upon Congress. Of the twelve amendments proposed to the States by Congress in September 1789, ten of them were originally intended to be placed in Article I of the Constitution, with the other two intended to be placed in Article III.

Of the ten amendments originally designated for placement in Article I (the Legislative Article), the first two were to have been put where Congress is provided for (in Sections 2 and 6 of Article I), the other eight were to have been put where Congress is restrained in various ways (in Section 9 of Article I). The two amendments originally intended for Article III (the Judicial Article) are probably there because they modified provisions already in Article III with respect to jury trials.

It seemed natural to the statesmen of 1789 to consider restraints upon Congress to be restraints as well upon the rest of the National Government. Most of what that Government does still depends on Congress. Congress must make the laws that the President executes and that the Courts interpret and apply. Also, Congress must create and finance the Executive Departments and the military and provide for the Courts and their jurisdictions.

In short, Congress determines who the Executive and the Courts are to be and much of what they are to do. President Washington had little to do during his first nine months in office and the Supreme Court did not convene for the first time until February 1790. Both the President and the Court had to wait until Congress provided for them and gave them something to do.

This means that to control Congress *is* pretty much to control all of the Government of the United States, which helps explain why most of the amendments were originally intended for the Legislative Article. Still, three of the twelve amendments proposed in 1789 obviously deal more with Congress than do the others: the first is concerned with the composition of the House of Representatives; the second is concerned with the compensation of Members of Congress; and the third, which we now know as the First Amendment, is explicitly directed at Congress.

III.

The first two of the twelve amendments proposed by Congress in September 1789 failed of ratification by the State legislatures. They were, we have noticed, originally to have been placed in those parts of the Constitution (Sections 2 and 6, respectively, of Article I) that deal with the matters addressed in these two proposed Amendments.

The text of the two proposed amendments that failed to be ratified was this:

Article I. After the first enumeration required by the first article of the Constitution, there shall be one Representative for every

thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

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

Why did these proposed amendments fail to secure ratification? Was it sensed that these two provisions were not of the dignity of the others? Are they inappropriate for a bill of rights and hence better reserved for separate amendments or even for statutes?⁶⁴

Still, it is significant what has happened to the two rejected amendments. The first was made obsolete, so to speak, by steady population growth in the United States. Concern had been expressed during the Ratification Campaign that the House of Representatives would not be large enough to be truly representative, with only sixty-five members of the House provided by the Constitution for the First Congress. It soon became evident, however, that there was no need to worry about having a large enough House of Representatives, but perhaps just the opposite.

The second failed amendment-proposal, regulating the timing of changes in the compensation of Members of Congress, is adhered to in practice. Congress routinely makes changes in its own compensation take effect only after an intervening Congressional election.

The American experience with these two rejected amendments, as well as with several others, reminds us that constitutional amendments in this Country are rarely controversial. They usually deal with matters that either have been settled by events, such as

64. We have no records of debates in State legislatures on this issue, where the first of these provisions failed by two States and the second by four States. (Ten States were required for ratification.) See Anastaplo, *Making of the Bill of Rights*, *supra* note 3, at 374; 5 THE FOUNDERS' CONSTITUTION 40-41 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter FOUNDERS' CONSTITUTION]. On current attempts by State legislatures to ratify the proposed Congressional-pay amendment of 1789, see James J. Kilpatrick, *Long-lived Amendment Raises Important Issue*, CHI. SUN-TIMES, Aug. 22, 1991, at 48.

The Kurland-Lerner Collection is very useful for students of the Constitution, as is the *Encyclopedia of the American Constitution*, *supra* note 4. For the documentary record from the First Congress, see CREATING THE BILL OF RIGHTS (Helen E. Veit et al. eds., 1991).

the Civil War, or are already widely accepted. Even the Equal Rights Amendment proposed in 1972 has virtually been put into practice despite its having failed of ratification, a failure that may have been in large part due to accidents in timing.

I have noticed in my earlier Lectures that few, if any, of the Amendments to the Constitution during the past two centuries have cut down any substantive power of Congress. The two Congressionally-proposed amendments rejected in 1789-1791 by the States, however, *would* have placed restraints upon powers that Congress was given: the power to determine the composition of the House of Representatives, and the power to determine the compensation of Congress. The Federal Convention had considered various ways of hedging in both of these powers, including even by setting a permanent size for the House of Representatives and by keying Congressional compensation to the price of specified commodities. The Convention decided that it had to rely, here as elsewhere, upon the integrity of the Members of Congress and upon the vigilance of the people who selected them, which is how matters still stand with respect to these and like determinations.

IV.

I have suggested that three of the twelve Congressionally-proposed amendments of 1789 deal more with Congress than do the other nine. I have discussed, however briefly, the two proposals which failed to be ratified by the State legislatures. The last of these three did secure ratification, the proposal we now know as the First Amendment. The text of that proposal reads:

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.

It is, because of the way that the State legislatures happened to respond to the twelve proposed amendments, something of an accident that this should have become the *First* Amendment, a designation that people generally sense to be appropriate.⁶⁵

The First Amendment is the only one of the first eight Amend-

65. One of the two rejected amendments did not fail by much. *See supra* note 64. It should also be noticed that, for some time after 1791, parts of the Bill of Rights were sometimes referred to by their original numbers, evidently by people who had only the original Congressional resolution to draw upon and who did not know that not all of those proposed amendments had been ratified. *See, e.g.,* 8 ANNALS OF CONG. 1955 (1798). What does this suggest about the immediate significance of the Bill of Rights

ments that is somewhat innovative. All of the others are copies of, or derivative from, respectable English prototypes. That is, Amendments II through VIII are reaffirmations of long-established rights of the English-speaking peoples, including those in North America.

There are two principal sets of concerns addressed in the First Amendment: a concern with religious freedom and religious establishments and a concern with freedom of speech and of the press. A distinctively American response is given in each case, but perhaps necessarily in such a way as to leave questions for us to this day.

Freedom of the press does have, even in this Country, some traditional features to it. English constitutional principles may be seen in the insistence among us that there can be no previous (or prior) restraint of the press (that is, no system of censorship). These principles find their most dramatic advocacy in John Milton's *Areopagitica* of 1644.

Our freedom of speech provision, although perhaps more characteristic of the United States, also draws upon English constitutional history. For centuries Members of Parliament had been assured immunity for whatever they said in the exercise of their duties. For example, the 1689 Bill of Rights (in England) declared that "the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament." Similarly, the Constitution of 1787 provides in Section 6 of Article I that Senators and Representatives 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.

The recognition in the First Amendment of the freedom of discourse of the people at large, explicitly nationalizing thereby the traditional immunity of "freedom of speech, and debates or proceedings in Parliament," testifies to what any truly self-governing body requires. The American people were already exercising this right by 1789, whether or not their States had bills of rights or guarantees in them of freedom of speech or of the press. These were rights that were confirmed, not created, by the speech, press, assembly, and petition provisions of the First Amendment.

upon its ratification? Consider, as well, the significance of the "accident" of names touched upon in Lecture No. 4, § IV.

The entire constitutional system in this Country very much depends on a self-governing people that exercises popular control not only over what its governments do, but also over what the Constitution itself provides. The primary emphasis of the First Amendment here is upon a free and open discussion of public affairs, as distinguished from what is now called *freedom of expression*. Freedom of speech and the press, as distinguished from a much broader freedom of expression, may be necessary for effective self-government. On the other hand, an unregulated freedom of expression can, in some circumstances, undermine the character and education needed for sustained self-government. Freedom of expression, such as in artistic activity, can itself be something that a people should want to see protected to a considerable extent, but there is not for *it* the absolute protection that is guaranteed by the First Amendment for freedom of speech and of the press (that is, for unfettered public discussion of the public business). Freedom of expression is protected more by our rights to property and liberty, interests of which persons *can* be deprived, or have regulated, by due process of law. The constitutional provisions that protect property and liberty, such as the Fifth Amendment, are more individualistic and less civic-minded (or public-spirited) in orientation than are the Speech and Press Clauses of the First Amendment.

A truly new way may be seen in the insistence in American constitutions (State as well as National) that the people are entitled, as the source of all governmental authority in this Country, to the right to discuss the public business as much as they wish, including not only the selection and doings of officers of government but also the framing and amending of forms of government.⁶⁶

V.

We can be reminded of the federalist character of the American constitutional system by noticing that it is explicitly Congress (and, by implication, the National Government) that is restrained by the First Amendment from abridging the freedom of speech or of the press. The States are not addressed on this issue by the First Amendment.

But, we should also notice, Congress is *not* kept by the First Amendment from regulating State abridgments of freedom of

66. See George Anastaplo, *Censorship*, in 3 ENCYCLOPEDIA BRITANNICA at 21-22 (15th ed. 1986). That article serves as a summary of the principal constitutional argument made in GEORGE ANASTAPLO, *THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT* (1971) [hereinafter ANASTAPLO, *THE CONSTITUTIONALIST*].

speech or of the press. Such Congressional interventions on behalf of freedom of speech and of the press can be in the service of the National Government's Article IV obligation to guarantee each State in the Union a republican form of government, especially where State suppressions threaten the ability of the people to govern themselves.

We should immediately add, however, that self-government need not be subverted—indeed, it may even be enhanced—by prudent State efforts to control publications that threaten to undermine morality. The United States is more apt to try to regulate expression in the interest of national security (by acting against sedition, treason, or more loosely speaking, subversion), while the States are more apt to try to regulate expression in the interest of morality (by acting against corruption, licentiousness, and dissoluteness). But whatever government purports to do, and for whatever ends, freedom of speech and of the press protects those who want to examine what is being done and why.

Strictly speaking, then, it is not freedom of speech and of the press that the States are most apt to suppress but rather certain aspects of freedom of expression. Freedom of expression, I have suggested, is more of a property interest that can be legitimately regulated by law for the sake of common morality and the general welfare than an absolutely privileged free-speech interest, however much it does resemble freedom of speech in some respects.

Is not freedom of expression critical to the appeal of religious freedom as well? Human beings, at least in the Western World, are considered to be (in principle, at least) radically on their own with respect to spiritual matters, however much is made of religious communities. The appeal of freedom of expression, as well as a pervasive dedication to self-government, can seem to provide a connection between the two kinds of freedom guaranteed by the First Amendment. There is a primacy to the freedoms guaranteed by the First Amendment, as may be seen in the one amendment-proposal developed in the House of Representatives for the States: "No State shall infringe the right of trial by jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press."⁶⁷ Thus, in addition to the traditional "right of trial by jury in criminal cases," the only other great rights nominated by the

67. Reprinted in Anastaplo, *Making the Bill of Rights*, *supra* note 3, at 371. It is a prophetic curiosity of American history that this states-limiting proposition, which was rejected by the Senate, was the *fourteenth* in the list prepared by the House of Representatives. On the Fourteenth Amendment, see *infra* Lecture No. 12.

House of Representatives for protection against State infringement in the Bill of Rights are those found in the First Amendment.

VI.

The Religion Clauses of the First Amendment oblige Congress to stand clear of religious establishments, which means that Congress can neither provide for religious establishments of its own nor interfere with any State religious establishments then existing or later to be developed. The United States, in short, is to keep its hands off completely *here*. This means that all State establishments of religion are to be left alone by the National Government. State concerns here, as with the policing of freedom of expression already referred to, reflect the police power of the State, especially with respect to curbing corruption and promoting morality.

Although Congress cannot interfere at all with State religious establishment, it is evidently left free by the First Amendment to regulate State prohibitions of the free exercise of religion: Congress is kept from prohibiting the free exercise of religion; but it is not kept from correcting State interferences with the free exercise of religion. In this field, unlike that of religious establishments, the States need not be left alone by Congress to develop their local preferences in whatever way they may choose.⁶⁸

I do not attempt in these Lectures to recapitulate systematically how the Courts have interpreted the two dozen Amendments we are reviewing. Still, it can help us appreciate what the First Amendment does and does not provide by noticing that the Establishment Clause has been distorted in its interpretation by the Courts. That clause is now interpreted virtually to mean that governments cannot cooperate at all with religious institutions, for example, with respect to the public funding of church-sponsored schools. This seems to me a misreading of the First Amendment, because the forbidden "establishment" does not refer to official cooperation with religion but rather to official preference for one or a few religious sects at the expense of all the others in the community.⁶⁹ Extensive, almost natural, collaboration between Church

68. Congress did not seem to be concerned, in framing the First Amendment, about the standards that the United States might use in policing State prohibitions of the free exercise of religion. The applicable standards, subject to development and adaptation, seem to have been generally understood. On religious freedom, see George Anastaplo, *Church and State: Explorations*, 19 *LOY. U. CHI. L.J.* 61 (1987) [hereinafter Anastaplo, *Church and State*].

69. The New York Ratifying Convention put its proposed amendment this way in July 1788: "[N]o religious sect or society ought to be favoured or established by law in

and State may be seen again and again in Eighteenth-Century America. Consider, for example, the concluding article of the Virginia Declaration of Rights (June 12, 1776) which declares that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience." But it also adds that "it is the mutual duty of all to practice Christian forbearance, love, and charity" towards each other.

Whatever problems there may be in interpreting the Religion Clauses, they are compounded when the First Amendment is made applicable, by means of the Fourteenth Amendment, against the States. For one thing, it is difficult to figure out how the Establishment Clause, with its obvious protection of the States from any Congressional interference with State religious establishments, can be made applicable against the States as well. Is there not something awkward about this particular transformation of the coverage of the First Amendment?

Now that the First Amendment *is* considered applicable to the States, it remains to be seen what the States, in collaboration with religious institutions, may continue to do against general corruption and in the service of common decency.

VII.

We have already noticed that the First Amendment may be inherently the most controversial article in the Bill of Rights. All of the other Amendments from the Second through the Eighth are much more technical and long-established, and hence less likely to be controversial, however troublesome particular applications may be from time to time.

That many rights seemed obvious enough to Eighteenth-Century Americans is evident from the way they were taken for granted in the Privileges and Immunities Clause of the Constitution of 1787. Also, various rights seemed ascertainable enough to be capable of being referred to as they are in the Ninth Amendment. The First Amendment, on the other hand, may seem somewhat less traditional in its implications.

The Religion and Speech concerns of the First Amendment reinforce each other in critical respects. Both depend on, and encourage, that personal responsibility and choice which we associate with effective self-government. The provisions of this Amendment

preference to others." *Reprinted in Anastaplo, Making the Bill of Rights, supra* note 3, at 360.

are, in the spirit that pervades them, distinctively American. The freedom of speech and of the press that the First Amendment affirms permits the American people to discuss fully and assess deeply all of the other rights to which they are said to be entitled. That freedom also permits repeated examination of what rights the American people should have and how they should be exercised, with even the Constitution always subject to reconsideration and amendment. The constitutional Amendment that protects Americans in their devotion to the sacred also insures that no public policy will ever be regarded as so sacred in this Country that it cannot be subjected to the most searching inquiry.

6. AMENDMENTS II, III, AND IV

I.

We have noticed that most of the restrictions of the Bill of Rights were directed in the first instance against Congress. This intention was indicated by the original plan of placing almost all of the proposed amendments in that part of the Constitution, Article I, Section 9, which collects many of the restrictions upon Congress. The overall concern evident in the Constitution is that there be a rule of law. This is reflected in the dominance of the legislature in the constitutional system, which makes it even more important that Congress be held in check. Care is taken as to both how Congress is constituted and how legislation is enacted. The prohibitions of ex post facto laws and bills of attainder in Section 9 of Article I are designed to insure that Congress act only through properly-developed legislation. The guarantee of the writ of habeas corpus, also affirmed in Section 9 of Article I, protects to some degree against the rule of law being cavalierly set aside.

The first three proposed amendments to the Constitution, two of which were not ratified by the State legislatures, placed direct limitations upon Congress. Limitations, in effect, upon Congress may be seen in most of the other Amendments as well. But some of them apply more to the President than to Congress, and these are our principal concern in this Lecture.

The array of twelve proposed Amendments, prepared in the First Congress in 1789, is often regarded as rather haphazard in organization, a proposition that we have already questioned. By noticing further the rationale of that arrangement, we might be better able to interpret those Amendments. We cannot rely here simply on what the Courts have said in interpreting these Amendments, however much we may be obliged to conform to what the

Courts do say from time to time. The courts, in adjusting to circumstances, do not always read the texts with the care that they deserve.

It can be said that the Bill of Rights Amendments are organized according to their primary "target": the first three of the twelve proposed amendments (including Amendment I) address primarily Congress, the next three (Amendments II-IV) address primarily the President, the next four (Amendments V-VIII) address primarily the Courts, and the last two (Amendments IX-X) affirm general principles. The arrangement of the twelve proposed amendments of 1789 can be described in still another way: the sequence is determined by the order in which government and citizens come together, running through the stages of association between citizens and their government. We move from citizens shaping and directing the Congress, to the citizen (or, more generally, the person) being subjected to a series of governmental actions.

The shaping and directing of Congress culminates in the First Amendment protection of the freedom of speech and of the press required by citizens who are to inform, supply, and admonish Congress. The Second, Third, and Fourth Amendments deal with abuses apt to arise from the demands of Government on citizens—for military services, for the quartering of soldiers, and for evidence. Government, particularly the Executive, can be seen as trying to defend the Country through the activities restrained in these three Amendments. In Amendments V through VIII we can see a supervision of the stages of a trial, once evidence is assembled pursuant to the restraints laid down in the Fourth Amendment.

We now consider, in turn, the three Amendments in which the Executive, along with the Congress, is held in check, especially as the President tries to organize the defense of the Country. These are Amendments II, III, and IV.

II.

The Second Amendment provides: "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." The original intentions of this Amendment may be, in some ways, the most difficult for us to agree upon, so divided and ingenious are advocates on both sides of the controversy about gun control in this Country today.

An early source of the Second Amendment may be found in the Bill of Rights of 1689, where it is provided: "That the subjects

which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law." The vigorous case made by those who argue against extensive gun control is presented in the following account of the Second Amendment:

However controversial the meaning of the Second Amendment is today, it was clear enough to the generation of 1789. The amendment assured to the people "their private arms," said an article which received James Madison's approval and was the only analysis available to Congress when it voted. Subsequent contemporaneous analysis is epitomized by the first American commentary on the writings of William Blackstone. Where Blackstone described arms for personal defense as among the "absolute rights of individuals" at common law, his eighteenth-century American editor commented that this right had been constitutionalized by the Second Amendment. Early constitutional commentators, including Joseph Story, William Rawls, and Thomas M. Cooley, described the amendment in terms of a republican philosophical tradition stemming from Aristotle's observation that basic to tyrants is a "mistrust of the people, hence they deprive them of arms." Political theorists from Cicero to John Locke and Jean-Jacques Rousseau also held arms possession to be symbolic of personal freedom and vital to the virtuous, self-reliant citizenry (defending itself from encroachment by outlaws, tyrants, and foreign invaders alike) that they deemed indispensable to popular government.⁷⁰

Further on, this advocate argues:

In contrast to the original interpretation of the amendment as a personal right to arms is the twentieth-century view that it protects only the states' right to arm their own military forces, including their national guard units. . . .

The states' rights interpretation simply cannot be squared with the amendment's words: "right of the people." It is impossible to believe that the First Congress used "right of the people" in the First Amendment to describe an individual right (freedom of assembly), but sixteen words later in the Second Amendment to describe a right vested exclusively in the states. Moreover, "right of the people" is used again to refer to personal rights in the Fourth Amendment and the Ninth Amendment, and the Tenth Amendment expressly distinguishes "the people" from "the states."⁷¹

I notice, before suggesting a counter-argument, that it is far from

70. Don B. Kates, Jr., *Second Amendment*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra* note 4, at 1639.

71. *Id.* at 1639-40.

clear that “the Tenth Amendment expressly distinguishes ‘the people’ from ‘the states.’” In fact, there have been scholars who have insisted that *people* is not distinguished from *States* in the Tenth Amendment, but rather is virtually its equivalent.⁷² In any event, *people* there, and perhaps also when used with respect to the right of assembly in the First Amendment, seems to be an aggregate, not individuals, just as in the Declaration of Independence. And so also in the Second Amendment?

Some read the Second Amendment as protecting citizen-soldiers and the local militia against the depredations of the National Government, something which the State governments are supposed to resist. The militia is distinguished from the army, as may be seen in the Constitution of 1787.⁷³ Still, the militia too is subject to discipline, which is not something that most gun owners who make much of the Second Amendment today are amenable to, especially if wartime service seems imminent.

The Second Amendment proposal, when initially brought before the First Congress in much the form we now have it, had a conscientious-objection exemption appended to it. Egbert Benson argued against this exemption in the House of Representatives:

[He] moved to have the words “but no person religiously scrupulous shall be compelled to bear arms,” struck out. He would always leave it to the benevolence of the Legislature, for, modify it as you please, it will be impossible to express it in such a manner as to clear it from ambiguity. No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government. If this stands part of the constitution, it will be a question before the Judiciary on every regulation of the militia, whether it comports with the declaration or not. It is extremely injudicious to intermix matters of doubt with fundamentals.

I have no reason to believe but the Legislature will always possess humanity enough to indulge this class of citizens in a manner they are so desirous of; but they ought to be left to their discretion.⁷⁴

The way this issue was approached implies there was or could be a *duty* to bear arms, a duty that some might on occasion try to avoid by recourse, for example, to a conscientious-objector status. Does

72. See, e.g., 1 CROSSKEY, *supra* note 52, at 705.

73. See Letter from Joseph Hawley to Elbridge Gerry (Feb. 18, 1776), *reprinted in* 5 FOUNDERS' CONSTITUTION, *supra* note 64, at 216.

74. 1 ANNALS OF CONG. 752 (Joseph Gales ed., 1789). On conscientious objection to military service, see Anastaplo, *Church and State*, *supra* note 68, at 127-45.

not this approach tend to regard “the right to bear arms” more as a prerogative of the local community (or the people) acting collectively than as a personal privilege of gun-owners? Did the proposal of a conscientious-objector exemption here reflect an understanding of the guarantee as recognizing a power in the States to conscript members of the militia? To emphasize a personal right here, with little or no regard for the obligations and demands of the community in protecting itself, is something like putting the emphasis in the First Amendment upon the physical act of speaking without regard for the primary public-discourse aspect of the traditional right to “freedom of speech.”

It seems to have been understood from the earliest days in Anglo-American constitutional history that whatever right to bear arms there was, it could be regulated by the community. The English Bill of Rights of 1689 referred, as we have seen, to the possession of arms “as allowed by law.” The anti-gun-control advocate I have just quoted from drew on William Blackstone and William Rawle. But those authors took for granted the regulation of all arms (which are not limited to firearms). Blackstone, in describing the arms one may have, speaks of “such as are allowed by law.”⁷⁵ Rawle observed in the early Nineteenth Century, “A disorderly militia is disgraceful to itself, and dangerous not to the enemy, but to its own country. The duty of the state government is to adopt such regulations as will tend to make good soldiers with the least interruptions of the ordinary and useful occupations of civil life.”⁷⁶ Further on he added, “This right ought not, however, in any government, to be abused in the disturbance of the public peace.”⁷⁷ Advocates of gun control today have considerable “disturbance of the public peace” to point to as attributable to the remarkable proliferation of weapons among us. Even the advocate of the anti-gun-control position from whom I have quoted at length concludes his article with major concessions to the power of government to regulate the ownership and use of weapons:

Interpreting the Second Amendment as a guarantee of an individual right does not foreclose all gun controls. The ownership of firearms by minors, felons, and the mentally impaired—and the carrying of them outside the home by anyone—may be limited or banned. Moreover, the government may limit the types of arms that may be kept; there is no right, for example, to own

75. 1 BLACKSTONE, *supra* note 41, at *139.

76. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 125-26 (2d ed. 1829), *reprinted in* 5 FOUNDERS' CONSTITUTION, *supra* note 64, at 213.

77. RAWLE, *supra* note 76, at 5 *id.* 214.

artillery or automatic weapons, or the weapons of the footpad and gangster, such as sawed-off shotguns and blackjacks. Gun controls in the form of registration and licensing requirements are also permissible so long as the ordinary citizen's right to possess arms *for home protection* is respected.⁷⁸

This advocate, who minimizes the militia orientation in the Second Amendment in his emphasis upon home protection, has enlisted Joseph Story in support of his reading of the original meaning of the Second Amendment. But the critical passage on the subject in Justice Story's *Commentary* is decidedly different in spirit from what this advocate has said:

The importance of [the Second Amendment] will scarcely be doubted by any persons, who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. *How it is practicable to keep the people armed without some organization, it is difficult to see.* There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.⁷⁹

78. Kates, *supra* note 70, at 1640 (emphasis added). If the argument is put this way, do not the kind and the degree of gun control become (as they should be) political, not constitutional, questions?

79. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1890 (1833) (emphasis added), reprinted in 5 FOUNDERS' CONSTITUTION, *supra* note 64, at 214. One can see something of the old-fashioned militia in Israel today. On more than one occasion during the Summer of 1989, I felt quite safe in picking up hitchhiking men and women in uniform who were carrying submachine guns and other weapons.

Consider this suggestion, which provoked some angry letters to the editor: "Congress has the constitutional right to enact a Militia Act of 1992, to require every person who

It seems to me that what may properly be done about the control of the private ownership of arms in this Country is a political, not a constitutional, issue. If the advocates of virtually unlimited access to firearms should be obliged to regard this as a political issue, they can be depended on to muster all their forces with the greatest possible effect without running the risk of relying on dubious constitutional support.

III.

The Third Amendment exhibits, as does the Second Amendment, the concern of Eighteenth Century Americans about how the people are to be protected from the depredations of those whom they have to rely on to protect them: "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."

This guarantee had found expression in Section VI of the Petition of Right of 1628:

And whereas of late great companies of soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourn, against the laws and customs of this realm, and to the great grievance and vexation of the people.

A century and a half later, Americans expressed similar sentiments in the Declaration of Independence, with one of the grievances there turning around "quartering large bodies of armed troops among us." A decade earlier, Benjamin Franklin, while serving as one of the North American agents in London, had argued:

All that the [American] agents contend for is, that *the same protection of property and domestic security which prevails in England, should be preserved in America.* Let [the British government] first try the effects of quartering soldiers on butchers, bakers, or other private houses here [in England], and then transport the measure to America."⁸⁰

owns a gun or aspires to own one to 'enroll' in the militia. In plain 1990s English, if you want to own a gun, sign up with the National Guard." Robert A. Goldwin, *Gun Control is Constitutional*, WALL. ST. J., Dec. 12, 1991, at A15; see also ANASTAPLO, *AMERICAN MORALIST*, *supra* note 12, at 367-74; *Letters to the Editor*, WALL. ST. J., Jan. 14, 1992, at A15.

80. Benjamin Franklin, *THE GAZETEER AND NEW DAILY ADVERTISER*, (May 2, 1765), reprinted in *5 FOUNDERS' CONSTITUTION*, *supra* note 64, at 215 (emphasis added); see also Dennis J. Mahoney, *Third Amendment*, in *4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION*, *supra* note 4, at 1890.

An attempt was made in the First Congress, when the Bill of Rights proposals were debated, to eliminate the "time of war" exception to the prohibition upon the quartering of soldiers in the Third Amendment. The following proceedings in the House of Representatives on August 17, 1789 are illuminating:

The fourth clause of the fourth proposition was taken up as follows: "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."

Mr. Sumter hoped soldiers would never be quartered on the inhabitants, either in time of peace or war, without the consent of the owner. It was a burthen, and very oppressive, even in cases where the owner gave his consent; but where this was wanting, it would be a hardship indeed! Their property would lie at the mercy of men irritated by a refusal, and well disposed to destroy the peace of the family.

He moved to strike out all the words from the clause but "no soldier shall be quartered in any house without the consent of the owner."

Mr. Sherman observed that it was absolutely necessary that marching troops should have quarters, whether in time of peace or war, and that it ought not to be put in the power of an individual to obstruct the public service; if quarters were not to be obtained in public barracks, they must be procured elsewhere. In England, where they paid considerable attention to private rights, they billeted the troops upon the keepers of public houses, and upon private houses also, with the consent of the magistracy.

Mr. Sumter's motion being put, was lost by a majority of sixteen.⁸¹

It is salutary to be reminded, upon noticing Congress's refusal to remove the wartime exception in the Third Amendment, that there *are* community needs to be served in these matters. This protection of the public service against those individuals who would obstruct it is to be compared with the tendency of some today to deny the legitimate concerns of government with respect to the common defence, as may be seen in how the conscientious-objection cases have developed in this Country in recent decades.

I return to Justice Story for his discussion of the Third Amendment:

This provision speaks for itself. Its plain object is to secure the perfect enjoyment of that great right of the common law, that a

81. 1 ANNALS OF CONG. 752 (Joseph Gales ed., 1789).

man's house shall be his own castle, privileged against all civil and military intrusion. The billeting of soldiers in time of peace upon the people has been a common resort of arbitrary princes, and is full of inconvenience and peril. In the petition of right (3 Charles I.), it was declared by parliament to be a great grievance.⁸²

The reference here to a man's home as his castle leads us naturally into the Search and Seizure provision of the Fourth Amendment.

IV.

Before we consider the Fourth Amendment, however, we should notice the implications of the use of qualifications in some of the Amendments. For one thing, the presence of these qualifications points up their absence in other places, such as in the First Amendment, where Congress is forbidden to make any law respecting the establishment of religion, prohibiting the free exercise of religion, or abridging the freedom of speech, press, assembly, or petition. Thus, the First Amendment rights are unqualified, however much they depend on what such terms as *establishment of religion*, *free exercise of religion*, and *freedom of speech or of the press* mean.

In the Second, Third, and Fourth Amendments, unlike in the First Amendment, there are qualifications. In the Second Amendment, the right to bear arms is keyed to "the security of a free State" and is evidently related to the existence of a "well regulated Militia." In the Third Amendment, the quartering of soldiers in houses without the consent of owners may be resorted to by the government only in wartime. And, as we shall see, not all searches and seizures are forbidden by the Fourth Amendment.

These qualifications, as is true with other qualifications in the Constitution of 1787, are with a view to the common good. The character and requirements of the community, especially a republican community, affect the purpose as well as the extent of various rights. These Amendments assume not only personal interests and desires but also civic interests, keeping in view the contributions that only government can make, as well as the threats that governments do pose, to the happiness of citizens.

The modern approach to these matters makes much more of "doing one's own thing," as we noticed in Lecture No. 5 about how the freedom of speech and of the press absolutely protected by the First Amendment has been expanded to immunize practically

82. 3 STORY, *supra* note 79, § 1893, *reprinted in* 5 FOUNDERS' CONSTITUTION, *supra* note 64, at 218.

all "freedom of expression" from regulation. The muting of the original public-discourse aspect of the First Amendment is encouraged by the current eclipse of the assembly and petition elements in the First Amendment. This eclipse is in large part due to the scope and effectiveness of freedom of speech and of the press among us. An eloquent exercise of the right to petition may be seen in the Declaration of Independence, where a long list of grievances is recited, grievances which the Colonists had again and again called to the attention of their "British brethren." Even as the development of a free press has made the right of petition (whether for public or private grievances) less significant, the primary purpose of a free press has been lost sight of.

The emphasis upon freedom of expression is not limited to readings of the First Amendment, with the consequent relaxation of restraints on pornography, libel, and advertising. This approach is seen in still another dramatic form today in the way that virtually unlimited access to handguns is insisted upon in some quarters, even though we now have every year firearms deaths that mount up to two-thirds of the total American battle deaths of a decade of involvement in the Vietnam War.⁸³

Related to, and perhaps reinforcing the insistence upon, a general freedom of expression is the appetite we are developing for more and more privacy, which *is* intended to be served to a limited extent by such Amendments as the Third, Fourth, Fifth and Eighth, and perhaps somewhat by the right of petition provision in the First Amendment. The right to privacy about which we now hear so much seems to be the distinctively modern way of making a great deal of the ancient right of property. But property rights always have had built into them an awareness of the community which makes property itself possible. Privacy rights, on the other hand, tend to legitimize a radical separation from, if not even a repudiation of, the community, a repudiation in the name of what can be regarded as natural yearnings. All this leads to an intensification of individuality and hence a preoccupation with self-fulfill-

83. See WORLD ALMANAC 702, 940, 954 (1992); Erik Eckolm, *A Basic Issue: Whose Hands Should Guns Be Kept Out of?*, N.Y. TIMES, Apr. 3, 1992, at A1 ("[F]irearms deaths . . . totalled 35,000 in 1989, including 18,000 suicides, 15,000 homicides, 1,500 accidents and others unspecified."). We have even more fatalities on the highways each year, but many more people are involved in those activities—and, besides, the advantages of our massive motor traffic, despite its human costs, are generally recognized. Probably more lives are made possible, if not even saved, because of our highway traffic than are lost there.

ment and of a corresponding depreciation, or at least a neglect, of citizenship and a commonly-shared public sense of duty.

The movement toward more and more unfettered individuality and hence freedom of expression may be an inherent tendency of republics. There *is* something infectious (if not undisciplined) about liberty, not least because of the considerable pleasure we get from saying and doing whatever we please. But an enduring liberty depends on a stable community, which depends in turn on a disciplined and enlightened people, especially if that people is to remain self-governing. An appreciation of the care with which the Constitution of 1787 and its 1791 Amendments were crafted should help us respect the requirements and blessings of public order.

V.

The tension between a proper privacy and the needs of effective governance may be seen in the Fourth Amendment, which provides:

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.

Here, as elsewhere in the Bill of Rights, we see the affirmation of an old right that had been developed in England in response to even older abuses. One form these abuses took there, as well as in North America where they helped provoke the Revolution, was the use by the British government of general warrants (or general writs of assistance), especially in tax matters. The right set forth in the Fourth Amendment is a right refined in the United States, going beyond what the English (whose government still has access to general writs of assistance) had insisted upon.

The development of the right not to be subjected to unreasonable searches and seizures was dramatized in England by the controversy about the publication of an issue of the *North Briton* journal in 1763. Here is one scholar's account of the use of general warrants in that case and theretofore:

The general warrant did not confine its reach to a particular person, place, or object but allowed its bearer to arrest, search, and seize as his suspicions directed. In 1763, a typical warrant by the British secretaries of state commanded "diligent search" for the unidentified author, printer, and publisher of a satirical

journal, *The North Briton*, No. 45, and the seizure of their papers. At least five houses were consequently searched, forty-nine (mostly innocent) persons arrested, and thousands of books and papers confiscated. Resentment against such invasions ultimately generated an antidote in the Fourth Amendment and is crucial to its understanding.

General warrants and general searches without warrant had a lengthy pedigree. In 1662, a statute codified writs of assistance that allowed searching all suspected places for goods concealed in violation of the customs laws. Such writs had been used since at least 1621 and themselves absorbed the language of royal commissions that had for centuries authorized general searches without warrant. Similarly promiscuous searches had existed for numerous applications: the pursuit of felons, suppression of political and religious deviance, regulation of printing, medieval craft guides, naval and military impressment, counterfeiting, bankruptcy, excise and land taxes, vagrancy, game poaching, sumptuary behavior, and even the recovery of stolen personal items.⁸⁴

In 1763 an English judge recorded his outrage upon reviewing the evidence in one such case:

To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject. I thought that the 29th chapter of Magna Charta, *Nullus liber homo capiatur vel imprisonetur, &c. nec super eum ibimus, &c. nisi per legale iudicium parium suorum vel per legem terrae, &c.* which is pointed against arbitrary power, was violated.⁸⁵

I return to the scholar I had quoted in order to notice the American responses to these issues:

Although the right against unreasonable search and seizure has lengthy British roots, its cornerstone, the confinement of all searches, seizures, and arrests by warrant to the particular place, persons, and objects enumerated, derives from Massachusetts. A cluster of Massachusetts statutes and court decisions from 1756 to 1766, the third stage in a century-long process, uniformly restrained searches and arrests to the person or location designated in the warrant. Legislation in the 1780s extended this specificity to the objects of seizure. The Fourth Amendment is thus the marriage of an ancient British right and a new, colonial interpre-

84. William J. Cuddihy, *Fourth Amendment (Historical Origins)*, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra* note 4, at 761.

85. *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763), *reprinted in* 5 FOUNDERS' CONSTITUTION, *supra* note 64, at 230. *See supra* note 41.

tation that vastly extended its meaning.⁸⁶

We are also told that eight States inserted guarantees against general warrants in their constitutions of 1776-1784 and that four State Ratifying Conventions urged an amendment to the Constitution which would provide a corresponding restraint on searches by the new national government.

An elaborate predecessor to the Fourth Amendment may be found in the Massachusetts Constitution of 1780:

Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws.⁸⁷

It is instructive to reflect upon the repeated use of the term *unreasonable* in a series of Search and Seizure declarations. Courts are told that they must use their judgment in issuing warrants. This reflects the power and duty of the Courts to assess these and like matters. The power left here with the Courts is evident in an account of pre-Revolutionary proceedings in Massachusetts:

Writs of assistance came under attack in the American colonial courts. James Otis, a fiery young Massachusetts attorney, made a brilliant "higher law" assault on the writs in Paxton's Case (1761). Although Otis lost, most colonial courts refused to issue such writs when required to do so by the Townshend Act of 1767, and a series of pamphlets beginning with John Dickinson's *Farmer's Letters* joined in the assault.⁸⁸

What are trial judges to do when prosecutors submit evidence that has been improperly seized by officers of government?⁸⁹ One way of dealing with this problem is what we now know as the Exclusionary Rule, which forbids governmental use in court of any such evidence. This rule is a possible but not a necessary implication of a guarantee which is designed, in large part, to keep the

86. Cuddihy, *supra* note 84, at 763.

87. MASS. CONST. of 1780, pt. 1, art. 14, reprinted in 5 FOUNDERS' CONSTITUTION, *supra* note 64, at 237.

88. Cuddihy, *supra* note 84, at 762.

89. The discussion that follows is adapted from my *Constitutional Comment* for GERA-LIND KOLARIK & WAYNE KLATT, FREED TO KILL: THE TRUE STORY OF LARRY EYLER 418-21 (1992).

Executive in check. This Exclusionary Rule implication of the Fourth Amendment, developed by American judges, is rarely resorted to elsewhere. It is not, for example, the rule in other Common Law jurisdictions such as Great Britain and Canada, where official disciplinary proceedings and (it is said) damage suits by aggrieved persons are relied upon to keep the police in line.

What is the genesis of the American rule? It is considered unbecoming for governments to depend on evidence that is tainted. Judges sometimes say that the honor of the community requires that only lawful means be used to secure convictions. Even more is made of the need to discipline not only the police but also the community at large. Various rules are defended as serving the development and maintenance of a moral sense in the community. This is a way of teaching that human relations are not to be merely the result of the random play of forces.

Many older lawyers and judges believe that the Exclusionary Rule and other such rules have had, despite occasional obvious injustices in their application, a generally salutary effect upon the police. The police, they remember, were all too often a law to themselves before these judicial curbs were imposed upon them.

Even today some police are notorious for using supposed or minor traffic violations to stop, search, interrogate, and otherwise harass many people, especially members of minority groups, who are innocent of other offenses. Our automobiles have become so important to us that they are, in important respects, like the houses we have traditionally considered privileged places.

Law enforcement authorities frequently testify that a well-disciplined police force is not likely to be adversely affected by the Exclusionary Rule, once the rule is properly publicized. Surprisingly few indictments, except perhaps in "the war against drugs" where the volume of offenses encourages even more official shortcuts than hard-pressed police routinely resort to, are dismissed because of the Exclusionary Rule. It is hard to determine, however, how many prosecutions are *not* initiated because of the Exclusionary Rule. Still, it should be noticed that criminal law specialists generally believe that, contrary to a widespread public perception, the Exclusionary Rule has had relatively little adverse effect on the criminal justice system and no discernible effect on the crime rate or on the ability of law enforcement officers to control crime in this Country.

The Exclusionary Rule is a relatively minor offender among the various legal provisions that routinely deny courts access to the

truth and otherwise protect guilty (as well as innocent) people. Far more important are such traditional, or Fifth Amendment, immunities as the right against self-incrimination, the right of a defendant to remain silent when put on trial, the right one has not to testify against one's spouse in most situations, and the right of clients to speak in total confidence to their attorneys, all of which are reinforced by the presumption of innocence. Even more pervasive in liberating our everyday life is the law of private property, which leaves a wide scope for unsupervised activity.

Do we want our lives organized in any other way with respect to such matters? After all, the police are sometimes rather confident about who the criminals are that are at large in the community. What do we want done to the people thus suspected, when there is no solid evidence available with which to prosecute them? Should torture be routinely permitted when dealing with the more difficult suspects? More lie detector use? Universal surveillance, including systematic eavesdropping on telephone conversations? Official monitoring of all financial transactions, of travel activities, and even of social relations?

Although we are reluctant to go this far, we can still wonder what we *can* do to take proper care of ourselves.

VI.

The education of our people, which includes a sound grounding in morality, is vital here. The provision of such grounding is one of the principal duties and opportunities of State Governments in our constitutional system. How the States are to be guided and restrained by the Constitution in these and other matters remains controversial as it has been from the beginning of the Republic.

We have noticed that the history of the drafting of the Bill of Rights, however general the language of most of these Amendments may be, displays an intention to address only the National Government. The case of *Barron v. Baltimore*,⁹⁰ which elicited in 1833 a forceful Opinion of the Court by Chief Justice Marshall, is generally taken to dispose of attempts to make the Bill of Rights directly applicable to the States without benefit of any subsequent amendments.

There remains, however, the question of what Barron's lawyers believed was available to them because of the Bill of Rights in their suit challenging State action. Perhaps they were trying to draw

90. 32 U.S. (7 Pet.) 243 (1833).

upon the implications of the fact that the Bill of Rights should be seen primarily as confirming rights that had “always” belonged to the American people, rights that had been developed in large part by Common Law judges. We have noticed the repeated refusals of pre-Revolution Colonial judges in North America to issue the search warrants that British officers asked for.

That various critical rights of the American people did not depend on the Constitution of the United States is evident in a State court case of 1814. Consider how a Connecticut appellate judge spoke on that occasion of a Search and Seizure issue on review before him:

That this warrant was such as *no justice ought to have issued* will be admitted; for it is not only a warrant to search for stolen goods supposed to be concealed in a particular place, but it is a warrant to search all suspected places, stores, shops and barns in Wilton. Where those suspected places were in Wilton is not pointed out, or by whom suspected: so that all the dwelling-houses and out-houses within the town of Wilton were by this warrant made liable to search. The officer also was directed to search suspected persons, and arrest them. By whom they were suspected, whether by the justice, the officer, or complainant, is not mentioned; so that every citizen of the United States within the jurisdiction of the justice to try for theft, was liable to be arrested and carried before the justice for trial. The warrant was this: Search every house, store or barn within the town of Wilton, that is suspected of having certain bags concealed in it, said to be stolen, and all persons who are suspected of having stolen them. *This is a general search-warrant, which has always been determined to be illegal, not only in cases of searching for stolen goods, but in all other cases.*⁹¹

It is suggested by the materials I have been drawing on that whatever laws and rights bound all American governments before the Constitution was ratified should have continued to bind those governments after the Bill of Rights was ratified, except in those instances where the first eight Amendments modified the previous arrangement. This means that the general legal system, with its constitutional presuppositions about the privileges and immunities of Americans, should have continued to shape not only the National Government but the State Governments as well. This general legal system has had a pervasive influence on this Country, as have both the general English heritage evident in our language and

91. *Grumon v. Raymond*, 1 Conn. 40 (1814) (Reeve, C.J.), reprinted in 5 FOUNDERS' CONSTITUTION, *supra* note 64, at 240 (emphasis added).

a market economy geared to vast territories available to be exploited by everyone.

VII.

We have observed that most of the great rights recognized in the Bill of Rights of 1791 had been settled long before in the Common Law. The Common Law is taken for granted throughout our constitutional system, particularly in the assumed capacity of judges to distinguish between the reasonable and the unreasonable, between the just and the unjust and, hence, between the acceptable and the unacceptable.

Was not the United States Supreme Court, as the preeminent judicial body in this Country, assumed from the beginning to be at the apex of the Common Law pyramid? This assumption may have been at the root of the decision by the plaintiff in *Barron v. Baltimore* to take his case to the United States Supreme Court.⁹² May not the reliance by that plaintiff on the Bill of Rights, which the Court ruled was not applicable to the States, have been little more than a convenient way of invoking traditional Common Law guarantees that every government in the United States is bound to respect?

Courts of the United States (now generally known as Federal Courts) are required to conduct their own proceedings in accordance with directives laid down in the Constitution and its Amendments and in acts of Congress. These directives include provisions respecting jurisdiction and processes. How far may the courts go in regulating the activities of other branches of the National Government?

Take, for example, the directive to the National Courts by the Fourth Amendment that they not permit unreasonable searches and seizures. Perhaps they are entitled if not even obliged, in the spirit of this directive, not to admit any evidence that has been improperly gathered. May they go even further, however, and order non-judicial officers of the National Government not to make *any other use* of material that is considered so tainted by the mode of gathering that it should never be used in court? Is not this a variation upon the issue of judicial review that I have discussed in my Commentary on the Constitution of 1787? This issue, as well as the issue about the extent and effect of the Bill of Rights, should be further clarified by the investigation in my next Lecture of those

92. For an instructive discussion of *Barron v. Baltimore*, see 2 CROSSKEY, *supra* note 52, at 1056-82.

Amendments (V-VIII) that are very much concerned with how judicial proceedings should be conducted, if not by all judges in this Country, at least by those who are both privileged and obliged in their routine judicial capacity to take their bearings by the Constitution of 1787 and its Amendments.

7. AMENDMENTS V, VI, VII, AND VIII

I.

Of the three branches of the governments in the United States, the judiciary is the least affected by the Constitution of 1787, even though the National Government under the Articles of Confederation had no permanent judiciary of its own. The legislatures and executives of both the National and the State governments were much more affected by the new constitutional order after 1789 than were the judges in this Country. Judges would continue doing what judges had been doing for centuries in English-speaking communities: they would continue to interpret statutes, including constitutional provisions, and to apply and develop the Common Law.

Article III, the Judicial Article of the Constitution, permits Congress both to provide for the Supreme Court that is created by the Constitution and to establish a system of inferior courts. But the Constitution, unlike what it does in the Legislative and Executive Articles, assumes in the Judicial Article that things will continue much as they had long been in judicial proceedings, with the Common Law vital to the entire system of jurisprudence. It is also assumed that legislatures will continue to provide guidance for the courts both with respect to the processes they employ and with respect to the substantive law they apply, supplementing what the Constitution itself supplies. It is important to notice here that courts cannot establish on their own the extent of their jurisdiction and powers. That must be left to the Constitution and to statutes made pursuant to the Constitution. In short, courts should not be expected to legislate.⁹³

To say that the American judiciary was least affected by the Constitution of 1787 is to recognize that the principal activities of English-speaking judges should not be affected by political or perhaps even constitutional realignments. Where the judicial head of the community is to be found and what its jurisdiction includes is a political decision, but not how that court does what it does. Simi-

93. See ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 133-34, 139.

larly, the decision of how many inferior courts there should be from time to time and what they are to do is a political decision, but not *how* they are to do whatever they are assigned to do.

The system of government provided by the Constitution of 1787 could have operated indefinitely with no United States ("Federal") courts inferior to the Supreme Court. State courts can be, and often still are, used to do what the Federal judges do in administering the laws of the United States. It is left to Congress to decide what inferior courts the Country needs. The constitutional system would not work properly, however, if State executives and State legislatures were depended on to do much of what the President and the Congress do. That was attempted, with unsatisfactory consequences, in the Articles of Confederation.

All judges in the Country were expected, even before the Constitution, to apply the relevant National and State laws, including the Common Law, appropriate to the cases before them. There was no reason to believe that the activities of judges would change or that the Common Law would be different from what it had been before the Constitution was ratified. One reservation heard in the Federal Convention about reliance upon State judges should be noticed: many of them did *not* have life tenure, which kept them from being as independent of public opinion and of political considerations as the Framers believed that judges should be. The judges relied upon by the Constitution are expected to be fully, or truly, judges. This means, among other things, that they should not be subject to being routinely corrected by the people when they go astray. The cumbersome, and rarely-used, impeachment remedy is the only means of holding them personally responsible for what they do. This helps explain why the bulk of the provisions in the Bill of Rights (beginning with the Fifth, if not the Fourth, Amendment and running through the Eighth Amendment) have as perhaps their principal concern the restraining of judges.

Congress, it seems, was considered to pose far less of a threat to the rights of the people. Not only was Congress subject to elections every two years but it was also continuously exposed to the exercise by the people of their potent freedom of speech. The President, although subject to similar restraints, was considered more of a threat, especially because of his powers as Commander-in-Chief, powers that are therefore placed under tight control by the Constitution. Congressional control of the purse is critical here, a restraint that was circumvented with the Iran arms-Contra aid experiment. Judicial tyranny, on the other hand, is harder to ward

off in any particular case, especially if judges enjoy the independence they require in order to be effective. The dangers posed by judges may be seen in the elaborate precautions provided in the Judiciary Article with respect to the crime of treason, a crime that had been harshly dealt with and even extended by the English judges over the centuries.⁹⁴

Reinforcing the perennial popular concern about how judges might conduct themselves is the mystery in which judges tend to be clothed. Technicalities have to be so important in the law that citizens are easily intimidated when they try to figure out what the law provides. This may be seen in difficulties one may have trying to explain to laymen the nature of the Common Law or the intricacies of Article III of the Constitution.⁹⁵ Similar difficulties are encountered when one examines the provisions in the Bill of Rights that deal with the conduct of judicial proceedings, especially because those provisions obviously presuppose a well-developed system of law.⁹⁶

A well-developed, and indeed long-established, system of law should become apparent to us as we consider in turn the Amendments (the Fifth through the Eighth) that are primarily concerned with potential abuses in the course of judicial proceedings. All officers of government are reminded here, as in the Second, Third, and Fourth Amendments as well, of privileges and immunities that had long been claimed as part of the heritage of the English-speaking peoples.

II.

The Fourth Amendment, as we have seen, was directed to both the Executive and the Judiciary. All of the Amendments, we have noticed, also have Legislative conduct in view. But the Fifth, Sixth, Seventh, and Eighth Amendments seem particularly concerned with the Courts, taking us as they do through the judicial process.

The Fifth and Sixth Amendments deal extensively with criminal

94. See FARRAND, *supra* note 16, at 345-50; ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 146-47.

95. ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 124-25.

96. One can see again and again in Plato's *Laws*, even when a new city is being founded by the participants in that dialogue, that many complicated ways of doing things among the Greeks must be taken into account. I have twice used, with considerable success, the *Laws*, and particularly the excellent translation by Thomas L. Pangle, as the sole text in a law school jurisprudence course. PLATO, *LAWS* (Thomas L. Pangle trans., 1980).

proceedings, following upon the proper mode of securing evidence that is provided for in the Fourth Amendment. The text of the Fifth Amendment reads:

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 offence 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.

There are five elements set forth here. The first two specify who can be tried in a criminal proceeding. Action by a grand jury is a prerequisite (except for the trials of those in military service), but one can be tried only once for the same offence (that is, a second indictment will not be permitted or a retrial on the first indictment, once one is acquitted). Many technical questions have to be addressed, however, in any application of these two provisions.

For example, what is a grand jury, how does it work, and what form does its action have to take in order to provide the proper basis for a criminal trial? Both statutes and judicial determinations, stretching back to the days of Magna Carta and even before, have helped make the grand jury what it is. It is obvious that judges must be relied upon if we are to know what is called for on any particular occasion. The two dozen citizens assembled to determine whether any person should be subjected to a criminal trial stand in the way of prosecutors and judges who might be inclined to oppress their fellow citizens. The grand jury can also serve to make officials of government more vigilant and vigorous in prosecuting and punishing criminals (including those who betray the public trust) than they might otherwise be.

Even more difficult technical questions are raised in the application of the Double Jeopardy guarantee of the Fifth Amendment. Double jeopardy, we have been told, "is the most ancient procedural guarantee provided by the American Bill of Rights."⁹⁷ Even so, many difficult questions remain to be resolved, usually by Courts, such as when precisely "jeopardy attaches." Thus, we are told, although the Common Law recognized the pleas of former

97. Jay A. Sigler, *Double Jeopardy*, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra* note 4, at 576.

acquittal and former conviction, which would stand as bars to another trial on the same charge, the American law has taken a more expansive view of the right here: even a prior accusation without a verdict can sometimes result in a successful double-jeopardy plea. Complications extend to questions about whether the crime being charged is indeed the same as an earlier one that had been charged, especially when the same facts are the basis of the two charges, and about what the effects are of separate prosecutions for the same crime in State and Federal Courts.

Conscientious judges have to resolve these matters, and they must do so pretty much on a case-by-case basis. Legislatures cannot do much more than provide general rules, especially if the spirit of the constitutional prohibitions of bills of attainder is to be respected. It should be obvious that an independent judiciary is required here if popular passions and overly zealous prosecutors are to be held in check. It should also be obvious that judges should have at their command considerable instruction in how such matters have been dealt with by their predecessors. This instruction must promote an awareness of the considerations of fair play and social policy that generally guide judicial determinations.

Both the indictment and the double jeopardy requirements presuppose the rule of law, including respect for the various laws that govern how prosecutors and judges conduct themselves. However important technical requirements and learning have to be, the constitutionalist's understanding can help make it less likely that these privileges and immunities will be converted into snares and delusions.

III.

The remaining three elements in the Fifth Amendment describe the limitations placed upon government efforts to deprive a person of various things: (1) information he must provide about his activities, (2) his life, liberty, or property, and (3) private property desired for public use.

The first of these limitations is absolute: no person "shall be compelled in any criminal case to be a witness against himself." No doubt, the defendant often may be the one person who knows most about what really happened on a particular occasion, but the government may still have to make its case without his cooperation. Here, by the way, is one of many places in our Constitutional system where absolutes are relied upon.

There remain complicated questions to be resolved here also.

What constitutes "testimony against [oneself]"? Does it include the taking of blood and other bodily specimens? May incriminating testimony be compelled if comprehensive immunity from prosecution is provided? May one be compelled to testify against oneself in proceedings other than the criminal case in which one is a defendant? In addressing these and like questions, the purposes of any privilege against self-incrimination have to be taken into account. A considerable body of analysis takes account of the abuses that this privilege is intended to guard against and the respect for human dignity that it embodies. We can be reminded here of something said about the Search and Seizure Guarantee in the Fourth Amendment: "The law will not tempt a man to make a shipwreck of his conscience in order to disculpate himself."⁹⁸

The second of the Fifth Amendment limitations on deprivations is conditional: a person may be deprived of life, liberty, or property *with* due process of law. This Due Process Clause is generally said to hearken back to the famous provision in Magna Carta where adherence to the law of the land by the king was proclaimed. It has been reaffirmed many times since then, as in the third article of the Petition of Right of 1628:

[B]y the statute called The great charter of the liberties of England, it is declared and enacted, That no freeman may be taken or imprisoned, or be disseised of his freehold or liberties, or his free custom, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land.

Three centuries earlier, in 1354, an act of Parliament, in reaffirming Magna Carta, had changed *law of the land* to *due process of law*.⁹⁹ *Due process* became the preferred term in this Country once it was emphasized in the Fifth and Fourteenth Amendments. "Due process of law," it has been said, became "the most important and influential term in American constitutional law."¹⁰⁰ Part of that influence has been dubious, taking the form as it did of a reading of the Due Process Clause that permitted courts to invalidate legislation even though that legislation did *not* disregard or violate the judicial processes that the clause was originally intended to guide. The most notorious use of the Due Process Clause thus far has been in the *Dred Scott Case* of 1857, where it

98. *The King v. Dr. Purnell*, 96 Eng. Rep. 20 (K.B. 1748), *reprinted in* 5 FOUNDERS' CONSTITUTION, *supra* note 64, at 219.

99. Leonard W. Levy, *Due Process of Law*, *supra* note 4, at 589. These terms may not have been regarded as synonymous. Further, this is aside from the recourse there has been in the United States to that peculiar hybrid called "substantive due process."

100. *Id.* at 589, 591.

was held (in effect) that the Fifth Amendment kept Congress from trying to keep slavery out of the Territories of the United States, and this despite the significance of what had been done about slavery in the Northwest Ordinance.

Although *Dred Scott* was a misreading of the Due Process Clause (which we shall consider at greater length when we discuss the Fourteenth Amendment and *its* Due Process Clause in Lecture No. 12), it should be conceded that due process may be seen even in a system that permits slavery. Slavery probably tends to be ameliorated somewhat when there is a general respect for the law of the land, which means that even the institutions of slavery have to be provided for by law. This is not to deny, however, that the underlying assumptions about the inestimable importance of a person's right to "life, liberty [and] property" implicit in the Due Process Clause tend to call into question any system of slavery that is based merely on arbitrary racial differences.

Due process, or a respect for the law of the land in the ordering of judicial proceedings, is taken for granted throughout the Constitution of 1787, perhaps most dramatically in its reaffirmation of the venerable privilege of the writ of habeas corpus. We are again reminded that what we see in our constitutional documents testifies to a much more extensive system of legal institutions than is made explicit on the surface of these documents. Thus, the Due Process Clause leaves open for determination what processes may be due on various occasions, something that the legislature may have to help to determine from time to time.

The third of the Fifth Amendment limitations on deprivations is also conditional: a person may have his private property taken for public use if just compensation is paid to him. Here, too, it is evident, upon examination of the controversies that Courts deal with, that intricate questions have to be confronted. What is a "taking"? What is a "public use"? How is "just compensation" to be determined? For example, if legislation or other governmental activity effectively prohibits the use by an owner of his property, is that to be considered a taking? A variety of circumstances have elicited a variety of responses by the Courts. Generally, though, it is believed that the property in question has to be physically taken over or destroyed by the community for it to be regarded as a taking. In non-taking instances, however, the community may want on occasion to compensate owners whose continued use of property is made virtually impossible by something the community has done

(perhaps unexpectedly) in its own interest—but that need not be a Taking Clause problem.

By and large, the simpler, less sophisticated readings of these provisions should be preferred. It should be recalled that these provisions were evidently straightforward enough for the Congress that drafted the Bill of Rights; few of these provisions required explanations, so far as we can tell from the records that we happen to have. It is obvious from the available debates in Congress and in the Country at large that the Drafters of the Bill of Rights were dealing with provisions that had long been familiar to practitioners in Common Law courts.

IV.

The Sixth Amendment was the only one of the first ten Amendments that was intended, when first proposed, to replace a provision in the Constitution of 1787. One of the proposed amendments that was not ratified by the States (changing the ratio of representation in the House of Representatives) was also intended to replace a provision in the Constitution. But that replacement represented a change in a constitutional provision, whereas the Sixth Amendment was advanced as an amplification of what was already there. That is, trial by jury in criminal cases is assured in the Constitution of 1787: the provision in Article III of the Constitution is primarily concerned, however, with the effect of division of the Country into States. Otherwise, the Article III jury-trial clause is a reminder of what was generally recognized as the right to trial by jury in criminal cases.

The original jury-trial provision in the Constitution of 1787 reads:

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.

It is taken for granted that it is generally known what trial by jury is. What the elements are of a proper criminal trial also seem to be known, but some of them were nevertheless spelled out in the Sixth Amendment where it is provided:

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 defence.

The various elements of a trial were not only known, but long known. The elements collected here in the Sixth Amendment are familiar down to our time. What is now the status of the equally long-established elements not mentioned in the Sixth Amendment? Are some of them "saved" by the Due Process Clause of the Fifth Amendment? It is hardly likely that the Drafters of the Bill of Rights intended to repudiate all elements other than those mentioned, especially because there is nothing to indicate that the elements collected here are of a different calibre from the ones not mentioned. All of these elements result from a long historical development, however much various of them may be justified or cherished as somehow natural in their appeal. Certainly, it is natural that long-established rights, even if partly accidental in their origins or development, should be respected in a community.

It is almost certain, we have seen, that the elements of the criminal process set forth in the Fifth and Sixth Amendments would have been taken for granted by judges and lawyers in all American courts, even without the enactment of the Bill of Rights. Many of these elements, and others as well, have repeatedly been taken for granted, for two centuries, in legislation pertaining to the Courts of the United States. Even though the enumeration of some of the traditional elements may not have implicitly denied a constitutional status for other equally traditional elements that were not mentioned, that enumeration did tend to lead to their neglect: they have not been regarded as worthy of the highest constitutional respect. What, for example, is the constitutional status of such traditional elements of trial by jury as the size of a jury, the right of challenge to prospective members of a jury, and the requirement of unanimity for a jury verdict?

The Sixth Amendment, amplifying as it does a provision in Article III, shows us what could be done as well for many other provisions in the Constitution of 1787. What is the significance, if any, of amplification here but not elsewhere? Is the choice of what rights were to be thus spelled out in large part due to chance-driven "history"—and hence not to be understood to require the depreciation of the rights that did not happen to be mentioned in the Bill of Rights? We shall return to this question when we consider the Ninth Amendment in my next Lecture.

V.

We see in the Seventh Amendment, dealing with the right to trial by jury in civil cases, provision for a right that had been considered for inclusion in the Constitution by the Federal Convention and then rejected. As noted in Lecture No. 2, the Convention found itself stymied in its efforts to settle upon what the traditional right to a civil trial jury consisted of. A guarantee of this right was asked for on the last day of systematic review of the provisions of the constitution that was being prepared. But, it was argued in response, there was simply too much variation in practice from State to State to permit a statement of the right that would satisfy the Country at large. As one delegate put it, "The constitution of Juries is different in different States and the trial itself is *usual* in different cases in different States."¹⁰¹

Even so, the demand for a constitutional guarantee was heard again in the First Congress—and so we have the Seventh Amendment, which reads,

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.

We can see here how the drafters of the Bill of Rights finessed the problem that had troubled the Federal Convention. It is simply said that "the right to trial by jury shall be preserved," with nothing said about what that right consists of. The less said about that, it seems to have been thought, the better. This is in marked contrast to what is said in the Fifth and Sixth Amendments about the criminal process. Perhaps the judges were depended on to work out a nationwide understanding over the years about the proper conduct of civil cases. We must wonder whether this was also expected with respect to other rights that had begun to take somewhat different forms across the Country. The superintending role here of the United States Supreme Court might have been depended on as well.

The second half of the Seventh Amendment does spell out a feature of the right being preserved. The limitation there upon how a "fact tried by a jury" shall be dealt with on appeal was provided because of concerns that had been expressed about the implications of a provision in Article III, Section 2 of the Constitution of 1787:

101. 2 FARRAND, *supra* note 16, at 628 (Sept. 15, 1787) (Nathaniel Gorham of Massachusetts); see *supra* Lecture No. 2, § V.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a 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.

Thus, the Seventh Amendment reaffirms the decisive role of the jury in American jurisprudence.

We should notice as well that the Seventh Amendment explicitly refers, for the first time either in the Constitution or in the Bill of Rights, to the Common Law (and this it does twice). The way it is referred to here again reminds us that the Common Law, which regulates many commercial and other relations between persons in this Country, was taken for granted throughout the Constitution without having had to be mentioned explicitly.

Whatever diversities had begun to develop in the procedural aspects of the Common Law from State to State, it is evident in the Constitution of 1787 and its Bill of Rights that the substantive aspects of the Common Law could be considered uniform or at least were considered capable of being made uniform under the guidance of Congress and the Supreme Court. Again and again, the Framers, whether of the Constitution or of the Bill of Rights, proceeded as if a general understanding of constitutional matters and legal practices could be relied upon.

VI.

Amendment VIII provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This guarantee goes back, in virtually the same language, to the English Bill of Rights of 1689. It was repeated many times, as in the Virginia Declaration of Rights in 1776, before the draft of the Eighth Amendment was prepared by the First Congress in 1789.

Legislators as well as judges are addressed by this Amendment. We notice echoes here of the Fifth Amendment's Due Process Clause which attempts to protect "life, liberty [and] property." The concern about excessive bail, excessive fines, and cruel and unusual punishments deals, it seems, with liberty, property, and life in that order.

Contemporary opinions probably have to be drawn on, at any particular moment, to determine whether bail or fines are excessive and whether a punishment is cruel and unusual. Those opinions

may change from time to time. It should be obvious as well that bail, fines, and punishment should be tailored to the crime being dealt with. They may also have to be tailored to the circumstances of the person being dealt with. All this means that both the enduring standards of the community and the judgment and sense of humanity of lawyers, judges, and legislators must be drawn upon. The toughmindedness of Eighteenth-Century statesmen is suggested by Samuel Livermore's comment in the First Congress on the "cruel and unusual punishments" clause:

No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.¹⁰²

In recent decades considerable use has been made of the Eighth Amendment in efforts to get the death penalty declared unconstitutional by the courts. One obstacle for abolitionists here is that the Constitution and its Bill of Rights, like the Common Law before them, do take it for granted that capital punishment may be properly resorted to. The Fifth Amendment, for example, refers to capital crimes and anticipates (as does the Fourteenth Amendment) that a person may be lawfully deprived of his life. It is also obvious that Congress, from the beginning, provided for the death penalty in its statutes as did probably all Eighteenth-Century State legislatures.¹⁰³

Still, it is possible that radical changes in sensibilities or penology since 1789 have made capital punishment seem "cruel and unusual." Judges have to weigh contending arguments carefully if they are to adjudicate this matter in the spirit of the Eighth Amendment. Also relevant here is whether death sentences are distributed in such a way as to be either arbitrary or racially discriminatory, which would pose problems under the Fifth and Fourteenth Amendments.

These are certainly considerations that officers of government, as

102. 1 ANNALS OF CONG., 754 (Joseph Gales ed., 1789).

103. Compare JAMES WILSON, A CHARGE DELIVERED TO THE GRAND JURY (May 1791) (advocating use of the death penalty) with BENJAMIN RUSH, ON PUNISHING MURDER BY DEATH (1792) (questioning the ineffectiveness of harsh punishments), both reprinted in 5 FOUNDERS' CONSTITUTION, *supra* note 64, at 378-79.

well as the people at large, should take into account in weighing the use of the death penalty. Here, as elsewhere, it may be better to rely upon legislatures to lay down overall policy, however important judges may have originally been in developing many of the rights enshrined in the Bill of Rights. It may be especially important to rely upon politically-sensitive legislators in those instances where constitutional judgments should properly take account of changes in public opinion.

VII.

One massive impression left by the Bill of Rights provisions we have been surveying in this Lecture is that judges are relied upon to know well the constitutional heritage of the English-speaking peoples. Judges typically have the longest memories among the various officers of government in this Country. A judge keeps looking way back, much more than do Congress and the President who tend to be (and perhaps should be) much more responsive to the transient opinions of the Country at large.

Judges should be learned and skilled. The primary concern we have is that judges be competent in judicial matters, so much so that Judges (unlike Presidents and Members of Congress) need not be citizens of the United States. Judges are distinguished also by having life tenure and by not being liable to restraint at the polls, however much the Courts of the United States may be subject under the Constitution to regulation by Congress.

We can see, when we consider the many restraints placed upon the Courts in the Bill of Rights and elsewhere, that adherence to the Constitution depends on much more than judicial or any other official supervision. After all, what is it that makes judges, especially members of the Supreme Court, hew to the constitutional line, since there is no non-judicial body that routinely reviews what *they* do?

Perhaps the most important guide for officers of government is their, and ultimately the general, understanding of what the Constitution provides. How sound that guidance is depends on how well the Constitution is understood. One question here is as to what was originally expected to be the significance of the Bill of Rights for the States. The presuppositions and tenor of the Bill of Rights suggest that it was generally understood that the restraints placed upon the judiciary in the Constitution applied, even without the Bill of Rights, to the States, just as they applied to the Federal Judiciary prior to the Bill of Rights. For the most part, we have

seen, the Bill of Rights recognized rights that had been claimed and exercised by the American people well before Independence.

If judges were to continue to act as judges had long been acting, then State as well as Federal Judges could be expected to take their lead from the Bill of Rights, especially in how they conducted judicial proceedings. And if the reminders provided by Amendments Five through Eight were substantially those developed in the Common Law, a recognition of the United States Supreme Court as the paramount Common Law court in the United States suggests that that Court was expected, even before the Fourteenth Amendment, to supervise to some degree how State courts conducted themselves. This is still another way of saying that the Constitution, from the beginning, anticipated that American courts would continue acting as courts in the Common Law tradition had "always" acted.

A sense of fairness, consistent with precedents, general expectations, and the social, economic, and religious opinions and institutions of the Country, is relied upon in how the law is to be developed and applied. The reference to "*just* compensation" in the Fifth Amendment is one of many reminders in our constitutional documents of the moral standards taken for granted in all officers of government as well as in the people at large.

Fairness depends, as we have seen, on an awareness of and adaptation to circumstances as times change. We very much depend on competent judges to develop, especially for judicial proceedings, long-established privileges and immunities. Not all of these rights are referred to in the Bill of Rights, but enough are collected there to provide judges guidance as to what is expected of them in the way they administer justice.

8. AMENDMENTS IX, X, XI, AND XII

I.

We have seen, in our survey of the Bill of Rights, that its orderliness reflects the orderliness of the Constitution of 1787. We have also seen that most, if not all, of the amendments proposed in 1789 were easily understood both by the Congress that prepared them and by the State legislatures that ratified them.

We have seen as well that the Bill of Rights reaffirmed rights that had long been claimed by the American people and that had been routinely respected by their governments. It is likely that little if anything changed in the conduct of the Government of the

United States as a result of the ratification of the Bill of Rights in 1791. Since matters continued much as they had, there probably was little need to invoke the Bill of Rights before the Alien and Sedition Acts controversy in 1798.¹⁰⁴

One effect that the Bill of Rights may eventually have had was to obscure the traditional character of these rights. The more that came to be made of the Bill of Rights, the less evident it became that all, or virtually all, of the rights found there had "always" been applicable against all governments in English-speaking North America.

The reaffirmation of rights found in the first eight Amendments to the Constitution is carried further in the Ninth and Tenth Amendments, where the prerogatives of the people are recognized. These Amendments may not add anything to what is evident in the Constitution and in the first eight Amendments, or at least they do not add what some believe they add. The documents and other materials from which relevant information may be drawn about these matters have long been known to students of American constitutional developments. Also long known, but largely lost sight of these days, is how much is to be gathered from a sound assessment of the information that *has* been available for more than a century about our constitutional system.

We deal in turn now with the four Amendments that follow upon the first eight Amendments to the Constitution of 1787: the Ninth and Tenth Amendments and, thereafter, the two Amendments that immediately supplement the Bill of Rights.

II.

The Ninth Amendment provides, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." This Amendment was designed to address one argument made repeatedly during the Ratification Campaign by proponents of the Constitution to justify the absence of a Bill of Rights: it is risky to list some rights lest those not listed be implicitly negated. This argument was spoken to by James Madison on June 8, 1789 when he first submitted to the House of Representatives an array of proposed amendments to the Constitution:

It has been objected also against a bill of rights, that, by enumer-

104. Merrill D. Peterson, *Alien and Sedition Acts*, in 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra* note 4, at 43-44; see ANASTAPLO, THE CONSTITUTIONALIST, *supra* note 66, at 810.

ating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to [the Ninth Amendment].¹⁰⁵

The implications of silence are thereby dealt with.

We are again reminded by the retention of rights insisted upon here of what had long been the rights of the English-speaking peoples independent of particular constitutional documents. A comprehensive constitutional system seems to have been assumed by both the Congress that prepared and the State legislatures that ratified the Bill of Rights. Consider, again, the implications of the Privileges and Immunities Clause of Article IV of the Constitution, where it is provided, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." What was intended to be the effect of that Clause? Is it something like the Equal Protection Clause of the Fourteenth Amendment, obliging each State to treat everyone in that State alike with respect to certain rights, whether they be citizens of that State or of another State? Or does it recognize certain rights that should be available to American citizens everywhere, rights that are consistent with, if not required from each State by, the Republican Form of Government Guarantee (also in Article IV)? In either case, the Privileges and Immunities Clause testifies to the opinion that there are rights that are not enumerated in the Constitution.

It is hard to say, however, what precisely was intended to be included among the rights referred to either in the Privileges and Immunities Clause or in the Ninth Amendment—or whether anything precise, or fixed, was intended. One problem here is how Courts should act in protecting such rights. Certainly, the judiciary should not try to conduct itself as a third branch of the legislature: the judiciary does not have the popular base or the political leadership and restraints needed for legislation; nor can it provide the comprehensive guidance that legislation can provide in dealing with any particular matter. And yet a kind of legislation seems to be resorted to when courts exercise judicial review in developing substantive rights while policing the activities of legislatures.

105. 1 ANNALS OF CONG., 439 (Joseph Gales ed., 1789).

Fewer difficulties are encountered when the Courts develop, as well as apply, procedural rights of the kind found in Amendments Four or Five through Eight. Even so, did the listing of rights in the Bill of Rights tend to "freeze" them in a way that they would not otherwise have been? Or has the United States Supreme Court been able to develop new procedural rights by elaborating those expressly laid down in the Bill of Rights? Some elaboration may be seen by the Congress as well, along with what has been done in providing for various "entitlements," which may be, in effect, new economic rights.

Still, we must wonder what may be the other rights "retained by the people" that the Ninth Amendment contemplates. What, for example, is the status here of natural rights? The Framers did accept and build on the Common Law, which very much depends on a grasp of natural right or, at least, on the workings of an awareness of natural right. But the lessons of "history" may be as important as the guidance provided by nature, at least in what Courts are to do.¹⁰⁶ It should matter to judges and others who try to apply the Ninth Amendment what rights happened to emerge in the course of the centuries-old Anglo-American constitutional development.

Indications of those rights, and sometimes of the forms they have taken, may be found in the extensive lists of rights recommended by the State Ratifying Conventions in 1787-1788.¹⁰⁷ We have seen that the recommendations which called for cutting into the substantive powers of the new General Government were systematically rejected by the First Congress. Were there left unenumerated by the amendments proposed by Congress any other State recommendations with respect to rights similar to those that *were* acted upon by Congress?

It can be argued that, but for the institution of slavery which had to be accommodated in the late Eighteenth Century, an equal protection principle might have found even more expression than it

106. For example, although natural right may dictate that no one should be condemned without a fair trial, this does not by itself make trial by jury necessary or identify the indispensable elements of a proper trial by jury in a criminal case. Does the American emphasis on a written constitution tend to undermine reliance on an unwritten constitution which would be more sensitive to natural right?

For Justice Story's explanation of the "natural right" meaning of a maxim, see 3 STORY, *supra* note 79, § 1898, *reprinted in* 5 FOUNDERS' CONSTITUTION, *supra* note 64, at 400.

107. See THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 2d ed. 1836); see also ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 308 n.19.

did in the Constitution of 1787 and the Bill of Rights. Provision for, as well as any pervasive reliance upon, a rule of law has equal protection implications. But the equal protection principle had to await the post-Civil War Amendments for its full (natural?) expression, most obviously with respect to slavery.

One major concern expressed again and again by advocates of a bill of rights during the Ratification Campaign of 1787-1788 was that there should be limitations placed upon standing armies in time of peace.¹⁰⁸ But even so stout a "civil libertarian" as George Mason recognized "that an absolute prohibition of standing armies in time of peace might be unsafe." He attempted to have precautions taken with respect to the establishment and use of the militia.¹⁰⁹ A major precaution found in the Constitution that bears upon these matters is the two-year limitation placed in Article I on appropriations for the Army.

Perhaps it would be useful for us to study developments in Great Britain the past two centuries to see what rights have been further developed there by Common Law judges, especially as attempts have been made to apply the Common Law concerns with natural justice and the common good to changing circumstances. In the United States, on the other hand, the Common Law tends to be pushed aside these days, now that much more is made by lawyers, judges, and legal scholars of the will of the sovereign and much less of reasoning from first principles.

It should be particularly instructive to consider what has been done with the right of privacy by British Common Law judges, independent of legislative guidance. Elements of a general respect for privacy may be found in various parts of the Constitution and the Bill of Rights, such as in the respect accorded to the right of property. But it is difficult to recognize a general or comprehensive right to privacy without calling into question many of the seemingly legitimate powers of government. The right to privacy, if it is to be practicable, probably does depend on extensive legislative guidance, not only *ad hoc* judicial determinations. It is instructive to notice just how much the prescriptions laid down by the Supreme Court in the 1973 Abortion Cases¹¹⁰ resemble legisla-

108. For a discussion of standing armies limitations during the Ratification Campaign, see THE COMPLETE ANTI-FEDERALIST 94-95 (Herbert J. Storing & Murray Dry eds., 1981); 1 ST. GEORGE TUCKER, BLACKSTONE, *supra* note 41, at 300-01, *reprinted in* 5 FOUNDERS' CONSTITUTION, *supra* note 64, at 218.

109. 2 FARRAND, *supra* note 16, at 616-17 (Sept. 14, 1787).

110. *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973). Much the same can be said about the Executive Order invalidated in the *Steel Seizure Case*—

tion. However dubious much of what the Court has said about abortion may be thus far, a woman's right to *choose* whether she will resort to an abortion may eventually turn out to be among us a right that must be taken seriously, especially considering how deeply more and more women are evidently coming to feel about the subject (including many who would not themselves want an abortion). On the other hand, the limitations of deference to any extensive right to privacy have been recognized across the centuries, as may be seen, for example, in Plato's *Laws*:

For there are many little things, not visible to everyone, that take place in private and in the home, which, because of each person's pain, pleasure, and desire, go against the advice of the lawgiver, and would easily make the dispensations of the citizen diverse and dissimilar.¹¹¹

This is related to the question of what the powers and duty of the community are with respect to the moral life of its citizens.

Whatever else the Ninth Amendment does, it recognizes and in effect ratifies a considerable constitutional history. A comprehensive constitutional system seems to be acknowledged, including (as we shall see) the perhaps most significant of the people's prerogatives "saved" by the Ninth Amendment: the right of revolution.

III.

The Tenth Amendment provides, "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 Amendment says, in effect, that the Constitution means what it says. To suggest that the Tenth Amendment may be redundant is not a welcome message to those conventional States' Rights partisans who make so much of it.

Proposals were received by the First Congress from several States for some such affirmation as may be seen in the Tenth Amendment. What understanding of the constitutional system is reflected in those proposals? The Ninth Amendment, we have seen, addressed the implications of silence with respect to various rights of the people. The States' Rights proponents of *something* like what we now know as the Tenth Amendment also addressed the implications of silence. We have seen that these proponents attempted to have the Government of the United States limited to

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). See ANASTAPLO, THE CONSTITUTION OF 1787, *supra* note 2, at 114, 316 n.77.

111. PLATO, LAWS 788A-B; see *supra* note 96.

those powers that were *expressly* delegated to it by the Constitution. This would have severely restricted, among other things, the scope of the Necessary and Proper Clause.

We have observed that several attempts were made, in the course of drafting the Bill of Rights in the First Congress, to have the proposed amendment read, "The powers not *expressly* delegated to the United States" The Federalists controlled the First Congress, however, just as delegates of like mind had controlled the Constitutional Convention. They did not intend to dilute in any way the powers that had been developed for the General Government by the Convention. It is not surprising, therefore, that Congress repeatedly refused to put in *expressly* or its equivalent, however much some interpreters of the Tenth Amendment (including all too many Justices of the United States Supreme Court) have since tried to do. Instead, the Tenth Amendment recognizes that the Government of the United States does have the powers it has—that is, the powers provided for it in the Constitution of 1787. After it became evident to States' Rightists that they could not, either in the First Congress or thereafter, amend a Constitution that soon came to be generally venerated, they directed their efforts to curtailment of the powers of Congress by trying to shape the way key provisions of the Constitution were read, particularly the Commerce Clause.

Perhaps the only powers that the Tenth Amendment denies to the General Government are those that may have been created, by implication, by various of the restrictions placed upon that government in the Bill of Rights. Some of those who tried to head off a Bill of Rights in 1787-1789 had argued for a very narrow reading of the grants of powers to Congress.¹¹² They had argued that there was no need for the declaration of many of the rights requested because the General Government did not have the power to do various of the things that those rights sought to prevent being done. The more successful the proponents of a bill of rights were in placing prohibitions upon the General Government, however, the more they seemed to expand the powers of that government by implication. The Tenth Amendment may provide some restraint here upon the powers implied by specific restraints.

The Tenth Amendment, like the Ninth Amendment, confirms an extensive and generally understood constitutional system. These two Amendments recognize that silence should not be taken

112. See, e.g., C.C. Pinckney, Speech in South Carolina House of Representatives (Jan. 18, 1788), reprinted in 3 FARRAND, *supra* note 16, at 256-57.

as permitting a limitation either upon the rights of the American people or upon the powers of its General Government.¹¹³

Lest it be suspected that the interpretation I have offered here is idiosyncratic, I call to the stand Justice Story for an extended passage on the Tenth Amendment from his 1833 *Commentary*:

This amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities, if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE, as a part of their residuary sovereignty. When this amendment was before congress, a proposition was moved, to insert the word "expressly" before "delegated," so as to read "the powers not expressly delegated to the United States by the constitution," &c. On that occasion it was remarked [replied], that it is impossible to confine a government to the exercise of express powers. There must necessarily be admitted powers by implication, unless the constitution descended to the most minute details. It is a general principle, that all corporate bodies possess all powers incident to a corporate capacity, without being absolutely expressed. The motion was accordingly negated. Indeed, one of the great defects of the confederation was, (as we have already seen,) that it contained a clause, prohibiting the exercise of any power, jurisdiction, or right, not *expressly delegated*. The consequence was, that congress were crippled at every step of their progress; and were often compelled by the very necessities of the times to usurp powers, which they did not constitutionally possess; and thus, in effect, to break down all the great barriers against tyranny and oppression.

It is plain, therefore, that it could not have been the intention of the framers of this amendment to give it effect, as an abridgment of any of the powers granted under the constitution, whether they are express or implied, direct or incidental. Its sole design is to exclude any interpretation, by which other powers should be assumed beyond those, which are granted. All that are granted in the original instrument, whether express or implied, whether direct or incidental, are left in their original state. All powers not delegated, (not all powers not *expressly* delegated,) and not prohibited, are reserved. The attempts, then, which have been made from time to time, to force upon this language an abridging, or restrictive influence, are utterly unfounded in any just rules of interpreting the words, or the sense of the instru-

113. On the Tenth Amendment, see 1 CROSSKEY, *supra* note 52, at 675-708.

ment. Stripped of the ingenious disguises, in which they are clothed, they are neither more nor less, than attempts to foist into the text the word "expressly;" to qualify, what is general, and obscure, what is clear, and defined. They made the sense of the passage bend to the wishes and prejudices of the interpreter; and employ criticism to support a theory, and not to guide it. One should suppose, if the history of the human mind did not furnish abundant proof to the contrary, that no reasonable man would contend for an interpretation founded neither in the letter, nor in the spirit of an instrument. Where is controversy to end, if we desert both the letter and the spirit? What is to become of constitutions of government, if they are to rest, not upon the plain import of their words, but upon conjectural enlargements and restrictions, to suit the temporary passions and interests of the day? Let us never forget, that our constitutions of government are solemn instruments, addressed to the common sense of the people and designed to fix, and perpetuate their rights and their liberties. They are not to be frittered away to please the demagogues of the day. They are not to be violated to gratify the ambition of political leaders. They are to speak in the same voice now, and forever. They are of no man's private interpretation. They are ordained by the will of the people; and can be changed only by the sovereign command of the people.¹¹⁴

IV.

I have argued that the powers of the Government of the United States are kept in check by the Ninth Amendment, insofar as those powers are checked by the rights of the people recognized there. I have also argued that the powers of the Government of the United States are recognized for what they are in the Tenth Amendment. In both cases, the overall authority of the people is affirmed.

One consequence of the Ninth and Tenth Amendments is the affirmation of the principle that it is We the People, not the States, who have made the Constitution. What these Amendments did was, in this respect, not what their proponents wanted but perhaps just the opposite. The States are shown by the Tenth Amendment to be subordinated to the will of the same people that the United States is; the States are shown not to exist independently either of the People or of their National Constitution. The Ninth Amendment, insofar as it explicitly recognizes rights that exist independently of the Constitution, may have subordinated the States even

114. 3 STORY, *supra* note 79, §§ 1900-01, *reprinted in* 5 FOUNDERS' CONSTITUTION, *supra* note 64, at 406-07.

more to the general constitutional system than the Constitution of 1787 had done.

The people, we see from the Ninth and Tenth Amendments, retain rights independent of all governments in the United States. We also see that the people have delegated the powers that governments possess, both nationally and locally, reserving to themselves what they have willed. Thus, the Ninth and Tenth Amendments gave the American people an opportunity to say again about the constitutional dispensation found in the Constitution of the United States, "We ourselves did it—and we really mean it!" It is evident from the Tenth Amendment that the People of the United States may determine the powers of and limitations upon the States, no matter what the people of any particular State may prefer.

The key right and power of such a self-governing people, implicitly recognized by the Ninth and Tenth Amendments, can be said to be the right of revolution, properly understood. Abraham Lincoln, in speeches made during his first few months as President, conceded the right of revolution, the very right that was being invoked by various Southern States at the time in justifying their attempted secession from the Union. But the right of revolution, if it is to be properly invoked, requires a just cause; it is not merely a case of might making right. Of course, both sides to a controversy may consider their respective causes just, even though both sides may also recognize that only one of them can be correct. The American Colonies had not allowed differences of opinion with Great Britain, as to what was just, to lead them to believe that they were not entitled to rebel. The importance of giving reasons in such circumstances should be evident. The Declaration of Independence, with its appeal to "a candid World," recognizes that there is an argument to be made. Arguments *help* all parties to do the right thing in such circumstances, however incapable one side or the other (or both) may be, for the time being, in working out or accepting the best argument.

The Declaration of Independence suggests what has to be known and shown before recourse to the right of revolution is justified, at least in modern circumstances. Natural right, or a sense of what is by nature right, has to be used in assessing grievances and the particular situation, including the history and expectations of a people. An informed grasp of both principles and facts is vital to a proper determination of what is called for.

The great right of revolution is not mentioned in the Bill of Rights. Certainly, it is not a justiciable right. Nor does its validity

depend on any government's recognition of it. The *legal* form that the right of revolution has taken from time to time in Anglo-American history is the repudiation of any requirement of non-resistance that governments have attempted to impose upon citizens. Or, put it in our terms today, the advocacy of the availability of the right of revolution is itself protected by the First Amendment. At the very least, the right of revolution acknowledges that there are standards, rooted both in nature and in the known political experience and constitutional history of a civilized people, that may be resorted to in assessing the claims and the deeds of governments. The authority of the people to make such assessments is recognized not only by the Ninth and Tenth Amendments, but also by the Preamble and Articles V and VII of the Constitution, and even by the First Amendment which protects the right and power (if not even the duty) of the people to examine and discuss what their governments are saying and doing.

V.

We have now reviewed the ten articles in the Bill of Rights. There were, we recall, originally twelve proposed articles in the Bill of Rights prepared by the First Congress. The first and second proposed articles, we also recall, were not ratified by the States.

In order to complete our survey of the Amendments of the Constitutional Period, we now consider the Eleventh and Twelfth Amendments. These Amendments, ratified in 1798 and 1804, respectively, can be said to have been in the spirit of the original Constitution, as were the Amendments found in the Bill of Rights. That the period from 1776 to 1804 was a separate stage in our constitutional development is indicated by the fact that no further amendments were made to the Constitution for two-thirds of a century thereafter, the longest period in the history of the United States without a constitutional amendment.

The Eleventh Amendment provides, "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." We can see here, as in the Twelfth Amendment, how specific changes to the Constitution can be made: there is here no general statement of a principle or right, but merely a modification of an existing arrangement.

The immediate cause of that modification was the decision that had been rendered in 1793 by the United States Supreme Court in

Chisholm v. Georgia.¹¹⁵ Whatever the original intentions of the Framers, Article III of the Constitution was interpreted by the Supreme Court to permit the kind of suits now forbidden by the Eleventh Amendment.¹¹⁶

If the conventional interpretation of Article III is correct, Congress could, by amending the Judiciary Act of 1789, have legislated the remedy provided by the Eleventh Amendment. Did the Third Congress want to make sure, by resorting to an amendment instead of a statute, that no future Congress restored this jurisdiction to the Courts of the United States? Or did Congress believe that a constitutionally-granted judicial jurisdiction was beyond complete legislative removal? That is, did Congress then believe, contrary to the conventional interpretation today, that all of the jurisdiction of the Courts of the United States has to be recognized and provided for in one way or another by Congress? If so, the Eleventh Amendment may be one of the few Amendments, if not the only Amendment, that gave the States something that they had not had under the Constitution of 1787.

The Eleventh Amendment, like the *Chisholm* case that it nullified, implies that the Courts of the United States may use the Common Law in appropriate cases. Thus, the Common Law may have to be used to settle some of the suits between States that are still within the jurisdiction of the United States Supreme Court. If the Courts of the United States are to use the Common Law in appropriate cases, must not Congress have available to it a power that the Common Law always recognized, the power of some legislature to supervise and, if need be, to correct or redirect what its courts do with the Common Law?

We find in *Hollingsworth v. Virginia* an early recognition of the effect of the Eleventh Amendment:

The Court, on the day succeeding the argument, delivered a unanimous opinion, that the [Eleventh] amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens of subjects of any foreign state.¹¹⁷

Whether a State could be sued in its own courts by "the citizens of another state, or by citizens of subjects of any foreign state," de-

115. 2 U.S. (2 Dall.) 419 (1793).

116. *Id.* Notice the use of *construed* in the Thirteenth Amendment: Congress may have been suggesting that it was interpreting, perhaps even properly interpreting, the Constitution, rather than truly amending it.

117. 3 U.S. (3 Dall.) 378 (1798).

pended on what the constitution and laws of that State provided. And that is how matters stood until the Fourteenth Amendment, which of course has made a State much more vulnerable to suits in Federal Courts by citizens of other States as well as to suits by its own citizens.

VI.

The critical provision of the page-long Twelfth Amendment of 1804 reads: "The Electors shall meet in their respective states, and vote by ballot for President and Vice-President . . . they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President" This, like the Eleventh Amendment, is a follow up to the Bill of Rights. The Twelfth Amendment responds to the Presidential election fiasco of 1800-1801.

The problem of providing for the President is returned to again and again in constitutional Amendments. Americans have never been sure they have it quite right. Further changes are contemplated in some quarters today, such as the direct election of the President. But this (I have suggested in my Commentary on the Constitution of 1787) could have unfortunate consequences, and not only because it would tend to make it even harder for Congress to exercise the control over the President that both the President and the Country need. In addition, the States would tend to be depreciated in their political influence as States by such a development.

The obvious need for the Twelfth Amendment, or for Congressional legislation to the same effect, arose because of the emergence of nationwide, or at least multistate, political parties in the United States. This meant, among other things, that two candidates could end up with enough votes to be President, because the 1787 constitutional arrangement did not distinguish Presidential and Vice-Presidential choices in the original balloting on each occasion. The Twelfth Amendment not only removed this embarrassment but also made it virtually impossible to elect a President of one party and a Vice President of another party, which could be expected under the Constitution of 1787 and was indeed seen during the John Adams Administration, with Thomas Jefferson as Vice President.

One other effect of the Twelfth Amendment, or of the development of the political parties that helped lead to the Amendment, was that thereafter recourse to the House of Representatives for

the choice of a President would be rare.¹¹⁸ The original constitutional expectation had been that the House would have to settle most contests, with the original balloting in the States by the more or less independent electors usually serving only as a nominating stage.¹¹⁹

VII.

The first twelve Amendments are one-half of the Amendments we now have. Although twenty-six Amendments have been ratified, two of them (the Eighteenth and the Twenty-first) virtually cancel each other out.

The American people, once the first half (or One through Twelve) of the Amendments had been ratified, still had the Constitution of 1787 in its essentials. The first twelve Amendments pretty much adapted the old constitutional system of the English-speaking peoples to republican conditions in North America.

By the time the Twelfth Amendment was ratified, the United States Supreme Court had asserted *and exercised* a power to review acts of Congress for their constitutionality. Although the Court was not to exercise that power again for half a century, it did mean that a fundamental change may have been in prospect for the original constitutional arrangement, especially as the implications (both beneficent and threatening) of genuine self-government on a continental scale began to become apparent.

I have suggested that the first half of the Amendments we have, through the Twelfth, left the original constitutional arrangement essentially intact. The second half of our Amendments, from the Thirteenth through the Twenty-sixth, shows the effects of profound social and political developments to which the emerging political parties contributed. These developments were generated in large part by the equality principle of the Declaration of Independence, a principle that is taken for granted (although it had to be compromised) in the Constitution of 1787.

118. Since 1801, when Thomas Jefferson was elected President by the House of Representatives, John Quincy Adams is the only President to have been elected in the same manner. That was in 1825. The Hayes-Tilden contest in 1877, a much more complicated affair, was not (strictly speaking) resolved by the House of Representatives.

119. The emergence of political parties has also led to the virtual elimination of the Presidential electors in the States. (It may be time to get rid of them altogether.) A related change is the designation in the Twelfth Amendment of three, rather than five, as the number of candidates to be considered by the House of Representatives in the event that no candidate has a majority of Presidential electors. Party discipline makes it far less likely that there would be more than two or three serious Presidential candidates for the House to have to consider on any particular occasion.

To say that the equality principle has found vivid expression in our constitutional development is to recognize that the modern world has had its effect, not least in the influence among us both of the Declaration of Independence and of life under the Constitution following upon that Declaration and its Revolution.

9. EDUCATION IN THE NEW REPUBLIC

I.

Once the Constitution and its Bill of Rights were established, the American people could settle down to governing themselves. The education of that people and their leaders became critical to how competent such self-government would be. Instructive in any assessment of this education is an appreciation of what Americans in the early Nineteenth Century drew upon from antiquity besides considerable respect for the republican institutions of Rome. I observed, in a treatise on American constitutional law published two decades ago, that I myself drew for inspiration and guidance upon both the *Apology of Socrates* as recorded by Plato and the Declaration of Independence of which Thomas Jefferson was the initial author. I observed on that occasion,

The tension evident in this study may be inevitable for anyone who tries to "live with" both the *Apology of Socrates* and the Declaration of Independence—for anyone, that is, who finds himself drawn to two public declarations which are, despite their superficial compatibility, radically divergent in their presuppositions and implications. Thus, an attempt is made [in this study] to see American constitutional law and political thought from the perspective of our ancient teachers.¹²⁰

We should be reminded of how the ancients have come to be regarded by Americans by considering what Jefferson and his contemporaries had to say about Plato, perhaps the greatest of the philosophical writers of antiquity. Jefferson's approach to that author was evidently the typical American approach, so much so that Plato could soon be (if he was not already) reduced to insignificance in American political thought. By the time of Abraham Lincoln, for example, Plato is rarely referred to by public men.

Jefferson's own high standing in American political thought is generally recognized:

Thomas Jefferson is not the only spring of American political thought, but he is the primary one. All the principles of American political life, and all the tensions among those principles,

120. ANASTAPLO, THE CONSTITUTIONALIST, *supra* note 66, at 420.

show themselves in his works and words. He served in the Virginia House of Burgesses and House of Delegates and as governor of Virginia and was a delegate to the Continental Congress from 1775 to 1776 and again from 1783 to 1785. Appointed a member of a committee to which Congress assigned the task of drafting a statement declaring and justifying the separation of the American colonies from England, he was deferred to by his fellow committee members and thus emerged as the principal author of the Declaration of Independence. That Declaration, appealing before the opinions and judgment of all of mankind to principles of right embodied in nature, manifested the fundamentals upon which the United States rest and to which all modern liberal democracies look.¹²¹

Our point of departure for this discussion is the proposition that there may be seen in the dialogues of Plato and in the political careers of Jefferson and his contemporaries two forms of excellence. The "American" critique of Plato should help us to notice problems that we in this Country have always had in sensing the amplitude and depth of the more thoughtful ancients. We should, after surveying the Jeffersonian response to Plato, be better able to get into the minds of the men who not only developed the Constitution of 1787 and its first twelve Amendments, but also trained their successors.

II.

Our principal texts for this discussion are Thomas Jefferson's letter from Virginia of July 5, 1814 to John Adams in Massachusetts, and Adams's response of July 16, 1814.¹²² These letters are part of the famous correspondence between the two former Presidents that was revived and extended during the last decade and a half of their long lives. This intimate correspondence transcended the bitter political differences they had had at the turn of the century, which culminated in Jefferson's defeat of Adams in the presidential contest of 1800-1801. One cannot imagine any prominent American politicians today being either inclined or equipped to carry on a private correspondence with the learning, grace, and seriousness evident in these letters. For one thing, both Jefferson and Adams exhibit a relaxed familiarity with the ancients and what they called

121. THE POLITICAL THOUGHT OF AMERICAN STATESMEN 6 (Morton J. Frisch & Richard G. Stevens eds., 1973).

122. Unless otherwise indicated, all quotations in the text of Lecture No. 9 from the Jefferson-Adams correspondence are taken from their letters of July 5 and July 16, 1814. These two letters, which are set forth in Appendix A, are from THE ADAMS-JEFFERSON LETTERS 430-39 (Lester J. Cappon ed., 1971).

“classical reading,” so much so that their opinions about the matters they range over still invite respectful attention.

In 1814 Jefferson was seventy-one-years old, Adams was seventy-eight. Their correspondence, which had been renewed in 1812, continued into 1826. It was in that year, 1826, that these last two surviving signers of the Declaration of Independence died on July 4th, fifty years to the day after their signing of that founding instrument. Adams, although he had always been somewhat more old-fashioned than Jefferson, found himself agreeing with much that Jefferson said, especially about the ancients. Thus, we see in this exchange not simply the Jeffersonian reading of the ancients but, we might say, the reading as well of the better-educated American (that is, the modern) democrat.

Although old age was catching up with both men, who were by that time retired from active political life, they remained quite lively in their speculations. That age was indeed catching up with them may be seen in what Jefferson could say, and Adams could agree to, about how their bodies were wearing out. Mechanical analogies could be drawn upon in this July 1814 exchange and elsewhere, with machinery spoken of, reflecting perhaps a more or less materialistic approach to such matters. Such materialism is not without significance in any effort to understand why Jefferson and Adams think and talk as they do about the Platonic, if not even the ancient, understanding of things.

I will work primarily from the Jefferson letter of July 5, 1814. My account of it is divided into three related parts: (1) the political, if not world-wide, circumstances of the day, particularly as seen in the career of Napoleon Bonaparte and in the activities of England; (2) an extended critique of a Platonic dialogue; and (3) the educational circumstances of the day, particularly with a view to reforms in the schooling to be provided American youth.

III.

Jefferson, after commenting on visitors and on matters of health, turns to the depredations abroad of Napoleon Bonaparte and of England, who had been deadly opponents during the then-recent European wars. He characterizes the French leader as “the Attila of the age,” adding, “Bonaparte was a lion in the field only. In civil life a cold-blooded calculating unprincipled Usurper, without a virtue, no statesman, knowing nothing of commerce, political economy, or civil government, and supplying ignorance by bold presumption.” Jefferson, after “rejoic[ing], for the good of man-

kind, in the deliverance of Europe from the havoc which would never have ceased while Bonaparte should have lived in power," wonders how the United States should respond to triumphant England: "I see with anxiety the tyrant of the ocean remaining in vigor, and even participating in the merit of crushing his brother tyrant." English impressment of American sailors had offended Jefferson. He is now concerned about whether New England will stand up to English demands with respect to the fisheries that mean so much to Massachusetts. He hopes that Massachusetts will choose to fight for her rights—but he recognizes that New England, not Virginia or the South, should take the lead in the development of that policy.

Whatever the party and sectional differences in the United States concerning the War of 1812—it is partly for this reason that Jefferson proceeds with some delicacy here—Jefferson does seem to find a sympathetic audience in Adams.¹²³ Adams has reservations, but does not seem to be offended by, but rather endorses, what Jefferson says about Napoleon Bonaparte and England.

We are reminded by Jefferson's remarks about foreign policy that much of Jefferson's career and thought has a political context. He, like Adams, is a vigorously practical-minded man: the whole world is their domain and universal respect for liberty under law is their end. This is both good and bad. It is important that political necessities, and hence common sense and natural right, be recognized. But are there not risks in making too much of the practical?

An undue emphasis upon the practical may be seen in what has become of higher education in our own time. Consider, for example, the spectacular ceremony on October 3, 1991 on the campus of the University of Chicago, where a dozen honorary degrees were conferred in opening the University's year-long centennial celebration. In the awards much was made of research, of creating new knowledge, and of the usefulness of such knowledge. Very little, if anything, was said about studying the ancients. The usefulness of research is epitomized in our time by that dramatic harnessing of nuclear energy which was demonstrated for the first time on the campus of the University of Chicago on December 2, 1942. Is not too much talk heard these days of creating knowledge, and not enough of discovering it or, even better, of rediscovering what

123. See, e.g., Letter from Thomas Jefferson to Don Valentin de Foronda Coruna (Dec. 14, 1813), *reprinted in* 14 THE WRITINGS OF THOMAS JEFFERSON 32 (Andrew A. Lipscomb ed., 1905) [hereinafter JEFFERSON WRITINGS]; Letter from John Adams to Thomas Jefferson (Mar. 2, 1816), *reprinted in* 14 JEFFERSON WRITINGS *supra*, at 441.

thoughtful human beings have always known? Few if any of the accomplishments celebrated these days will be of much significance, except perhaps as transitions, to thoughtful observers a quarter-century (to say nothing of a century) hence.

Another way of putting this is to say that the prudence and eloquence of the Founding Period in this Country drew upon intellectual and spiritual capital that was not being replaced by the education and training of the decades that followed. Lincoln and his colleagues had, by the middle of the Nineteenth Century, "used up" much of what remained of that intellectual capital, except as it continued to be incorporated in the plays of Shakespeare. A failure to go back to our roots may be seen in what has become of both Biblical influences and classical education among us. This failure contributes to much that is shallow and shortsighted in our thought, however decent or, at times, self-sacrificing and even heroic we may be.

IV.

The virtual abandonment of classical education in this Country (and elsewhere) was anticipated by such criticism as that found in the Jefferson-Adams correspondence that we are sampling. These two patriots' condemnation of Plato was prompted by Jefferson's attempt to read the *Republic*, which we consider one of the more "accessible" of Plato's dialogues but which he found very difficult.

It was not for lack of trying on Jefferson's part. Much the same response to Plato is reported by Adams, who had once tried reading the dialogues in various translations, as well as consulting the Greek texts. We notice the importance of leisure for such efforts, which is not unrelated to the aristocratic presuppositions of much of classical thought. Such presuppositions may put off the democrat somewhat, even when he is not fully aware of their implications.

Jefferson reports that his attempt to read the *Republic* seriously "was the heaviest task-work I ever went through." It was anything but "amusement." Rather he complains about having had to wade through "the whimsies, the puerilities and unintelligible jargon of this work." The joy of reading Plato, to which many have testified across millennia, escaped both Jefferson and Adams.¹²⁴

What *is* it about Plato that offended Jefferson and Adams so

124. Similar criticism are made by them elsewhere. See, e.g., Letter from Thomas Jefferson to William Short (Oct. 31, 1819), reprinted in 15 JEFFERSON WRITINGS, *supra* note 123, at 219.

much? It is not only his obscurity—for there are things about Plato that are only too clear and can be dismissed by Jefferson as “puerilities.” One can be reminded here of the protests by another democratic politician—Calicles, in Athens, who is recorded in Plato’s *Gorgias* as complaining vigorously about the puerilities of Socrates. This suggests that there is, in how Plato approaches serious matters, something that is likely in its austere eroticism to arouse the suspicion, if not the enmity, of the partisans of democracy, if not of practical-minded men generally.

V.

It is the democrat in Jefferson who has a high opinion of certain Romans, especially Cicero. Here, as elsewhere, Jefferson expects Adams to agree with him for the most part. In fact, Adams says that Jefferson’s opinion about Plato “perfectly harmonize[s]” with his own. Adams reports that one of the few things he ever learned from Plato was that sneezing was a reliable cure for hiccoughs.¹²⁵

Jefferson can speak with respect elsewhere of the Roman Cato and of the Athenian Aristides.¹²⁶ These are virtuous men of action who are evidently considered republican in their sympathies. We are reminded again and again, upon reading the works of Jefferson and his American contemporaries, that Rome was in their eyes the other great republic before the United States. Jefferson’s republican sympathies are evident when he considers the great men of antiquity. We can see here how sensible the sturdy republican can be.

Jefferson knows that Cicero thought highly of Plato. He does not really consider, however, what the worthy Cicero could see in Plato: he may sense that there is a serious problem for him here, but he does not dwell upon it. We seem to have here one more instance of a modern failing: the ancients, including one’s great predecessors, need not be taken seriously. Predecessors are not given credit for intelligence, thoughtfulness, or sensitivity commensurate to our own.

Democrats do tend to believe that they are equal to all others. This principle of equality applies to the past as well as to contemporaries. So why should we defer to any authority of the past? Besides, does not the desire for independence promote liberation

125. See PLATO, SYMPOSIUM 185D-E. See generally LEO STRAUSS, SOCRATES AND ARISTOPHANES (1966).

126. Letter from Thomas Jefferson to William Canby (Sept. 18, 1813), reprinted in 13 JEFFERSON WRITINGS, *supra* note 123, at 377.

from the tyranny of the past?¹²⁷

Even so, Jefferson has the intellectual integrity *not* to assume that it was only Plato's style that accounted for Cicero's high praise of Plato.

VI.

Plato's style does dupe some readers, Jefferson believes. The "elegance of his diction" helps account for his reputation. A pleasing style *can* give the impression of wisdom.

Elsewhere Jefferson refers to Greek as "the most beautiful of all languages."¹²⁸ Whatever reservations Jefferson has about Plato, he can, as a great stylist himself, recognize in Plato the master of a language.

Emphasis is placed by Jefferson, in explaining Plato's reputation, on elements other than his thought: not only style, but also fashion and authority. Certainly, Plato's reputation is a massive fact that has to be accounted for.

VII.

The "dreams of Plato" are singled out by Jefferson for special condemnation. They are seen as fanciful, partaking, it seems, of Plato's questionable utopian projects.

Do not the dreams of Plato stand, somehow, in opposition to the American Dream? How are they to be distinguished? Is not much more made in the United States of the pursuit of happiness? Compare the classical emphasis upon happiness as something that is rooted in virtue. We are not likely to be comfortable in making much of a pursuit of virtue, especially if that pursuit should be guided by the community.

Jefferson, as perhaps the leading apostle among us of a dedication to the pursuit of happiness, is substantially modernist in his temperament. Elsewhere he identifies himself as an Epicurean, which is not to be seen (he insists) as simply hedonism or as an invitation to indolence.¹²⁹ But is it not difficult to avoid a decline into mere hedonism if much *is* made of the pursuit of happiness?¹³⁰

127. See ANASTAPLO, *AMERICAN MORALIST*, *supra* note 12, at 350.

128. Letter from Thomas Jefferson to Nathaniel F. Moore (Sept. 22, 1818), *reprinted in* 15 *JEFFERSON WRITINGS*, *supra* note 123, at 218.

129. Letter from Thomas Jefferson to William Short (Oct. 31, 1819), *reprinted in* 15 *JEFFERSON WRITINGS*, *supra* note 123, at 219, 222-24.

130. On the Declaration of Independence and the pursuit of happiness, see George Anastaplo, *The Constitution at Two Hundred: Explorations*, 22 *TEX. TECH L. REV.* 968,

Certainly, hedonism is more likely to become dominant among a people if individualism is encouraged, something that is likely whenever happiness and its pursuit, rather than virtue, become of consuming interest.¹³¹

VIII.

If Plato is tested by reason, Jefferson argues, he is exposed as full of "sophisms, futilities, and incomprehensibilities." Although he is reputed to be "a great Philosopher," rigorous thinkers can see that he is hardly competent in his arguments.

987 (1991) [hereinafter Anastaplo, *Constitution at Two Hundred*]. Consider also Laurence Berns's remarks at a St. John's College memorial service in 1979 for Simon Kaplan:

[H]e was concerned for the land of his refuge. What troubled him has been called many things: pseudo-sophistication, permissiveness, moral decline. His own way of putting it was much simpler: barbarism and, most dangerous of all for America, hedonism. What seemed to bother him was the fact that when people cease to observe and impose limits on themselves, it becomes natural to think more about having limits imposed by others from above.

ANASTAPLO, AMERICAN MORALIST, *supra* note 12, at 294. Consider also *Haggai* 1:2-4:

Thus says the Lord of hosts: "this people say the time has not yet come to rebuild the house of the Lord." Then the word of the Lord came to Haggai the prophet, "Is it time for you yourselves to dwell in your paneled houses, while this house [of the Lord] lies in ruin?"

Id. Compare 1 *Chronicles* 17:1. See also *supra* note 30.

131. For Adams's assessment of the thinkers of his own time, see Letter from John Adams to Thomas Jefferson (Dec. 25, 1813), reprinted in 15 JEFFERSON WRITINGS, *supra* note 123, at 33-34. Consider also the following instructive account of the American Heritage:

The political thought guiding the Founding, and hence the subsequent constitutional order, emerges out of and in some sense rebels against three complex, diverse, and competing traditions of Western political and republican theorizing. These traditions are: (1) the theocratic tradition rooted in the Bible, (2) the classical republican tradition rooted in classical political philosophy, and (3) the liberal tradition which originated out of a vast rebellion against the first two in a radically new rationalism and politics spearheaded by Machiavelli, Bacon, and Descartes. I would characterize the political thought of the American Founding as occupying, if you will, a tension-ridden field of spiritual and intellectual energy emanating from these three poles of radiation. The attaining of a clear view of the distinctive and even warring forces emanating from these three poles is fundamental to any accurate conceptualization of the Founders' enterprise. Only by such a careful delineation can we begin to understand what truly defines, and in some degree distinguishes, the thought of the various American Founders. That definition consists partly in the Founders' firm agreement with one pole—that of rebellious modern rationalism—over and against the two older poles, but also partly in various Founders' sometimes elegant, but oftentimes awkward, attempts to create new syntheses of ancient and modern rationalist and religious political thinking.

Thomas L. Pangle, *The Classical Challenge to the American Heritage*, 66 CHI. KENT L. REV. 145, 148 (1990); see also ANASTAPLO, AMERICAN MORALIST, *supra* note 12, at xiv-xvi.

Jefferson does not have much doubt about this. His only difficulty here is that others do not see as well what is obvious enough to him—and what should have long been obvious to everyone who stopped to examine what Plato does. It remains a mystery to him that Plato *can* continue to be regarded by some as “a great Philosopher.” In much of what Jefferson says, he seems to be backed up by Adams, who had been “disappointed” in his own study of Plato.

IX.

Central to Jefferson’s critique of Plato is that he is “one of the race of genuine Sophists.” Is this the peculiarly democratic response to serious philosophic thought? Is this what comes from being too practical in one’s orientation?

For the Athenian democracy, we should remember, Socrates too was essentially a sophist. That is, he appeared to the Athenians to be much like the itinerant sophists. In Aristophanes’ *Clouds*, Socrates is portrayed as prepared to train a student to become a sophist—and, as such, to be able to avoid having to abide by the laws of the city.¹³² Jefferson does speak much more kindly of Socrates than he did of Plato—but he did not have to endure Socrates as a critic of *his* city and of American politicians and their democratic policies.

What is there about sophistry which is particularly troublesome for Jefferson? Sophists pose political challenges, in that they are essentially outsiders, even when they are native-born. They undermine the political integrity of the community, caring more for their own advancement than for the concerns of patriotic citizens. Since they care more for success and self-interest than for truth or the common good, they resort to sophisms—that is, to arguments that are deeply flawed, however persuasive they may appear and however appealing they may be in some circumstances. In a sense, Jefferson reasons back *to* the sophistry of Plato by finding him guilty of using arguments that are far less conclusive than they are made out to be in the dialogue.

Jefferson does not seem to be sure whether Plato himself is aware of how flawed his arguments are. But perhaps that is the way sophists are: there must be some arguments that they depend on, to guide them in their way of life, of which they themselves do not appreciate the limitations.

132. See ARISTOPHANES, *CLOUDS*, line 1111. A particularly helpful translation of this classic is ARISTOPHANES, *CLOUDS* (Thomas C. West & Grace Starry West trans., 1984).

X.

Jefferson turns, partly in order to account for the Platonic reputation, to a critique of the serious practical consequences of the general respect for Plato in the Western World. The allure of his style aside, Plato survives in large part (according to Jefferson) because his "whimsies" are incorporated "into the body of artificial Christianity." That is, institutional Christianity finds Plato useful.¹³³ He does not say here how the Christians who used Plato understood him.

Jefferson's suspicion of, if not hostility toward, institutionalized religion remained with him to the very end. (It may be found in abundance as well among intellectuals down to our day.) Thus Jefferson, in the last fortnight of his life, could still inveigh against "monkish ignorance and superstition,"¹³⁴ reflecting thereby the influence upon him of the Enlightenment. He long believed that a priest-ridden people could not maintain free government.¹³⁵ He does see organized religion as an aid to good government, challenging the supposition of some legal scholars of his day that "Christianity is part and parcel of the laws of England."¹³⁶ That Plato had been used, and continued to be used, the way he was by organized religion is, for Jefferson, a major defect in him.

Adams does not fully share Jefferson's suspicion of organized religion, however much he too complains as well of the difficulty if not even the uselessness of the Platonic texts. Although he too is prepared to grant the supposed evils of the Roman Catholic Church that Jefferson referred to, he warns against the dangers of atheism.¹³⁷ Certainly, Adams is more respectful than Jefferson about the contribution that Christianity can make to an effective

133. Jefferson repeats this in an 1819 letter. Letter from Thomas Jefferson to William Short (Oct. 31, 1819), *reprinted in* 15 JEFFERSON WRITINGS, *supra* note 123, at 219-20.

134. Letter from Thomas Jefferson to Roger C. Weightman (June 24, 1826), *reprinted in* 16 JEFFERSON WRITINGS, *supra* 123, at 182. Jefferson also observed in this letter, as he anticipated the celebration of the fiftieth anniversary of the greatest Fourth of July:

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.

Id.

135. Letter from Thomas Jefferson to Baron Alexander Von Humboldt (Dec. 6, 1813), *reprinted in* 14 JEFFERSON WRITINGS, *supra* note 123, at 21.

136. *See, e.g.*, Letter from Thomas Jefferson to John Adams (Jan. 24, 1814), *reprinted in* 14 JEFFERSON WRITINGS, *supra* note 123, at 74.

137. Letter from John Adams to Thomas Jefferson (Mar. 2, 1816), *reprinted in* 14 JEFFERSON WRITINGS, *supra* note 123, at 439.

political order.¹³⁸ Has the intellectuals' disavowal of religion, in the Jeffersonian mode, meant in effect that the more vital religious movements in this Country tend more and more to be dominated by passions that are not subject to the discipline of educated men and women?

XI.

"The Christian priesthood," Jefferson argues, "saw, in the mysticisms of Plato, materials with which they might build up an artificial system which might, from its indistinctness, admit everlasting controversy, give employment for their order, and introduce it to profit, power and pre-eminence." Thus, he believes, the obscurities of Plato could provide Churchmen what the simple truths of Jesus could not. What makes Plato particularly attractive to Churchmen is that "nonsense can never be explained."¹³⁹ This means that there is no end to the mystery and speculation that self-serving religionists can exploit.

Jefferson, when he deals with such matters, emphasizes the motives of enterprising men, in such a way as to rely primarily (if not exclusively) on the low instead of the high. Whatever elevation that there may be in Plato's work cannot be seen for what it is. This is related to what we have become accustomed to in modern materialist accounts of personalities and events.

XII.

Jefferson singles out, among what he considers the many dubious arguments of Plato, the case that is made in the dialogues for the immortality of the soul. He seems to be concerned about this in our 1814 letter not so much for what is said about immortality in the *Republic* (which is relatively little) but rather for the use made of this teaching (from other dialogues) by Christianity.¹⁴⁰

We have observed that Jefferson does not investigate what the intelligent and sober-minded Cicero saw in Plato. Nor does he consider, we now notice, what Plato himself believed in his own arguments about such matters as the immortality of the individual

138. Letter from Thomas Jefferson to General Henry Dearborn (June 14, 1809), reprinted in 14 JEFFERSON WRITINGS, *supra* note 123, at 292.

139. Letter from Thomas Jefferson to Governor Wilson C. Nicholas (Apr. 2, 1816), reprinted in 14 JEFFERSON WRITINGS, *supra* note 123, at 449.

140. One of Lincoln's few references to Plato is with respect to the immortality of the soul. See 3 ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN 357 (Roy P. Basler ed., 1953) [hereinafter COLLECTED WORKS OF LINCOLN]. Did Lincoln pick this up from Jefferson? See *infra* note 149.

soul. That is, Jefferson does not consider what it would mean if Plato himself recognized the limitations of various of the arguments that are made in the dialogues. This bears upon whether Jefferson or any of his contemporaries, with the possible exception of Montesquieu, Jean-Jacques Rousseau, and Edmund Burke, were really able to *read* the most serious writers of antiquity. This general disability comes down to our day, and not only among those interested primarily in politics.

Adams and Jefferson seem to be agreed that the thoughtful man should not be concerned about the immortality of the soul, certainly not if he has conducted himself justly. Nor, they are agreed, is total oblivion to be feared.¹⁴¹ These responses by them to the prospect of death find considerable support in the Platonic dialogues, properly understood.

XIII.

Jefferson was thankful that Plato's influence on religion was not matched by a like influence on social policy. He considers Plato's opinions about popular government to be politically harmful, and it was fortunate (he believed) that they did not catch on. Particularly to be regretted is the emphasis in the *Republic* on the community of wives and children.

Adams is, here as elsewhere, somewhat more astute than Jefferson about the subtleties of ancient thought. Although he could be as critical as Jefferson of any endorsement by Plato of a community of wives and children, he could also see this measure, however questionable, as a way of preventing the perpetuation of family privilege. We, on the other hand, must wonder why neither Adams nor Jefferson took issue with Plato on the matters that democrats are usually troubled by, such as the reliance in the *Republic* upon a philosopher-king, the severe criticisms of democracy, the resort to various tyrannical-seeming institutions (including censorship), and the recourse to noble lies.¹⁴²

141. See Letter from John Adams to Thomas Jefferson (Dec. 25, 1813), reprinted in 14 JEFFERSON WRITINGS, *supra* note 123, at 34; see also Letter from John Adams to Thomas Jefferson (Sept. 14, 1813), reprinted in 13 JEFFERSON WRITINGS, *supra* note 123, at 372-73 (on whether the universe is infinite and eternal); Letter from John Adams to Thomas Jefferson (Mar. 2, 1816), reprinted in 14 *id.* at 440 ("Why then should we abhor the word God, and fall in love with Fate? We know there exists energy and intellect enough to produce such a world as this, which is a sublime and beautiful one, and a very benevolent one. . .").

142. Jefferson acknowledged that he occasionally tailored what he had to say to his audience. Letter from Thomas Jefferson to William Canby (Sept. 18, 1813), reprinted in

Perhaps critical to the Adams-Jefferson dismissal of Plato and classical political philosophy is the accepted opinion of their own time that, as Adams puts it, "Government has never been much studied by mankind, but their attention has been drawn to it in the latter part of the last century, and the beginning of this, more than at any former period"—and this has led to many recent experiments in constitution-making that have been unprecedented and instructive. In these matters, it seems, the ancients have become obsolete, or so Americans could easily believe in the early Nineteenth Century once their new national constitution had taken hold.

XIV.

It is vital to Jefferson's approach here that Plato be understood as having misrepresented Socrates. Socrates, he says, "had reason indeed to complain of the misrepresentations of Plato; for in truth his dialogues are libels on Socrates." Xenophon, for example, is regarded by Jefferson as a more reliable guide to the historical Socrates.¹⁴³

The distortions practiced by Plato with respect to Socrates were according to Jefferson, far exceeded by the distortions practiced by organized religion with respect to Jesus. This is a theme that he takes up again and again in his correspondence. Jefferson, as a rationalist, can catalogue elsewhere what he considers the questionable doctrines engrafted upon the account discernible in the Bible of the historical Jesus.¹⁴⁴

Jefferson is convinced that the discerning reader can detect beneath the surface of documents such as dialogues and gospels the simple, goodhearted men who had inspired those documents. Does this Jeffersonian conviction fail to appreciate how great, and complex, certain men truly are? This bears upon how difficult the

JEFFERSON WRITINGS, *supra* note 123, at 376; *see also infra* notes 148, 188. *See generally* LEO STRAUSS, PERSECUTION AND THE ART OF WRITING (1952).

143. Letter from Thomas Jefferson to William Short (Oct. 31, 1819), *reprinted in* 15 JEFFERSON WRITINGS, *supra* note 123, at 220; *see also* Pangle, *supra* note 131, at 147 ("Xenophon was probably the most widely read and cited classical political theorist at the time of the [American] Founding.").

144. The questionable Christian doctrines for Jefferson are "[t]he immaculate conception of Jesus, His deification, the creation of the world by Him, His miraculous powers, His resurrection and visible ascension, His corporeal presence in the Eucharist, the Trinity, original sin, atonement, regeneration, election, orders of Hierarchy, etc." Letter from Thomas Jefferson to William Short (Oct. 31, 1819), *reprinted in* 15 JEFFERSON WRITINGS, *supra* note 123, at 221 & n.1; Letter from Thomas Jefferson to Timothy Pickering (Feb. 27, 1821), 15 *id.* at 323-34.

reading of the greatest works of the mind can be. The subtlety and playfulness, and hence the true seriousness, of a Plato or a Socrates (or of Jesus?) are not apt to be noticed or given sufficient weight by the enlightened modern.

Is this a peculiarly democratic failing, reducing as many things as possible to a low, if not the lowest, common denominator?

XV.

Jefferson moves in his July 5, 1814 letter from a condemnation of Plato to a concern for the education of his day, especially because the young and others remain misled about Socrates, Jesus, and the like. Professional educators, he believes, have an interest in exaggerating the intricacies of Plato, and professional churchmen have an interest in keeping people in thrall.

Furthermore, he complains, the attitudes and activities of the young at this time (1814) leave much to be desired. They are hardly serious about education. In fact, he reports, they are not much inclined toward formal education at all; they want to be completely self-sufficient; they resist being disciplined by any authority. In a sense, it can be said, they are imitating Jefferson's own approach to the ancient teachers: they too intend to be independent.

Observations of this kind about education later found full expression for Jefferson in the founding of the University of Virginia. The emphasis there also tends to be utilitarian, albeit on a high level. For one thing, there seems to be little room in his curriculum for serious philosophy of the kind exhibited by Plato and Aristotle.

The arguments used by Jefferson to replace ancient book-learning (except for history, logic, and perhaps drama and poetry) with other, more modern, disciplines may have contributed to the already-developing American suspicion of book-learning as such, something that Mark Twain can have great fun with a half-century later. One sees again and again down to our day that humane letters are being squeezed out of curricula in this country, and this by people of good intentions (teachers, administrators, and students alike) who consider themselves quite practical.

All this may reflect the growing deference among us to individualism and an increasing alienation from community, whether the community be the political community of one's own time or the community of learned men and women across the centuries. One consequence of this is the widespread suspicion among us of any

effort to “legislate” morality—that is, of the effort by any community to insist upon the development and preservation of those opinions about right and wrong that the routine law-abidingness and dedication we do need depend on. Or, put another way, the Jeffersonian critique, for the sake of sound politics, of ancient philosophical thought may well have contributed to the subversion among us of serious political thought and hence of the political order itself.

XVI.

Jefferson, Adams, and their fellows were *political* men. They were moved more by the spirited element in the soul than by the erotic. Perhaps this contributed to their inability to read Plato properly. But their misreading can help us see Plato better—to see for him not only the importance of the erotic but also the secondary status (however important) of the political even in such a dialogue as the *Republic*. Our concern here has not been so much with the education of Jefferson and Adams, but with their influence and the influence of their generation upon the education of their successors. Jefferson’s personal reliance upon the classics is testified to by his repeated recourse to them in his old age, such as in this 1819 letter: “My business is to beguile the wearisomeness of declining life, as I endeavor to do by the delights of classical reading and of mathematical truths, and by the consolations of a sound philosophy, equally indifferent to hope and fear.”¹⁴⁵

We find in the American Founders political men who are distinguished by their dedication to the proposition that all men are created equal. This authoritative doctrine, which is at least in part attributable to Biblical influences, is grounded, to some extent, in nature. But does it not at the same time tend to ignore aspects of nature, and not only because of the widely-heralded conquest of nature that is looked to as a means of making all of us the beneficiaries of the resources available to be wrested from nature?¹⁴⁶ To the extent that nature seems, for Jefferson, more to be found in matter than in the ideas, Plato should be suspected by him, espe-

145. Letter from Thomas Jefferson to William Short (Oct. 31, 1819), *reprinted in* 15 JEFFERSON WRITINGS, *supra* note 123, at 221.

146. Jefferson’s admiration of Bacon and Newton is instructive here. *See, e.g.*, Letter from Thomas Jefferson to William Clark (Jan. 27, 1814), *reprinted in* 14 JEFFERSON WRITINGS, *supra* note 123, at 79. Jefferson, in his comments on Plato, seems to echo Isaac Newton in his PRINCIPIA, Book III, Rule III (1686): “We are certainly not to relinquish the evidence of experiments for the sake of dreams and vain fictions of our own devising . . .” On Jefferson’s thought, see EVA T.H. BRANN, PARADOXES OF EDUCATION IN A REPUBLIC 170 (1979). *See also* sources cited *supra* notes 121, 131.

cially since Plato's ideas are regarded by Jefferson to be undisciplined and subject to abuse by conniving men. Perhaps no single topic is in as much need of serious examination today by thoughtful students of politics as well as of philosophy as is the topic of the nature of nature.

A good place for Americans to begin such an inquiry is the Declaration of Independence. Not only should its "created equal" language be examined, but also the teaching there about inalienable rights. Vital to this inquiry should be a consideration of what the right of revolution implies about standards of right and wrong, of good and bad. These standards do not depend on what governments happen to demand from time to time. Nor, it should at once be added, do these standards look to chance personal preferences alone. In these matters Shakespeare continues to be instructive, bringing Biblical doctrines and classical thought together for us.

XVII.

Should one be drawn, as some of us *are* inclined to be, to both the *Apology of Socrates* and the Declaration of Independence? That question cannot be fully answered until one has examined both the Declaration and the *Apology* with the care that they invite and deserve. Does not the Declaration itself, for example, reflect more of ancient yearnings than Jefferson himself realized?

Jefferson recalls in 1825 that he had, upon drafting the Declaration, "intended [it] to be an expression of the American mind," drawing on the books of Aristotle, Cicero, Locke, and Sidney.¹⁴⁷ What, we may well wonder, *did* Jefferson get from Aristotle? And what, we may also wonder, did he consider the significance of the fact that Aristotle was Plato's greatest student, a student who always spoke with great respect about Plato even when he seemed to differ from him?

Jefferson's draft of the Declaration, we should remember, was reviewed carefully and altered considerably by the Continental Congress. Even Jefferson's original version had been written with the American people in view, much more so than his private letters (which are, we have noticed, tailored to his readers).¹⁴⁸ Recognition of Anglo-American constitutional history is also evident in the Declaration.

147. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), reprinted in 16 JEFFERSON WRITINGS, *supra* note 123, at 118-19.

148. See Letter from Thomas Jefferson to Timothy Pickering (Feb. 27, 1821), reprinted in 15 JEFFERSON WRITINGS, *supra* note 123, at 324; *supra* note 142.

Thus, it can again be said, the Declaration of Independence reflects an awareness among the American people of that which is by nature right. Old-fashioned notions about natural right, influenced perhaps by a sense of morality reaffirmed and refined by long-established religious influences, helped shape the Declaration of Independence in ways that Plato can perhaps help us notice. Lincoln, for one, could see in the Declaration's insistence upon equality the basis for an eventual repudiation of slavery in the name of justice. We may well wonder whether mid-Nineteenth Century Americans, better grounded in the ancient authors and less moved by religious passion, would have been able to deal more prudently than they did with the institutions of slavery and of radical individualism which seriously threatened constitutional government in the United States.¹⁴⁹

10. THE CONFEDERATE CONSTITUTION OF 1861

I.

The most massive attempt thus far to amend the Constitution of 1787 was made by the leaders of the Secessionist movement in 1860-1861.¹⁵⁰ Even so, the greatest tribute ever paid to the Constitution since the Founding Period may have been in 1861 by the framers of the Constitution of the Confederate States of America.

This 1861 tribute took two forms. First, there was the considerable reliance upon the 1787 Constitution in framing the Confederate Constitution. Ninety percent of the 1861 Constitution repeats, with much the same ordering and even numbering, what had been done in the Constitution of 1787 and in its Bill of Rights of 1791. The extensiveness of the 1861 imitation is illustrated by the provision for what we know as the District of Columbia:

The 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 one or more States [1787: "of particular States"] and the acceptance of Congress, become

149. Abraham Lincoln did not have ready access to the classics, except Euclid and perhaps Aesop and Plutarch. See, e.g., 4 COLLECTED WORKS OF LINCOLN, *supra* note 140, at 62. However, Lincoln did know the Bible, as well as Shakespeare. It was through Shakespeare that lessons from the classical world have had a profound effect on the English-speaking peoples. See Anastaplo, *Virtue of Prudence*, *supra* note 11, at 113-25.

150. There were eventually thirteen States that were said by some in those States to have seceded from the Union. See *Confederate States of America*, ENCYCLOPEDIA BRITANNICA 285 (14th ed. 1982). The seven States that had seceded by the time the Confederate Constitution was drafted in March 1861 were operating pursuant to a Provisional Constitution of February 8, 1861. *Id.*

the seat of the Government of the Confederate States [1787: "of the United States"]¹⁵¹

I find it intriguing that such a provision, with its specification of "ten miles square," should be regarded as precisely what was still needed three-quarters of a century after the Constitution was first written.

The considerable, even slavish, reliance in 1861 upon the 1787 Constitution is even more remarkable in light of the determination of the Confederate States to separate themselves from the government, if not from the way of life, called forth by the earlier Constitution. We come now to the second form that the 1861 tribute took, the pervasive effort by the Secessionists to frame the new Constitution so as to avoid the kind of central government against which they were rebelling. Is it not tacitly conceded, by the changes made in the 1787 Constitution, that without such modifications the new government might be empowered to act, or at least might well act, like the old government?

Light can be shed on our constitutional processes by noticing some of the shifts made in 1861 by the Confederates when they undertook to rewrite a constitution. There can be illuminated thereby both the Constitution of 1787 and the Amendments to it since the Civil War.

II.

The Confederate Constitution implicitly concedes the plausibility of the interpretation of the 1787 Constitution that had been advanced by such nationalists as George Washington, the young James Madison, Alexander Hamilton, John Marshall, Daniel Webster, Henry Clay, Abraham Lincoln, and perhaps the young John Calhoun. The 1861 Constitution provides, in effect, a commentary upon the United States Constitution, as well as a challenge to its principles.

Various matters that had been controversial during the preceding half-century were disposed of in the 1861 Constitution. It was evidently understood that it would not be enough to count on new, and more congenial, interpretations of the constitutional provisions that had been so troublesome. That was too risky—and besides, there would always be some who would find it in their interest to

151. CONFEDERATE CONST. OF 1861, art. I, § 8, cl. 17. All the quotations in the text of Lecture No. 10 are, unless otherwise indicated, to the Confederate Constitution of March 11, 1861. That Constitution, as published in 1979 for the University of Georgia Libraries by the Wormsloe Foundation, is set forth in Appendix B.

advance the old interpretations. For example, the 1861 Constitution provides that the President has the power to "remove at any time" civil officers he has appointed. Such a provision in the Constitution of 1787 would have strengthened the position of Andrew Johnson in 1868: those determined to impeach him would have had to look for other offenses to allege.

The Nationalists had made much since 1789 of those implied powers of Congress that some States' Rights people had sought to forestall in 1789 by trying to add "expressly" to the Tenth Amendment. It may seem somewhat surprising, therefore, that the Confederate framers did not say in their 1861 Constitution that Congress would have only the powers *expressly* delegated to it. But it must have been recognized that to do so would have made it difficult for the new Confederate government to do effectively the things *it* was supposed to do. The 1861 framers seem to have believed that it was better to spell out restrictions upon their Confederate government instead of eliminating its implied powers altogether. It would have been too unsettling, and crippling, otherwise.

Some restrictions upon the Confederate government take the form of two-thirds votes requirements for designated actions (especially with respect to certain revenue bills and certain appropriations). Other restrictions limit the powers of Congress to interfere with elections in the States.

III.

Various features in the 1861 Constitution reflect a radically different approach to the government of the Country from that found in the 1787 Constitution. This may be seen in the controversy during the first half of the Nineteenth Century over whether tariffs should be used to promote domestic manufactures. Such promotion is forbidden by the new Constitution, which provides that no "duties or taxes on importations from foreign nations [shall] be laid to promote or foster any branch of industry." Also forbidden is the allocation of federal funds for "any internal improvements intended to facilitate commerce." Even the Post Office must be self-supporting. This indicates how far the suspicion of commerce and the fear of subsidies for special interests went.

The critical role of the States is emphasized in the 1861 Constitution. This shift in emphasis may be seen at the very beginning, with the Preamble announcing that this new Constitution is the deed of "We, the people of the Confederate States, each State act-

ing in its sovereign and independent character” It is a Constitution which aims not at the “more perfect Union” sought in the 1787 Preamble, but at a “permanent federal government.” It is also a Constitution which is to be amended by the States, with the Congress having merely a ministerial part to play. Another change from the old way is what is done with the Ninth and Tenth Amendments: “the people” there referred to become “the people of the several States.” We are given to understand, again and again, that there is to be no recognition this time around of the people of the Country at large.

It is the States that matter, so much so that five out of the more than thirty American States in 1861 sufficed to form the new country—whereas nine out of the original thirteen had been required in 1787. (Only seven States had declared themselves seceded by the time the Confederate Constitution was drafted.) These States, unlike under the 1787 Constitution, are permitted to interfere somewhat with movements between States; they can emit bills of credit; they can combine (without Congressional approval, it seems) to improve the navigation any river which “divides or flows through two or more States.” Perhaps nothing indicates the enhanced status of the States under the 1861 Constitution more than the provision that “any judicial or other federal officer, resident and acting solely within the limits of any State, may be impeached by a vote of two-thirds of both branches of the Legislature [of that State].”

IV.

Intimately related to the enhanced status of the States under the Confederate Constitution is its heightened protection of slavery. If State sovereignty is attractive as a form of local government, one’s power over slaves may carry local government a significant step closer to home.

The Confederate constitutional protection for slavery includes limitations placed upon emancipation. In addition, the new Congress is kept from interfering with the introduction of slavery into the territories of the Confederacy. The 1861 Constitution thus makes explicit provision for the position that had been taken four years earlier by the United States Supreme Court in the controversial *Dred Scott Case*.¹⁵² One must wonder whether, by the 1861 Constitution’s doing this, it is implicitly conceded that the ruling in

152. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); see *supra* note 1.

Dred Scott was not required either by the Constitution of 1787 or by its Fifth Amendment.

On the other hand, the 1861 Constitution not only prohibits the international slave trade but even makes it a duty of Congress to suppress it. Is this done in such a way as to suggest that the power of suppression is *not* to be considered as an aspect of a broad commerce power, thereby protecting the domestic (including the "interstate") slave trade from any Congressional regulation?

The institution of slavery is recognized by the Confederate Constitution as vital to the new regime. So much is this so that the student of that constitution is obliged to ask whether the States in the Confederacy could on their own abolish slavery within their respective borders.¹⁵³ Whatever any State may do, it seems, the slave owner is entitled to move through or sojourn in every State in the Confederacy with his slaves.

V.

Several differences between the system of 1787 and that of 1861 should be emphasized. The Confederacy depends far more upon the States, far less on a national people (even in the South), than does the United States. Local government is made much more of, and so is property, especially property in slaves (which is, I have suggested, a peculiarly intensive form of local government). At the same time, the Confederacy is less open to commerce than the 1787 regime. Certainly, the new federal government is severely restricted as to what it may do to encourage manufactures and trade. At the heart of these differences may be quite different notions about what human nature is like.

Government itself is suspect in the 1861 Constitution; the further government is from local control, the more suspect it seems to be. This suspicion is accompanied by a sympathy for slavery as an institution. That kind of government is acceptable, despite its severity. All this means, in effect, that a general *equality* is sacrificed to the *liberty* of a privileged few, the major slaveholders.

Two paths lay before the American people in 1860. One path led back to the Articles of Confederation and considerable State sovereignty, perhaps to more State sovereignty than had ever existed in North America before 1787. Progress for the Confederacy is a dubious prospect, especially if it should depend on a concerted

153. See, e.g. CONFEDERATE CONST. of 1861, art. IV, § 2, cl.1.

national effort. Abraham Lincoln could disparage the Confederate deference to local self-determination as an invitation to anarchy.

The other path that lay before the American people in 1860 led (by way of the Civil War and the Emancipation Proclamation) to the Thirteenth, Fourteenth, and Fifteenth Amendments with their abolition of slavery and their insistence upon a general equality, and all this at the expense of State sovereignty. The promise of the Declaration of Independence with respect to the elimination of tyranny was thereby reaffirmed.

This second path, in taking its bearings by the Declaration of Independence, assumes that the United States is older than the States. The Country is seen as having begun in 1776 (if not in 1774), not in 1787 or in 1789. Lincoln's "four score and seven years" at Gettysburg looks back to the Declaration as the founding constitutional document for Americans.

To regard the Declaration of Independence as the foundation of the American constitutional system is to ratify the grand opinion about human nature enshrined there. It is an opinion very much open to natural-right teachings, so much so that the Declaration of Independence can speak of "the Laws of Nature and of Nature's God." Somewhat more Biblical, and hence perhaps more conventionally pious, may be the Confederate Constitution, which adds to its Preamble not only an insistence upon "each State acting in its sovereign and independent character," but also an invocation of "the favor and guidance of Almighty God," something which the Constitution of 1787 is silent about.

Is it not true down to our day that an openness to State sovereignty and an openness to Biblical religion tend to go together? Does a reverence for the Country at large, as distinguished from a love of one's own, tend to replace piety as ordinarily understood? In this and other ways we may have much to learn from the Confederate Constitution of 1861.

VI.

Among the things to consider in that 1861 Constitution, for what they may teach (and perhaps warn) us about constitutional reforms in our day, are various experiments in government.

It is provided that "Congress may, by law, grant to the principal officer in each of the Executive Departments a seat upon the floor of either House, with the privilege of discussing any measures appertaining to his department." It is also provided that the President is to have a six-year term and that he is not eligible to succeed

himself. It is provided as well that the President should be able to disapprove of particular items in any appropriations bill passed by Congress. Perhaps related to this is the insistence that each law should "relate to but one subject, and that shall be expressed in the title."¹⁵⁴

Each of these experiments has its advocates today. Other changes of this character in the 1861 Constitution are less interesting, being merely efforts to clarify points in the 1787 Constitution. These include provisions with respect to recess appointments, the acquisition of new territories (the Louisiana Purchase problem?), and the shift from "cannot be convened" to "if not in session."

Still other changes reflect changes in North America, as may be seen in raising the minimum electorate for a member of the House of Representatives from thirty thousand to fifty thousand. But it is odd that the twenty dollar figure is left undisturbed as the jurisdictional amount for a right to trial by jury in suits at common law.

VII.

Any proposed reforms of the Constitution of 1787 should take into account both the purposes of existing provisions and the likely consequences of any changes. An understanding of the Constitution as a whole is obviously required if changes are to be prudent.

How well, we must wonder, did the Confederate framers of 1861 understand the Constitution of 1787? They made it explicit that the two-thirds required to expel a member of a House of Congress is "two-thirds of the whole number." But this is implicit in the original Constitution—and making this change here may have had the unintended effect of changing the meaning of other passages where the whole number of members had been similarly implied.

Another departure from the constitutional arrangement which the Confederate framers inherited may be seen in what they did with Amendments One through Eight of the Bill of Rights appended since 1791 to the United States Constitution. All of these Amendments were placed in Article I, Section 9 of the Confederate Constitution, that section in which various restraints upon Congress are found. The Ninth and Tenth Amendments were placed in Article IV.

It is instructive that virtually no change is made in the wording of the first eight Amendments upon their incorporation into the

154. CONFEDERATE CONST. of 1861, art I, § 9, cl. 20. All this bears on what we call a "line-item veto." See *infra* Lecture No. 17, § IV.

Confederate Constitution. Does this reflect the dependence of those and like rights upon historic associations and traditional formulations? This reminds us of the further question whether it had ever been necessary to spell out in 1787-1791 the rights now found in the Bill of Rights.

Both history and tradition ultimately depend for their authority upon the natural tendency of human beings to identify the old with the good. This in turn should remind us of the primacy of the natural—and of that which is by nature right. Is it not here that the Confederate Constitution, with its unfortunate deference to slavery, is most vulnerable?

VIII.

We have seen in these Lectures what silences and implications may mean in a constitutional document. An instance of a revealing, indeed a most expressive, silence is the elimination from the 1861 Constitution of both of the references to the general welfare found in the 1787 Constitution (in the Preamble and in Article I, Section 8). Does not that elimination concede that that phrase, as found in the 1787 Constitution, is quite potent? Should not this be taken into account by those today who make much of “original intent” in the mistaken expectation that this means a weaker national government?

Still another revealing instance of silence is the compatibility assumed between, on the one hand, the permanent system of slavery evidently envisioned by the Confederate Constitution and, on the other hand, the reaffirmation in that Constitution of the Bill of Rights, the Republican Form of Government Guarantee, and the invocation of the Blessings of Liberty. Is not the assumption of such compatibility indicative of fatal flaws in the Confederate Constitution? Does not all this point up, in turn, the extent to which the accommodations to slavery in the Constitution of 1787 were meant to be temporary, a reluctant compromise that would permit the United States so to develop as to make slavery impossible in North America? The Confederate attempt at Secession in 1860-1865 testifies to *their* opinion that the national endeavor to eliminate slavery was dangerously far advanced.

IX.

The significance of silences in a Constitution reminds us also of the importance of words. The changes in terms used in the Confederate Constitution are revealing.

The framers of 1861 were careful to change all references in the 1787 Constitution that suggested the existence of a country prior to and superior in decisive respects to the States. Thus *Union* routinely became *Confederation* and *United States* became *Confederate States*.¹⁵⁵

The most revealing changes made by the 1861 framers had to do with slavery. We have noticed the protections extended to slavery, far more than had been available in the 1787 Constitution. But even more significant, perhaps, is the insistence in 1861 upon changing the 1787 usage (“all other persons”) to “all slaves.” The Framers of 1787 had steadfastly refused to use in their Constitution the terms *slave* and *slavery*. This was explained, not only by Lincoln in the 1850s but also by various of the Framers in the 1780s, as a reflection of the confident hope that slavery eventually would be eliminated. The awkward circumlocutions in 1787 when slavery was referred to exposed the dubiousness of the institution being accommodated, something that was recognized in the 1780s as much by leading Southerners as by Northerners.

Southern statesmen could, in the late Eighteenth Century, routinely speak of slavery as a necessary evil, an institution that they could hope was in the course of ultimate extinction. It was much later (well into the Nineteenth Century) before their successors were moved, *in their desperation*, to speak routinely of slavery as a positive good. So desperate did they become that they felt obliged by 1861 to treat slavery as something they could not live without, when in fact it had become something that they as decent people could not really live with, especially since the humanity of the

155. In addition, notice the use of the term *federal* in the Confederate Constitution, a term never used in the 1787 Constitution. CONFEDERATE CONST. of 1861, art. I, § 9, cl.10. Consider as well the following report:

The United States went to war in 1861 to preserve the *Union*; it emerged from war in 1865 having created a *nation*. Before 1861 the two words “United States” were generally used as a plural noun: “the United States are a republic.” After 1865 the United States became a singular noun. The loose union of states became a nation. Lincoln’s wartime speeches marked this transition. In his first inaugural address he mentioned the “Union” twenty times but the nation not once. In his first message to Congress, on July 4, 1861, Lincoln used the word “Union” thirty-two times and “nation” only three times. But in his Gettysburg Address two and one-half years later, the president did not mention the Union at all but spoke of the “nation” five times to invoke a new birth of freedom and nationhood. And in his second inaugural address on March 4, 1865, Lincoln spoke of the South seeking to dissolve the Union in 1861 and the North accepting the challenge to preserve the Union.

JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION at viii (1990); see also *infra* Lecture No. 11.

slaves had become all too evident once they had adopted the English language and American ways (including Christianity). The difficulties they saw in any program of wholesale emancipation remain to a considerable extent in American race relations down to this day.

Thus, one particularly revealing difference between the Constitution of the United States and the Constitution of the Confederate States is that one Constitution never used the terms *slave(s)*, *slavery*, and *slaveholding* until the time had come to abolish the institution while the other Constitution freely (even shamelessly) used these terms from its outset.¹⁵⁶

Does not what was done in 1861 stand as a dramatic tribute to what was done and was intended to be done, by Southerners and Northerners alike, in crafting as they did the Constitution of 1787?

11. THE EMANCIPATION PROCLAMATION OF 1862-1863¹⁵⁷

I.

I suggested in my last Lecture that the greatest tribute ever paid to the Constitution of 1787 since the Founding Period may have been in 1861 by the framers of the Constitution of the Confederate States of America. Another great tribute—but one that is *not* perverse in some of its implications—is the measured response by Abraham Lincoln to the Great Rebellion. His Emancipation Proclamation is quite revealing of his constitutional understanding and political judgment, even as it opens the way to political developments and constitutional amendments for more than a century thereafter.

There are, in responses to men singled out for our attention as Lincoln is, two tendencies among articulate citizens. One tendency is virtually to deify them as people somehow outside and above the Constitution. The other tendency is to denigrate them, even (as in

156. CONFEDERATE CONST. of 1861, art I, § 2, cl. 3; § 9, cls. 1, 2, 4; art. IV, § 2, cls. 1, 3; § 3, cl. 3.

157. Lecture No. 11 originated as a talk given on April 14, 1974, at the K.A.M.-Isaiah Israel Congregation, in Chicago, Illinois. See also ANASTAPLO, THE ARTIST AS THINKER, *supra* note 13, at 279-83. The 1974 Lecture was further developed, for publication in CONSTITUTIONAL GOVERNMENT IN AMERICA 421-46 (Ronald K.L. Collins ed., 1980). My discussion of the Emancipation Proclamation is adapted for use here, with much of the instructive material in the notes omitted for this occasion.

The texts of the Preliminary Proclamation (of September 22, 1862) and of the Final Proclamation (of January 1, 1863), which together constitute the Emancipation Proclamation, are taken from 5 COLLECTED WORKS OF LINCOLN, *supra* note 140, at 433-36, 28-30 respectively.

the case of Lincoln) to dismiss them as “racists” and the like. Thus, one writer observed:

However admirable the character of the American Constitution, it [is not] the most admirable expression of the regime. The Constitution is the highest American thing, only if one tries to understand the high in the light of the low. It is high because men are not angels, and because we do not have angels to govern us. Its strength lies in its ability to connect the interest of the man with the duty of the place. But the Constitution, in deference to man’s nonangelic nature, made certain compromises with slavery. And partly because of those compromises, it dissolved in the presence of a great crisis. The man—or the character of the man—who bore the nation through that crisis, seem[s] to me . . . the highest thing in the American regime.¹⁵⁸

Thus, also, another writer (in the *Chicago Tribune*, taking issue with an editorial therein on President Lincoln) observed:

A close look at Lincoln, the Civil War, slavery, and the political, social, and economic movements and moral climate of that era convinces me that Lincoln should not be credited with freeing the slaves. Rather he was clearly forced by his critics and the urgencies of war to end chattel slavery or go down in defeat. No thinking person objects to Lincoln’s adept use of the art of compromise. What I, as a black descendant of slaves, cannot escape is the fact that he also used that talent to delay as long as he could the recognition of a black human as something other than a piece of property.

This columnist added:

His insistence that a slave was a property first and a person second resulted in the great Lincoln plan: the freeing of slaves thru (1) Southern state initiative (slavery forever); (2) government payment for slaves to be freed; (3) gradual emancipation (to be complete around the year 1900); (4) government aid to slave states suffering from loss of slaves (more sympathy for the criminal than for the victim); and (5) colonization of blacks out of the United States. To those unsung heroes who didn’t permit Lincoln to ‘push thru his program,’ this one descendant of slaves belatedly thanks you.¹⁵⁹

158. HARRY V. JAFFA, *THE CONDITIONS OF FREEDOM* 8 (1975); see Anastaplo, *Virtue of Prudence*, *supra* note 11, at 165-68 n.64; sources cited *infra* note 168.

159. Vernon Jarrett, *Why We Must Re-evaluate Heroes of the Past*, *CHI. TRIB.*, Feb. 20, 1974, § 1, at 14. It should be remembered that Lincoln always had to contend with anti-Negro prejudices of Unionists in the North and Middle States. For Lincoln’s periodic, deliberate recourse to talk about “colonization of blacks” as his way of lulling the racial fears of white Unionists, see STEPHEN B. OATES, *WITH MALICE TOWARD NONE: THE LIFE OF ABRAHAM LINCOLN* 268, 297-99, 307, 312-13, 322, 325-26, 330-31, 339-42 (1977). See also *supra* note 45.

A defense of Lincoln (by the *Tribune*, referred to in the column just quoted) had argued that Lincoln's attitudes and policies should not be judged by "today's standards."¹⁶⁰ Such a defense, however, misses the point. Does it not imply that we know better than Lincoln did what should have been done, that our consciences or our understanding or our feelings are somehow superior to his?

It is not only we who believe ourselves in a superior position. Many, perhaps most, of Lincoln's fellow citizens believed at one time or another that their judgments and consciences were better than his. (At times, all they would give him credit for was a rough honesty, or sincerity.) Even his Secretary of State could observe in 1862 of Lincoln's policy: "[W]e show our sympathy with slavery by emancipating slaves where we cannot reach them, and holding them in bondage where we can set them free."¹⁶¹

But a more prudent assessment of that policy than may be found in most of the writings of either our contemporaries or Lincoln's is suggested by an oration delivered by Frederick Douglass on April 14, 1876, "on the occasion of the unveiling of the Freedmen's Monument [in Washington, D.C.] in memory of Abraham Lincoln." The distinguished former slave argued:

I have said that President Lincoln was a white man, and shared the prejudices common to his countrymen toward the colored race. Looking back to his times and to the condition of his country, we are compelled to admit that this unfriendly feeling on his part may be safely set down as one element of his wonderful success in organizing the loyal American people for the tremendous conflict before them, and bringing them safely through that conflict. His great mission was to accomplish two things: first, to save his country from dismemberment and ruin; and, second, to free his country from the great crime of slavery. To do one or the other, or both, he must have the earnest sympathy and the powerful co-operation of his loyal fellow-countrymen. Without this primary and essential condition to success his efforts must have been vain and utterly fruitless. *Had he put the abolition of slavery before the salvation of the Union, he would have inevitably driven from him a powerful class of the American people and rendered resistance to rebellion impossible.* Viewed from the genuine abolition ground, Mr. Lincoln seemed tardy, cold, dull, and indifferent; but measuring him by the sentiment of his country, a

160. Editorial, CHI. TRIB., Feb. 15, 1974, § 1, at 12.

161. 2 CARL SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS 21-22 (1939). The Secretary of State, William H. Seward, had just said, "I mean that the Emancipation Proclamation was uttered in the first gun fired at Fort Sumter, and we have been the last to hear it." 2 *id.* at 21.

sentiment he was bound as a statesman to consult, he was swift, zealous, radical, and determined. Though Mr. Lincoln shared the prejudices of his white fellow-countrymen against the negro, it is hardly necessary to say that in his heart of hearts he loathed and hated slavery."¹⁶²

Douglass quotes at this point Lincoln's letter of April 4, 1864, "I am naturally anti-slavery. If slavery is not wrong, nothing is wrong. I can not remember when I did not so think, and feel."¹⁶³ Whether Lincoln was, in fact, "prejudiced" would depend, first, on what one means by this term; second, on what all the causes were of African slavery; and, third, on what the effects were on the slaves of their bondage.

Earlier in his oration, Douglass made an observation about his immediate response to the Emancipation Proclamation, an observation that can provide our point of departure both in considering that Presidential decree and in assessing Lincoln's political judgment:

Can any colored man, or any white man friendly to the freedom of all men, ever forget the night which followed the first day of January, 1863, when the world was to see if Abraham Lincoln would prove to be as good as his word [pledged the preceding September 22]? I shall never forget that memorable night, when in a distant city I waited and watched at a public meeting, with three thousand others not less anxious than myself, for the word of deliverance which we have heard read today. Nor shall I ever forget the outbursts of joy and thanksgiving that rent the air when the lighting [the telegraph] brought to us the emancipation proclamation. In that happy hour we forget all delay, and forgot all tardiness, forgot that the President had bribed the rebels to lay down their arms by a promise to withhold the bolt which would smite the slave-system with destruction; and we were thenceforward willing to allow the President all the latitude of time, phraseology, and every honorable device that statesmanship might require for the achievement of a great and beneficent measure of liberty and progress.¹⁶⁴

II.

It is the statesmanship of Lincoln, as reflected in the Emancipation Proclamation, with which we will be concerned in this Lec-

162. WHAT COUNTRY HAVE I? POLITICAL WRITINGS OF BLACK AMERICANS 52-53 (Herbert J. Storing ed., 1970) (emphasis added) [hereinafter WHAT COUNTRY HAVE I?].

163. Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), reprinted in 7 COLLECTED WORKS OF LINCOLN, *supra* note 140, at 281.

164. WHAT COUNTRY HAVE I?, *supra* note 162, at 51-52 (emphasis added).

ture, thereby preparing the way for proper consideration of the Thirteenth, Fourteenth, and Fifteenth Amendments in order to understand what happened in 1862-1863, and why we must remind ourselves of the circumstances in which the proclamation was issued. The first part, the Preliminary Proclamation, was issued September 22, 1862; the second part, the Final Proclamation, was issued January 1, 1863.

The general setting was, of course, the Civil War, that war the prosecution of which President Lincoln understood as primarily an effort, in accordance with his constitutional duty, to save the Union from dismemberment. Thus, he observed (in a statement of August 22, 1862, just one month before his issuance of the Preliminary Proclamation—a statement which continues to anger his anti-slavery critics down to our day):

I would save the Union. I would save it the shortest way under the Constitution. The sooner the national authority can be restored; the nearer the Union will be "the Union as it was." If there be those who would not save the Union, unless they could at the same time *save* slavery, I do not agree with them. If there be those who would not save the Union unless they could at the same time *destroy* slavery, I do not agree with them. My paramount object in this struggle *is* to save the Union, and is *not* either to save or to destroy slavery. If I could save the Union without freeing *any* slave I would do it, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that. What I do about slavery, and the colored race, I do because I believe it helps to save the Union; and what I forbear, I forbear because I do *not* believe it would help to save the Union. I shall do *less* whenever I shall believe what I am doing hurts the cause, and I shall do *more* whenever I shall believe doing more will help the cause.¹⁶⁵

Lincoln concluded this statement—an open letter to Horace Greeley—with the assurance, "I intend no modification of my oft-expressed *personal* wish that all men every where could be free."¹⁶⁶ It should be noticed that Lincoln's flexibility, in his effort to save the Union, did not include a willingness to *enslave* anyone for that end. He observed on December 6, 1864:

I repeat the declaration made a year ago, that "while I remain in my present position I shall not attempt to retract or modify the emancipation proclamation, nor shall I return to slavery any per-

165. 5 COLLECTED WORKS OF LINCOLN, *supra* note 140, at 388-89.

166. 5 *id.* at 389.

son who is free by the terms of that proclamation, or by any of the Acts of Congress." If the people should, by whatever mode or means, make it an Executive duty to re-enslave such persons, another, and not I, must be their instrument to perform it.¹⁶⁷

This suggests the limits of what Lincoln was willing to do or say in the service of "statesmanship."

That is, he was not willing to enslave or to re-enslave anyone, even though he was willing to live with slavery. But we should be clear what "living with slavery" meant for him. It meant that the Union would be preserved, a Union in which slavery would be permitted to continue in those Southern States where it happened to exist at the time he became President. He did not mean to touch it there but neither did he mean to let it expand into any new territory. Thus, he was a "Free-Soil Man," not an "Abolitionist." But, he also believed, if slavery *could* be contained, it would wither away—and in such a way as to leave both former slaves and former masters in the best possible condition for living with one another as free men. In the meantime, a South which continued to remain part of the Union could not help but be moderated by Northern opinion and Federal power in what it did to its slaves, both at home and abroad.

The abolitionists insisted, "No union with slaveholders." It has been noticed that "[t]he extreme abolitionists, in the supposed purity of their principles, would have abandoned the four million slaves to their fate."¹⁶⁸ The alternative for them, of preserving the Union but destroying slavery, depended on a successful war effort—and that, it was generally believed, depended on a united effort on the part of the diverse factions loyal to the Union. Among those factions were not only the abolitionists—Lincoln figured, no doubt, that they had nowhere else to go—but also Northerners who did not have strong opinions about slavery (but who did care about the Constitution and the Union) and Middle States men who retained both slaves and loyalty to the Constitution. These men of

167. 8 *id.* at 152 (Annual Message to Congress, Dec. 6, 1864).

168. HARRY V. JAFFA, *EQUALITY AND LIBERTY: THEORY AND PRACTICE IN AMERICAN POLITICS* 157 (1965) [hereinafter JAFFA, *EQUALITY AND LIBERTY*]. Today, students of Lincoln and the Civil War are most fortunate to have available to them the pioneering work of Mr. Jaffa, particularly his *CRISIS OF THE HOUSE DIVIDED* (1959) [hereinafter JAFFA, *HOUSE DIVIDED*]. My own considerable debt to him is particularly evident in Lecture No. 11, §§ I, II.

For further discussion of Lincoln and the Civil War, see ANASTAPLO, *AMERICAN MORALIST*, *supra* note 12, at 537; Anastaplo, *HUMAN BEING AND CITIZEN*, *supra* note 11, at 61, 203; Anastaplo, *Slavery and the Constitution: Explorations*, 19 *TEX. TECH L. REV.* 677 (1989) [hereinafter Anastaplo, *Slavery and the Constitution*].

the Middle States were not, despite their slavery institutions, simply bad men; nor for that matter were the Southerners. Lincoln recognized that slavery was essentially a national affliction, that (for the most part) those who were burdened by it would have long since gotten rid of it if they could have seen a way to do so—a way both economically and socially feasible.

In this respect, Lincoln appreciated the long past of the Country and looked ahead to an even longer future. He recognized why one section of the Country was slave and why another was free. He had long hoped so to contain and thereby begin to ease out slavery as to make it possible for the two races (both emancipated from the curse of slavery) to live thereafter, whether together or separated, in the best possible way. What was called for, he saw, was neither sentimental indifference nor bitter recrimination. He was obliged, in any event, so to conduct the war as not to lose the support of the many men in both the Northern and the Middle States who were, at best, indifferent about slavery. He believed that the goal for which the maximum support could be gathered was that of preserving the Union. Thus, “[f]ighting the war was always secondary to keeping alive the political coalition willing to fight the war.”¹⁶⁹

Once great sacrifices had been made, more could be ventured. Once, that is, considerable Northern and Middle States blood had been shed on behalf of the Union, it was possible to direct the attention of the Country to slavery itself. “Slavery was what the rebel states were fighting for, and slavery enabled them to fight for slavery.”¹⁷⁰ It had long been recognized by the laws of war that one could deprive an enemy of whatever property helped keep him in the field. One could even appropriate such property for one’s own use. The slaves were for the South useful, perhaps even essential, property. It was on this basis that Lincoln could then mobilize Union men to move against Southern slavery, to ally themselves (in effect) with the freedom-seeking slaves held by the rebels.

The Emancipation Proclamation was, thus, a military realization of a prophecy Lincoln had made in his famous “House Divided” speech of June 16, 1858:

“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

169. JAFFA, EQUALITY AND LIBERTY, *supra* note 168, at 158.

170. *Id.* at 163.

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 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*.¹⁷¹

III.

Much of what I have said thus far should be generally familiar. Too much originality in such matters would be suspect. No doubt some may be inclined to question the assessment I have been tacitly making about Lincoln's judgment. That assessment is, to state it plainly, that Lincoln seems most impressive in his sure-footedness: he never seemed to err in the major moves he made once he assumed the Presidency. The mistakes he did make were due not to faulty judgment but to mistaken information, and in circumstances where he had to rely on what was told him. Throughout the war, he was remarkably adept, knowing both what he wanted and what he was doing. He was, in short, a model of prudential judgment, or at least as fine a practitioner of such judgment as we have had in government.

I can best illustrate what I mean—what prudence means in action, and especially in war circumstances (and a civil war, at that, where passions run particularly deep)—by examining in some detail the terms of the two documents which comprise the Emancipation Proclamation. By so doing, we can see as well what the Civil War meant and how it progressed, for the history of that war seems distilled in these documents. Perhaps even more important, we can see how first-class practical reason works, the kind of reason evident in the Constitution of 1787.

The Emancipation Proclamation, unlike the Constitution and the Declaration of Independence, was in a sense the work of one man—and hence of one mind. It was carefully thought out by Lincoln, with only a few suggestions by his Cabinet added after he revealed to them what he proposed to do. It is, we will see, both bold in its conception and disciplined in its execution, the lawyer's art in its perfection. It is, I suggest, more American than either the Declaration or the Constitution, in that *its* author had been fully shaped by the regime established after 1776.¹⁷²

171. 2 COLLECTED WORKS OF LINCOLN, *supra* note 140, at 461-62.

172. Similarly, it can be said that Christian thought (as we have come to know it) may be better seen in someone such as St. Augustine than in Jesus, if only because Jesus

There is, in our effort to grasp what Lincoln did, both a challenge and an opportunity. There is the opportunity of fully asserting ourselves as citizens, in that we can, at least for the moment, walk with someone who thought as deeply as any American statesman has about the character, aspirations, and deficiencies of our regime. There is also a challenge in that we are obliged to strive for a degree of seriousness to which we are not accustomed. We have become accustomed in our discussions of political things to the exposés and the superficialities of journalism and to the abnormalities and irrationalities of psychology—so much so that it is difficult to avoid sentimentality and sensationalism. We have to make an effort, then, to understand the Emancipation Proclamation. But then, the Proclamation *was* issued for the likes of us.

Lincoln challenges us to think; he challenges us to reconstruct the thinking he devoted to the problems he faced. We know that he devoted many hours to the text of the Emancipation Proclamation, especially the preliminary statement of September 22, 1862. If we should be able to work out what he took into account, and why, we can then be assured that we begin to understand the Civil War as an eminently political man could and did.

To take seriously a statesman's carefully expressed thought is, after all, the best tribute we can pay to him. Such an attempt at the most noble imitation is worthy of our greatest efforts if we are to understand who we are and what we aspire to.

IV.

It is said that Lincoln issued no statement or argument to support the Emancipation Proclamation. "He let the paper go forth for whatever it might do" ¹⁷³ But this is not to say that he never discussed it, for in a preparatory Cabinet meeting, he "proceeded to read his Emancipation Proclamation, making remarks on the several parts as he went on, and showing that he had fully considered the whole subject, in all the lights under which it has been presented to him." The discussion of the Proclamation on that occasion, we are told, included "the constitutional question, the war power, the expediency, and the effect of the movement." ¹⁷⁴

It is that discussion in Lincoln's Cabinet which we can, in effect,

was raised as a Jew with relatively little exposure to the philosophical tradition of the Greeks. See *infra* note 260.

173. 2 SANDBURG, ABRAHAM LINCOLN, *supra* note 161, at 20.

174. 6 JOHN G. NICOLAY & JOHN HAY, ABRAHAM LINCOLN: A HISTORY 161-62 (1914).

recreate if we are so minded. We turn first to an examination of the Preliminary Proclamation of September 22, 1862.

i.

I, Abraham Lincoln, President of the United States of America, and Commander-in-chief of the Army and Navy thereof, do hereby proclaim and declare that hereafter, as heretofore, the war will be prosecuted for the object of practically restoring the constitutional relation between the United States, and each of the states, and the people thereof, in which states that relation is, or may be suspended, or disturbed.

This is the first of Lincoln's proclamations as President that opens with his name and titles.¹⁷⁵ It is as if he intends to assert from the outset that this statement is especially his doing, that it emanates from his very being—and, insofar as he is a thinking being and this is well thought out, that is so.

This is only the second of his proclamations in which his title as Commander-in-Chief is invoked. Such invocation was not customary in Presidential proclamations.¹⁷⁶ We notice in passing the precision in his language, "proclaim and declare that hereafter, as heretofore." Such precision encourages us to expect that what he says throughout may profitably be read with care.

The insistence at the outset upon his status as Commander-in-Chief anticipates his insistence throughout upon this action as a legitimate war measure. No doubt he thought then what he was to say a year later (August 26, 1863) to a critic of the Proclamation:

I think the constitution invests its commander-in-chief, with the law of war, in time of war. The most that can be said, if so much, is, that slaves are property. Is there—has there ever been—any question that by the law of war, property, both of enemies and friends, may be taken when needed? And is it not needed whenever taking it, helps us, or hurts the enemy? Armies, the world over, destroy enemies' property when they can not use it; and even destroy their own to keep it from the enemy. Civilized bel-

175. 5 COLLECTED WORKS OF LINCOLN, *supra* note 140, at 433. There are collected in the Appendix to the United States Statutes thirteen of Lincoln's proclamations prior to this one. Both the Preliminary Proclamation and the Final Proclamation bear the superscription, "By the President of the United States: A Proclamation" (and their respective dates); both bear the signature, "By the President: Abraham Lincoln/William H. Seward, Secretary of State."

176. See 4 J.G. RANDALL, JR., LINCOLN, THE PRESIDENT 162 (1945). Too much is made these days of the President as "*our* Commander in Chief." What he is, according to the Constitution, is merely "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."

ligerents do all in their power to help themselves or hurt the enemy, except a few things regarded as barbarous or cruel. Among the exceptions are the massacre of vanquished foes, and non-combatants, male and female.¹⁷⁷

We see in this opening paragraph of the Preliminary Proclamation an insistence as well upon the purpose of this war, that of restoring the constitutional relations among the States. An anti-slavery crusade would have been far more questionable than an effort to save the Union—and that was, in many quarters, questionable enough. (We should remember that even today more citizens are in favor of “law and order” than are in favor of “racial justice” or “military justice” or “class justice.”) For most men, justice is what the law prescribes: they cannot be depended on to habitually accept much more than that or even to want much more than that. Would “much more than that” be for them an unwelcome freedom? Does not Lincoln’s approach recognize the limits of public opinion? Does it not recognize that respect for law is more “knowable” than respect for justice?

But, one is obliged to ask, are there not various kinds of constitutions (or master-laws)? Should this one have been established in the first place? That is, should the bargain have been made in the first place, that “constitutional relation” which permitted the States to retain jurisdiction over slaves? Was that bargain so immoral that it should never have been expected to hold? Still, what would have happened if the Southern States had been allowed to depart in peace, whether in 1787 or 1861? Had not the Union by 1861 served better the “Free States,” permitting them to grow to a stronger position in relation to the “Slave States” than they had been in the beginning?

Granted that the Union is to be preserved, upon what terms can it best be defended? Cannot people more readily be led to see that their interest is served by a constitutional regime (by orderly government, a continent-wide market, an absence of threatening neighbors) than it is served by a free regime (especially when the freedom yet to be fought for is that of others, not obviously their own)? On the other hand, once the crusade for freedom *is* launched, it is much more difficult to control: passions are much more likely to rage unchecked, whereas constitutionalism has a sense of restraint built right into it.¹⁷⁸

177. 6 COLLECTED WORKS OF LINCOLN, *supra* note 140, at 407-08.

178. One need only read the youthful Lincoln’s Temperance Speech in Springfield, Illinois on February 22, 1842 to sense his lifelong concern about moral passion. *See* 1

Besides, blatantly to attack slavery *is* to attack property rights and perhaps even the principle of property. Where is the stopping point once one starts down that road? Today, slaveholders; tomorrow, the wealthy? And the day after, anyone of talent or distinction? Is it not sensed by men of affairs that property does depend on the arbitrary, on the accidental, on peculiarly local circumstances? Does it not depend on the bargains which happen to be made from time to time? Lincoln must insist upon the object of restoration of the constitutional relation as critical, especially in light of what he is about to do. Cannot he effectively do what he is about to do partly because he *has* insisted heretofore on the proper constitutional relation, on constitutional technicalities and niceties?¹⁷⁹ Does one adhere scrupulously to a constitution and the law (as generally understood) in order to be able to step above them at the propitious moment, thereby leading one's people to a higher or more solid constitutional plateau than they are yet accustomed to?

We notice the emphasis on *restoration*. Things will go back to what they were—except for the opinion which some had held that secession was proper. But full restoration will be impossible once that particular opinion is disavowed, for the status of slavery will never be the same again. Still, the closest the South can come to having the original constitutional relation restored is by quickly acceding to the terms of the Preliminary Proclamation, thereby not “permitting” Lincoln to declare *any* slaves emancipated.

We should notice as well that it is not only the South which threatens the constitutional regime. Thaddeus Stevens, one of the radical abolitionist leaders in Congress, had proclaimed that there was no longer any Constitution and reported that he was weary of hearing the “never-ending gabble about the sacredness of the Constitution.”¹⁸⁰

Finally, we notice that the “constitutional relation” has not been destroyed; rather, it has been “suspended, or disturbed” in certain States—and it is there that restoration is called for. Self-preservation calls for such restoration—that self-preservation which we shall later on see to be so critical a guide for human action.

COLLECTED WORKS OF LINCOLN, *supra* note 140, at 271; JAFFA, HOUSE DIVIDED, *supra* note 168, at 233; *infra* text accompanying notes 228, 231.

179. We should remember that Lincoln had even annulled decrees or acts of emancipation by various of his generals in the field. LORD CHARNWOOD, ABRAHAM LINCOLN 268-70, 314, 319-20, 406 (1926). The civilian control of the military was evidently taken for granted throughout the Civil War, both in the North and South.

180. 2 JOHN T. MORSE, JR., ABRAHAM LINCOLN 109 (Boston & New York, Houghton, Mifflin 1893).

Much more can be said about this first paragraph. But we must pass on to the subsequent paragraphs, about which far less than this must be said if we are to canvass the entire document on this occasion.

ii.

That it is my purpose, upon the next meeting of Congress to again recommend the adoption of a practical measure tendering pecuniary aid to the free acceptance or rejection of all slave-states, so called, the people whereof may not then be in rebellion against the United States, and which states, may then have voluntarily adopted, or thereafter may voluntarily adopt, immediate, or gradual abolishment of slavery within their respective limits; and that the effort to colonize persons of African descent, with their consent, upon this continent, or elsewhere, with the previously obtained consent of the Governments existing there, will be continued.

Having laid in his opening paragraph the groundwork—that is, “We are determined to restore the authoritative constitutional relation”—Lincoln can then indicate what would be an improvement consistent with such restored constitutional relation: compensated emancipation by non-rebellious slaveholders. This offer is extended, it seems, to all Slave States, “so called,” those now in rebellion and those that had never been in rebellion against the United States. It was unlikely that the rebellious States would be won over, but what about the other Slave States, the loyal Middle States? They would not be affected by the impending proclamation, but was there not for them the suggestion here, as there had been the preceding March, that they would do better to sell their slaves now to the United States than to be deprived of them later?

Is not at least a useful appearance of fairness achieved by Lincoln’s offer to pay for what he considered himself empowered, if not even obliged, to take? Does not this reinforce the Lincolnian position that it is not the slaveholder, but slavery, which is the critical problem here, that it is not punishment or political and social reform but union which he is after? If it is to be a Union in which the traditional role of the States is respected, it is up to the States “voluntarily” to adopt a program of abolishment of slavery.

Does he use “abolishment” rather than “abolition” in order to soften what he is asking for? That is, *abolition* may still have been seen as far too radical, even by many anti-slavery Northerners. Besides, Lincoln cannot abolish the institutions of slavery in any State: he can only emancipate certain people in certain places at a certain time. Abolition requires a more comprehensive change, of

a permanent legislative character, than he is constitutionally capable of making on his own authority.

The reference to “gradual abolishment” recognizes not only concerns among the public at large about the danger of precipitate action but those of Lincoln as well. What *was* to be done with the millions of people “of African descent” if they should be cut loose from their accustomed moorings in this Country? Would they thereafter be exploited even more than they had been? Would they constitute a danger to the community? Could they be expected to know what to do with themselves? Was time needed to effect a proper transition? Or, failing that, should their removal from the Country be planned, for their own good as well as that of the Caucasians? Did Lincoln have to explore alternatives in this way, if only to indicate that he understood what many of his countrymen, North and South, were concerned about? By so indicating, did he not make it more likely that the public would eventually accept whatever *he* decided upon and offered as the least objectionable way of achieving the desired end? If he had failed to appreciate alternative positions, he would not have been trusted the way he came to be.

But to “appreciate” is not to agree: it is rather to understand why another should make the mistakes he is making. Slavery was, to say the least, a mistake, not only a moral mistake but (perhaps even more important for the future of the regime) a constitutional mistake. Was not our constitutionalism, with its rule of law and its dependence on an essential equality, bound eventually to undermine slavery or to be undermined by it? Was not slavery somehow hostile to the principles of the American regime? The Slave States depended on the law-abidingness of the Free States—on the respect of Free States for constitutional arrangements—in order to be protected in an institution that was, in a sense, lawless.

Finally, we notice the double emphasis on the necessity for consent: (1) the consent of those to be colonized, and (2) the consent of those governments that would receive the colonists. This, along with the deference to voluntariness on the part of the Slave States, points up the vulnerability of slavery in any regime where consent of the governed is made as much of as it is in ours.¹⁸¹

181. The two “consent” qualifications are said to have been inserted in the Preliminary Proclamation at the suggestion of Secretary of State Seward. 5 COLLECTED WORKS OF LINCOLN, *supra* note 140, at 434 n.4.

iii.

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.

One offer has just been made, that of compensated emancipation. Now comes another: "You can keep your slaves, if you wish, so long as you return to your allegiance." This once again emphasizes that it is the Union which Lincoln seeks to preserve, not Slavery which he seeks to destroy. One hundred days are provided rebellious slaveholders in which to take advantage of this offer. Some of the North still needed to be assured that Southern property and the American Constitution were being dealt with fairly.

"[A]ll persons held as slaves": does not this formulation imply that they are not truly slaves? One who is called a slave may be no more than someone held as a slave, perhaps as a prisoner of war. May he merely be *regarded* as a slave? Is not slavery as practiced in North America at that time only conventional slavery, with its convention arbitrarily guided by color differences and based primarily on force? Yet, even if slavery originated in injustice, it may have compounded the original injustice to have freed all slaves at once or to have freed them one way rather than another.

Notice that Lincoln can command only the response of the "executive government of the United States." The Courts and Congress act independently. We can see in the second paragraph of the Preliminary Proclamation that it is Congress, not the Executive, that can provide the "pecuniary aid" Lincoln speaks of there.

Notice also that freedom comes in two stages, so to speak: recognized freedom and actual freedom. Recognized freedom is what comes to someone from the sayings and doings of others; actual freedom depends more on one's own efforts. It should go without saying that not everyone who is recognized to be free is actually free. Men who have lived for generations in slavery may need generations of purgation and training before they become actually free—as the Israelites' forty years in the desert suggest.

iv.

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.

A promise is made as to what Lincoln will do on January 1st: designate the States, or parts of States, if any, in which the people thereof shall then be in rebellion. Is not that to be the principal purpose of that January 1st proclamation? What *follows* from such designation will have already been indicated in this September 22nd proclamation. Little more needs to be added on January 1st: the emancipation then will even have the effect of a promise fulfilled. That revolutionary step will be living up to a bargain already struck. There is about this sequence a psychological masterstroke.

By thus pointing ahead Lincoln succeeded in shifting attention to an occasion which was itself “expected” and even “demanded” by a kind of contract. (The designation required for that day was, for the most part, perfunctory: most of the States designated could have been designated by anyone; as we shall see, they in effect designated themselves.) Lincoln succeeded so well in shifting attention to the expected measure (on January 1) from the extraordinary measure (of September 22) that the January 1st statement (which is, except for its concluding language, more pedestrian) has become the one that is remembered and reproduced in anthologies, not the earlier September 22nd statement that had truly been decisive.

Notice Lincoln’s precise use of “if any”—“the States, and parts of states, *if any*.” After all, an offer has been made; it must not be assumed in advance that it will be rejected by anyone. To do so would be virtually to admit that it is a mere form. It would, besides, deny the rationality and hence the humanity of those in rebellion: they must be considered as, in principle, open to argument. They, too, are American citizens.

Notice, also, that the decisive indication that a State is *not* in rebellion is its good-faith representation in the Congress. He says,

in effect, "If you wish to avoid the effects of a military measure, exercise your rights as free men; send men of your choice to Congress; return to your seats in the national legislature and resume the duty and power you have always had there to help run the country." Does not this approach acknowledge the fundamentally republican character of the Country, a character to which the military power is ultimately subservient? We need not concern ourselves here with whether Congress would have immediately accepted such representatives from the States which had been in rebellion. It suffices to notice that republican standards were apparently relied upon even in those trying times.

Notice, finally, that Lincoln in effect cedes to rebellious States the power to decide themselves whether they are again to be in good standing. "[I]n the absence of strong countervailing testimony," their recourse to Congressional elections will "be deemed conclusive evidence" that they "are not then in rebellion against the United States." Is there not something generous about this also? Indeed, does not generosity pervade the Proclamation, the generosity of a truly magnanimous man who can at the same time be shrewd and knowing about the usefulness of generosity?

v.

That attention is hereby called to an act of Congress entitled "An act to make an additional Article of War" approved March 13, 1862, and which act is in the words and figure following:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter the following shall be promulgated as an additional article of war for the government of the army of the United States, and shall be obeyed and observed as such:

Article— All officers or persons in the military or naval service of the United States are prohibited from employing any of the forces under their respective commands for the purpose of returning fugitives from service or labor, who may have escaped from any persons to whom such service or labor is claimed to be due, and any officer who shall be found guilty by a court-martial of violating this article shall be dismissed from the service.

Sec. 2. And be it further enacted, That this act shall take effect from and after its passage.

Also [attention is hereby called] to the ninth and tenth sections of an act entitled "An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate property of rebels, and for

other purposes," approved July 17, 1862, and which sections are in the words and figures following:

Sec. 9. And be it further enacted, That all slaves of persons who shall hereafter be engaged in rebellion against the government of the United States, or who shall in any way give aid or comfort thereto, escaping from such persons and taking refuge within the lines of the army; and all slaves captured from such persons or deserted by them and coming under the control of the government of the United States; and all slaves of such persons found on [or] being within any place occupied by rebel forces and afterwards occupied by the forces of the United States, shall be deemed captives of war, and shall be forever free of their servitude and not again held as slaves.

Sec. 10. And be it further enacted, That no slave escaping into any State, Territory, or the District of Columbia, from any other State, shall be delivered up, or in any way impeded or hindered of his liberty, except for crime, or some offence against the laws, unless the person claiming said fugitive shall first make oath that the person to whom the labor or service of such fugitive is alleged to be due is his lawful owner, and has not borne arms against the United States in the present rebellion, nor in any way given aid and comfort thereto; and no person engaged in the military or naval service of the United States shall, under any pretence whatever, assume to decide on the validity of the claim of any person to the service or labor of any other person, or surrender up any such person to the claimant, on pain of being dismissed from the service.

*And I do hereby enjoin upon and order all persons engaged in the military and naval service of the United States to observe, obey, and enforce, within their respective spheres of service, the act, and sections above recited.*¹⁸²

This passage draws attention to two acts of Congress: one prohibits military officers from returning certain fugitive slaves, and the other (in the sections quoted from it) declares certain fugitive slaves free and places restrictions on the return of certain other fugitive slaves to their masters. The passage thereafter orders "all persons engaged in the military and naval service of the United States to observe, obey, and enforce, within their respective spheres of service, the act, and sections above recited."

What is all this doing in here? Perhaps it is partly to suggest that what Lincoln is now doing is not without Congressional prece-

182. The Emancipation Proclamation refers to all slaves in a rebellious State or part of a State, whereas in § 9 of this Act, Congress had referred primarily to "all slaves of persons who shall hereafter be engaged in rebellion, or who in any way give aid or comfort thereto."

dent. This passage may address itself to the more conservative Unionists. They are assured that all this is not simply executive usurpation on the President's part. Perhaps, also, it is partly to counter the hostility of abolitionists who would not like an emancipation decree framed in so qualified and so partial a manner as this one is. Such singleminded critics are reminded that at least the hated Fugitive Slave Clause of the 1787 Constitution has been in effect suspended.

In addition, there are other hints. The first Act Lincoln calls attention to is reproduced in its entirety, including the superfluous enacting clause (the title of the Act, also given, would have sufficed) and the "immediate effect" clause. But only two sections of the second Act are called to our attention, in marked (and intended?) contrast to what was done with the first Act. Does Lincoln thereby tacitly repudiate the other sections of the second Act? We cannot, on this occasion, explore this question; it suffices to notice that several of the sections of the second Act which he does *not* mention here are quite harsh, authorizing death sentences and comprehensive confiscation of all property. That harsh spirit is against what he is interested in establishing in the Proclamation: property in slaves *is* to be "confiscated" so to speak; but, after all, free men will thereby come into being.

The emphasis here is on fugitive slaves. Does not this suggest who may be able to take advantage at once of the Proclamation—those who flee from rebel territory? Is not an implicit invitation issued? This anticipates and to some extent deals with the complaint that the Proclamation emancipates only where the Union army is *not*.

Finally, we cannot help but notice—are we intended to notice?—that the language of Congress is less precise, less carefully thought out, than that of Lincoln. Does this show the reader that Lincoln is truly more worthy of being taken seriously?

vi.

And the executive will in due time recommend that all citizens of the United States who shall have remained loyal thereto throughout the rebellion, shall (upon the restoration of the constitutional relation between the United States, and their respective states, and people, if that relation shall have been suspended or disturbed) be compensated for all losses by acts of the United States, including the loss of slaves.

Once again, we see that the demands of war are not to be permit-

ted to obscure permanently either the desire or the duty to see justice done. Certainly, loyalty must be recognized and compensated. And, it has to be said, the United States should recognize that there has existed up to now a legitimate property interest in slaves which must still be taken account of. Does this remark (the closing one among the substantive paragraphs of the Preliminary Proclamation) appeal to the apprehensive Middle States Unionists (just as the preceding passage incorporating the Acts of Congress appealed in large part to impatient Abolitionists)? Do we once again see that Lincoln must keep quite divergent, but vitally necessary, horses yoked together if the war chariot is to advance?

vii.

In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

This is the standard testamentary statement for such proclamations. We will return to it at the end of the Final Proclamation.

viii.

Done at the City of Washington, this twenty second day of September, in the year of our Lord, one thousand eight hundred and sixty two, and of the Independence of the United States, the eighty seventh.

The eighty-seventh year hearkens back to 1776 and the Declaration of Independence. It is that “eighty-seventh” which Lincoln will transform into “four score and seven” when he speaks in November of 1863 at Gettysburg.

Why September 22nd? Lincoln had planned to issue this Preliminary Proclamation some weeks earlier (in fact, in July). But he had been dissuaded by Secretary Seward’s argument that he should at least wait until the Union forces won another victory rather than make the proclamation seem an act of desperation—for it *had* been a time of one defeat after another. Then there came the victory of Antietam, in the middle of September 1862—and a few days later, the Emancipation Proclamation.¹⁸³

Did Lincoln choose an interval of one hundred days so that the final proclamation would fall on New Year’s Day, a day of rebirth and rededication?

183. See RANDALL, *supra* note 176, at 156-57; OATES, *supra* note 159, at 311, 317-20.

ix.

There is, in the handwritten original of the Preliminary Proclamation of September 22, 1862, the repetition of "sixty two," in this fashion, "in the year of our Lord, one thousand, eight hundred and sixty two, and sixty two, and of the Independence of the United States the eighty seventh." This passage is in the hands of a clerk.¹⁸⁴

Here, for the first time in this commentary upon the Emancipation Proclamation, I move from what Lincoln thought and intended, to what may have been "unconscious" (and hence "inspired"?). This inadvertent repetition by a clerk of "sixty two" suggests that he, at least, made much of the date—as if to emphasize, "It is late 1862, not early 1861. We loyalists *have* tried for a year and a half to put down this dreadful rebellion with conventional measures. We can *now* proceed in good faith to a measure which we have had to be cautious in using, not only because it challenges longstanding constitutional arrangements (after all, it *is* a constitution we are defending) but also because it conforms to and gratifies the deepest desires of those of us who have always hated slavery. It *is* 1862!"

I must leave further poetic probings of the unconscious (or of the providential?) to others.

We turn now to the Final Proclamation of January 1, 1863. Much of what might be said about the parts of this proclamation has already been said in my review of the Preliminary Proclamation. We can be brief.

x.

Whereas, on the twentysecond 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,

184. The clerk had written in everything at the end of what is otherwise Lincoln's handwritten original of the Preliminary Proclamation (beginning at "In witness whereof"). 5 COLLECTED WORKS OF LINCOLN, *supra* note 140, at 56.

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.

A solemn version of the date of the Preliminary Proclamation is given, that version used in the final paragraph of that proclamation. We recall that when the dates were given for Acts of Congress in that first proclamation, simpler versions of their dates were given (that is "March 13, 1862," "July 17, 1862"). Is a proclamation somehow of greater dignity than an Act of Congress? Does the Presidency, properly employed, have a greater dignity than the Congress? Is this one reason why a Presidential proclamation about Southern slaves means more, and has a greater effect, than Congressional enactments? Is the Commander-in-Chief, in time of war, somehow the decisive ruler of a country, especially when the war is a civil war—for that makes war comprehensive?

These questions lead us to notice that there is nothing said about Congress in the Final Proclamation. Lincoln quoted at length from Congress in the Preliminary Proclamation; here he quotes only from himself. Both Congress and the States take second place in the constitutional drama now being enacted. They have served their purpose, they have had their chance—and now the President must get on with *conducting the war* to save the Union.

We also notice that nothing is said of compensation for voluntary emancipation; nothing is said of compensation for loss of slaves by loyal slaveowners. Both of these had been proposed, as promised, to Congress. But nothing substantial had come from the proposals. The emphasis is now upon this emancipation and its consequences.

A new stage has been reached in the war—but a stage which, it can be argued, developed constitutionally from the preceding stage. This proclamation "gets right down to business": there are no "frills" or offers or alternatives—but rather a judgment set forth in prosaic yet somehow solemn terms.

xi.

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 towit:

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 fortyeight 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 & Portsmouth); and which excepted parts are, for the present, left precisely as if this proclamation were not issued.

Lincoln's status of Commander-in-Chief is again emphasized, and reinforced further by the references to "time of actual armed rebellion" and "fit and necessary war measure." A solemn version of the date is again relied upon as he draws in this decree upon the full majesty of the language as well as upon the full force of the war power.

But the war power is properly to be employed for a certain purpose. It must be used discriminatingly, if constitutional government is truly to be defended. This is recognized by the exceptions Lincoln insisted upon making, in the application of his proclamation, for certain parishes in Louisiana and for certain counties in Virginia where Union forces were already in control. Might not Lincoln also have thought that such exceptions made his policy seem discriminating and hence contributed to its effectiveness?

The Secretary of the Treasury argued against such exceptions and kept after the President thereafter to extend the Emancipation Proclamation to all of Virginia and Louisiana. Lincoln replied on September 2, 1863:

Knowing your great anxiety that the emancipation proclamation shall now be applied to certain parts of Virginia and Louisiana

which were exempted from it last January, I state briefly what appear to me to be difficulties in the way of such a step. The original proclamation has no constitutional or legal justification, except as a military measure. The exemptions were made because the military necessity did not apply to the exempted localities. Nor does that necessity apply to them now any more than it did then. If I take the step must I not do so, without the argument of military necessity, and so, without any argument, except the one that I think the measure politically expedient, and morally right? Would I not thus give up all footing upon constitution or law? Would I not thus be in the boundless field of absolutism? Could this pass unnoticed, or unresisted? Could it fail to be perceived that without any further stretch, I might do the same in Delaware, Maryland, Kentucky, Tennessee, and Missouri; and even change any law in any State?¹⁸⁵

Notice the words, "Could this pass unnoticed?", "Could it fail to be perceived?" It is important for constitutional government what the people of the Country understand their officers to be doing and on what authority. And it is important that the people be trained to expect the basis of governmental authority to be evident, especially when extraordinary measures are resorted to.

Yet, we might ask, in what sense *are* the "excepted parts" "left precisely as if this proclamation were not issued"? Should not it have been evident to all—was it not evident to (and perhaps even intended by) Lincoln—that if the proclamation was effective with respect to the States and parts of States listed, then slavery was finished not only in the rebellious States but also in the loyal Middle States and in the "excepted" counties and parishes of Virginia and Louisiana? The emancipation of so massive a body of slaves made slavery itself quite vulnerable in the Country at large. Such slavery as then existed in North America could find enough intelligent defenders in this Country only if virtually all members of the slaves' race were subjected to slavery. If a significant number were free, and could develop themselves as free and responsible residents here, the supposed natural basis for slavery would no longer be tenable. Slavery could not survive, in a regime such as ours, if it

185. Letter from Abraham Lincoln to Salmon P. Chase, Secretary of the Treasury (Sept. 2, 1863), reprinted in 6 COLLECTED WORKS OF LINCOLN, *supra* note 140, at 428-29; see 2 MORSE, *supra* note 180, at 3, 99-100; 6 NICHOLAY & HAY, *supra* note 174, at 405. Lincoln's letter to Chase continues: "Would not many of our friends shrink away appalled? Would it not lose us the elections, and with them, the very cause we seek to advance?" 6 COLLECTED WORKS OF LINCOLN, *supra* note 140, at 429; see *supra* note 45. We have noticed that a respect for the Constitution may be seen in Lincoln's provision that the decisive indication a State is not in rebellion is that it is properly represented in Congress. The republican form of government is thereby deferred to.

clearly rested as much as it would have had to rest (after the Emancipation Proclamation) upon such obvious accidents as geography. The moral basis of slavery would have been undermined insofar as everyday morality rests in large part upon the customary and the uniform.

Consider finally, in this passage, how the States are listed: they are not alphabetical; nor in the order of admission to the Union; nor in order of secession. Rather, Lincoln begins with the only landlocked state among them (Arkansas), and then moves along the coast, starting with the State farthest away from him (Texas) and coming closer and closer to Washington (ending with Virginia). It is as if he sweeps them all in to himself. (States are listed differently in other proclamations.) Lincoln displays here a methodical turn of mind. In this way, too, we should be reassured to notice, he avoids “the boundless field of absolutism”—and this means we can safely think about what he is doing, for then we are thinking about thinking rather than trying to think about that which is irrational or accidental and hence essentially unknowable.

xii.

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.

We see here brought to completion what had been promised on September 22. We again see that Lincoln’s formal control is limited to the Executive government of the United States. Most of what one might say about this paragraph has been anticipated in this Lecture.

But what about the “order and declare”? Perhaps *he* realizes that he can order only some things, and can merely express a strong preference or hope with respect to other things. Consider other pairs of terms in this paragraph: “are, and henceforward shall be free”; “recognize and maintain the freedom of said persons.” Does he *order* such persons to be free *now*? Does he *order* such freedom to be recognized *now*? He can do that, perhaps. But he cannot order that such freedom be “henceforward” or that it be maintained. Will not that depend on future governments and future circumstances, perhaps ultimately on the judgment and will of the American people?

I note in passing that "maintain" had been put into the Preliminary Proclamation at the suggestion of a cabinet member; but Lincoln had misgivings about it. He was reluctant, he indicated, to promise something he did not know he could perform. He has retained "maintain" here but perhaps not without hinting at his reservations.

xiii.

And I hereby enjoin upon the people so declared to be free to abstain from all violence, unless in necessary self-defence; and I recommend to them that, in all cases when allowed, they labor faithfully for reasonable wages.

We see here one great problem of the future, a problem which continues to this day. In dealing with the freed people, Lincoln recognizes what he can and cannot say. He can, as President, *enjoin* them to "abstain from all violence": that is what the law ordains. But he cannot *enjoin* them to work: if they are truly free men, they must decide *that* on their own. Here he can only recommend: they can be urged to work faithfully; their prospective employers are implicitly instructed to pay them reasonable wages. Thus, emancipation is one thing; preparation for self-government is quite another—for *that* takes time and such willingness as Lincoln had to face up to the facts and to restrain himself. What can be proclaimed, therefore, is neither virtue nor genuine freedom but, at best, the removal of chains and a provision of opportunities. Education and training must thereafter do their part. Is not the problem with immediate, massive abolition reflected in the virtually complete silence about what is to become of the emancipated slaves? Is it sensible to expect them to manage on their own like other free men? Is not this why Lincoln had argued again and again for gradual, compensated emancipation, a mode of emancipation which could both motivate and empower masters to provide a proper transition for their slaves into a free life? Such a mode would have had the minimum of bitterness and of general poverty (due to the passions and ravages of war) to contend with.

Violence on the part of freed slaves is forbidden. Lincoln is speaking here to longstanding fears among slaveowners of bloody slave rebellions, fears which Middle States unionists as well as Northern humanitarians shared. Should such violence have broken out on a large scale, the Union cause might have been discredited: the old concerns, and repression in the South, might have then appeared justified. Still, violence is understood to be permit-

ted to the freed slaves for “necessary self-defense.” Is this a law of nature? Would it be self-defense to use force against the master who wants to retain his emancipated slave?

We see in this “necessary self-defense” an echo of the “necessary war measure” Lincoln had declared himself obliged to resort to in defense of the Union. Indeed, self-defense had promoted and permitted the original compromises with slavery in 1776 and 1787—that is, the defense of the several States, threatened by European powers and by continual war among themselves.

xiv.

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.

This sentence is quietly stated; the use of “declare and make known” almost suggests he is *reporting* something rather than ordering something—reporting something that is happening, that is bound to happen. The military uses to which freed slaves may be put are *not* immediately, or obviously, combative. He has to think of Southern fears and Northern prejudices, both of which can lead to actions harmful either to the slaves or to Lincoln’s government. There would be something shocking, perhaps even unnatural, many must have felt, in former slaves fighting against their former masters. This was a development which took some time to get used to—but it eventually came about, on a significant scale.

Southerners themselves were finally reduced to freeing slaves who would serve in *their* army. This vindicated Lincoln’s policy as a genuine war measure, a war measure which made African slavery thereafter untenable among Americans.

xv.

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.

This is perhaps the most complicated sentence in the two stages of the Proclamation. We must settle on this occasion for a few preliminary observations about it. Interpretation is made even more difficult when one understands it to have been supplied (in large part?) by a member of the Cabinet, not by Lincoln himself. If

that should be so, what appears to be complexity may only be confusion.

Still, a few questions may be in order: "this act" is considered to be "warranted by the Constitution, upon military necessity." Is it done because it is warranted? Or it is done for some other reason, and the power to do so is provided by "military necessity"? An "act of justice" is pointed to as somehow involved here. Is this the true purpose? Or is it understood that a respect for justice is itself good military strategy? Notice that it is regarded as certainly a "military necessity" but that it is only "sincerely believed" to be an "act of justice." Is the truth about justice far harder to arrive at than truth about military strategy? The President had delayed a long time in doing this: he had had to decide what the right thing to do was—and that depended not only on military strategy, natural right, and political circumstances, but also on his Constitutional powers, duties, and limitations.

The "considerate judgment of mankind" reminds us of the language of the Declaration of Independence's "opinions of mankind." Mankind has "judgment"; Almighty God has "gracious favor." It is not for man to assess what moves God or, indeed, to determine whether God moves at all. Man, it seems, must do what he thinks right—and then hope or pray for the best. The references to both mankind and God serve to remind the reader that immediate, personal concerns should not be permitted to usurp in us the proper, one might even say the constitutional, role of the truly human, the justly divine.

xvi.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

It is said that the issuance of the Emancipation Proclamation was delayed on January 1st because when it came to be signed in the morning, another formal testamentary paragraph, one appropriate for another kind of proclamation, had been inadvertently used in the place of this one in the official copy. It had to be sent back to the State Department to be redone. (It is this, along with a reception Lincoln had to attend for much of the day, which contributed to the delay indicated in the passage I quoted from Frederick Douglass.)

We can see even here, in constitutional matters as in worship, the importance of forms, of appearances, and (perhaps) of chance.

xvii.

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.

Nothing more (in addition to what has been said about the conclusion of the Preliminary Proclamation) needs to be said about this concluding sentence—except perhaps to notice that it *is* in the City of Washington that the decisive declaration against slavery was issued, that slavery which even the slaveholders of Washington's generation, including Washington himself, can be said to have looked forward to ending in a responsible manner as the republic matured.

Has not this examination of the Emancipation Proclamation argued that if Lincoln, as Washington's legitimate successor, could have constitutionally "save[d] the Union" *either* by "sav[ing] slavery" *or* by "destroy[ing] slavery," he would have preferred to do so by taking advantage of this opportunity to destroy slavery? Indeed, to preserve the Union on his terms *was*, even without the Emancipation Proclamation, to destroy slavery.

V.

Three topics remain to be discussed—but not at length in this Lecture. I will suggest the sorts of things that need to be considered.

There is needed, first, a consideration of the effects of the Emancipation Proclamation. One should note first and foremost that it did "work"—in that it promoted the flight of slaves from the South, that it undermined both the economy and the moral standing of the South both at home and in Europe, and that it contributed a significant military force of freed slaves to the North. We can see that, in order for such a policy to work, timing was critical. Also critical was that the President should have had a clear notion of goals and standards. This means that his ultimate considerations drew upon prudence and justice more than upon liberty and equality (as these are generally understood).

As the Union army moved South, thereafter, it "naturally" left freed slaves in its wake. This had, it seems, a great moral effect on what the North was doing and what it was seen to be doing. For example, the Proclamation emancipated Lincoln himself and people like him, as well as the Constitution itself and the very idea of republican government, from the burden of slavery.

We can see as well that ideas *do* matter in political life. One might even say that *only* ideas matter. That which we call "symbolic" can be very important. One should, in considering such matters, begin with the fact that the Proclamation was at once regarded as important. Only the Thirteenth Amendment, abolishing all slavery in the United States (adopted by Congress early in 1865 for ratification by the States), produced as enthusiastic a response from the antislavery people as the Proclamation had done. To be regarded as important is, in political matters, to be at least somewhat important.

It should be evident to us, upon thinking about the Proclamation and its effect, how critical the opinion of the public is for law and, in turn, how critical law is for morality and for civilization. Above all, it should be evident to us how critical it is to know what one is doing.

It should also be evident to us that the Proclamation and the war effort it served have had bad effects as well: the ascendancy of Executive power in the United States can be understood to have started during the Civil War; the separation of powers was undermined as were the States; the war power was magnified; and the notion of "total war" was made respectable. Should not a political man of Lincoln's understanding and temperament now devote himself to redefining, for *our* changed circumstances, what is appropriate in our constitutional relations? Would not Lincoln himself insist today that practical reforms, some of a far-reaching character, be made if we are to address ourselves sensibly and safely to the new challenges which confront us?

VI.

That is one topic which should be developed. I have already touched upon my second remaining topic in this Lecture—that which addresses itself to what we can learn, of a more general nature, from our study of the Emancipation Proclamation.

We see, of course, what prudence can mean in a particular situation—and hence what prudence itself means. One must adjust to one's materials, including the prejudices and limitations of one's community. Such adjustment often includes settling for less than the best. But the most useful adjustment is not possible unless one *does* know what the very best would be. We can also sense, upon the study of the doings of prudent men, how important chance is in human affairs—and hence how limited we often are in what we can do, even when we know what should be done.

We should notice as well, and guard against, that fashionable opinion which dismisses what is reasonable and deliberate as cold-blooded and calculating. It is also important, however, if one is to be most effective as a reasonable, deliberate, and deliberating human being, to seem other than cold-blooded and calculating—that is, it is important to be a good politician. Once again we are reminded of the importance in political things of appearances, of a healthy respect for the opinions (and hence the errors as well as the sound intuition) of mankind.

Certainly, self-righteousness should always be held in check, but not always a show of indignation. Still, indignation even in a good cause should be carefully watched. Consider, for example, the famous Abolitionist William Lloyd Garrison's 1831 promise:

*I will be as harsh as truth, and as uncompromising as justice. On this subject I do not wish to think, or to speak, or write, with moderation. No! No! Tell a man whose house is on fire to give a moderate alarm; tell him to moderately rescue his wife from the hands of the ravisher; tell the mother to gradually extricate her babe from the fire into which it has fallen;—but urge me not to use moderation in a cause like the present. I am in earnest—I will not equivocate—I will not excuse—I will not retreat a single inch—AND I WILL BE HEARD.*¹⁸⁶

Such passion may be useful, even necessary, if great evils are to be corrected, but only if a Lincoln should become available to supervise what finally happens and to deal prudently with others (zealous friends and sincere enemies alike) with a remarkable, even godlike, magnanimity.

VII.

Now, to my final topic for the future, which I preface with three quotations which can serve to illuminate as well this entire commentary on the Emancipation Proclamation.

The first quotation is from the New Testament. "Behold, I send you forth as sheep in the midst of wolves: be ye therefore wise as serpents, and harmless as doves."¹⁸⁷

The second is from Stephen A. Douglas who said of Lincoln, in the course of their celebrated Illinois debates in 1858, that Lincoln

186. WILLIAM LLOYD GARRISON, *THE LIBERATOR* No. 1, Jan. 1, 1831, *reprinted in* JOHN L. THOMAS, *THE LIBERATOR: WILLIAM LLOYD GARRISON* 128 (1963). For Garrison's "extremist" position, see *DOCUMENTS OF UPHEAVAL: SELECTIONS FROM WILLIAM LLOYD GARRISON'S THE LIBERATOR, 1831-1865*, at xiii (Truman Nelson ed., 1966).

187. *Matthew* 10:16.

“has a fertile genius in devising language to conceal his thoughts.”¹⁸⁸

The third is from Lincoln himself who once observed, “I am very little inclined on any occasion to say anything unless I hope to produce some good by it.”¹⁸⁹

Artemus Ward was evidently Lincoln’s favorite humorist during the Civil War:

The President’s reading of the humorist’s story, “High-Handed Outrage at Utica” to his cabinet before presenting them with the Emancipation Proclamation [on September 22, 1862] is well known. “With the fearful strain that is upon me night and day,” said Lincoln, “if I did not laugh I should die, and you need this medicine as much as I do.”¹⁹⁰

But, I suggest, there may be even more to this famous episode than is recognized. Why was that particular story selected by Lincoln for this occasion? The story Lincoln read to his cabinet *is* amusing. But notice, also, that it is about a great traitor, perhaps indeed the greatest traitor who has ever lived. This traitor is dealt with soundly, if irrationally, in the story.¹⁹¹

188. 3 COLLECTED WORKS OF LINCOLN, *supra* note 140, at 261. Compare 3 *id.* with 3 *id.* at 249-50, 277, 279-81. On salutary concealments, see PLATO, REPUBLIC 414E; THUCYDIDES, PELOPONNESIAN WAR, II. 65. See also *supra* notes 142, 148.

189. 5 COLLECTED WORKS OF LINCOLN, *supra* note 140, at 358.

190. JAMES C. AUSTIN, ARTEMUS WARD 107-08 (1964); see OATES, *supra* note 159, at 318-19; 1 SANDBURG, *supra* note 161, at 583.

191. I take the full text of “High-Handed Outrage at Utica” from THE COMPLETE WORKS OF ARTEMUS WARD 36-37 (Charles Farrar Browne ed., 1898):

In the Faul of 1856, I showed my show in Utiky, a trooly grate sitty in the State of New York.

The people gave me a cordyal recepshun. The press was loud in her prases.

1 day as I was givin a descripshun of my Beests and Snaiks in my usual flowry stile what was my skorn disgust to see a big burly feller walk up to the cage containin my wax figgers of the Lord’s Last Supper, and cease Judas Iscarrot by the feet and drag him out on the ground. He then commenced fur to pound him as hard as he cood.

“What under the son are you about?” cried I.

Sez he, “What did you bring this pussylanermus cuss here fur?” and hit the wax figger another tremenjis blow on the hed.

Sez I, “You egrejus ass, that air’s a wax figger—a representashun of the false ‘Postle.’”

Sez he, “That’s all very well for you to say, but I tell you, old man, that Judas Iscarrot can’t show hissself in Utiky with impunerty by a darn site!” with which observashun he kaved in Judassis hed. The young man belonged to 1 of the first famerlies in Utiky. I sood him, and the Joory brawt in a verdick of Arson in the 3d degree.

Id. The Artemus Ward volume includes a number of instructive pieces on slavery, Lincoln, and the Civil War.

Consider the title: "High-Handed Outrage at Utica." Utica was the famous African city that allied itself to *republican* Rome in the mighty struggle against Carthage. Did not Lincoln intend to gather to the cause of the American Republic an African power (those men of "African descent") against the threatening Carthage represented by the South?

But, perhaps he recognized, there was in his own action something questionable, something dubious, even high-handed and outrageous—at least, there would be, in appearance, especially if he did not handle it properly. Thus, he saw himself as others saw him, *or as others might see him*—and laughed at himself.

This would be, of course, most subtle—and far higher humor than anything Artemus Ward was ever capable of. But if Lincoln should have been so subtle, so detached, should not that really make us take notice? It points up the deliberateness, the self-conscious artistry, the coolness of Lincoln. This is, indeed, startling self-criticism, which he would share with his most perceptive observers. Or should what I am now drawing upon be dismissed as mere chance and hence unsound speculation? So be it—for those who would have it so.

In any event, we are obliged to emphasize, even more than we have already, that Lincoln must have known what he was doing, including what impression he needed to make. This man is truly a remarkable child (indeed, a prodigy) of the American constitutional regime. Should not these observations induce us to return to the Emancipation Proclamation and to take it, as well as the Constitution that it both draws upon and serves, even more seriously than we have? We have examined merely the Proclamation's surface—but in doing so, have we not been reminded that the surface, the appearance of things, is critical for responsible political action?

The words one uses—and the words one keeps to oneself—very much contribute to the appearances of things and hence to one's effects. In this sense, a word fitly spoken is like apples of gold in settings of silver.¹⁹²

192. See *Proverbs* 25:11: "A word fitly spoken is like apples of gold in pictures of silver." (This verse served as the epigraph upon the publication of an earlier form of this Lecture in 1980.)

Lincoln, aware that the Emancipation Proclamation was necessarily limited in scope and not without problems as to its authority, encouraged (in due time) the constitutional amendment with respect to slavery that his Proclamation can be said to have prepared the way for. Thus, he announced on June 9, 1864 that he approved his party's "declaration of so amending the Constitution as to prohibit slavery throughout the nation":

When the people revolt, with a hundred days of explicit notice, that they could,

12. AMENDMENTS XIII, XIV, AND XV

I.

The three Civil War Amendments to the Constitution of 1787 continued the deep wartime division in this Country by pitting one section against another, at least until the passions of war had subsided enough to permit everyone to see that the new order was truly preferable in key elements to that with which the Framers of the Constitution had been saddled in 1787. No respectable defenders of slavery are heard among us today. Even the segregation of a half century ago has come to be generally recognized as no longer defensible, however useful it may have once seemed during a period of transition following the Civil War and Reconstruction. The merits of the new order are so widely appreciated that little is heard these days either about the way in which ratifications were gotten out of State legislatures for one or more of the Civil War Amendments or about the way the United States Supreme Court explained itself in dealing the mortal blow to segregation that it did in 1954.

We have noticed the orderliness of the arrangement of the first ten Amendments and, to a lesser extent, of the next two Amendments as well. But, we have also noticed, there is far less of a pattern to the Amendments after the Twelfth, except as responses to historical developments and unpredictable events around the world or within the United States. This suggests that the original constitutional framework was sound.

The Amendments since the Bill of Rights, as well as the Confederate Constitution of 1861, testify to what happens when constitution-making is done primarily in response to events or circumstances. The Constitution of 1787, on the other hand, rises above circumstances to a remarkable degree, however much it was prompted by the problems of that day. Even so, the need for amendments was anticipated by the Constitution's Framers, especially by those who recognized that there had to be compromises that would keep the Constitution from conforming even more than

within those days, resume their allegiance, without the overthrow of their institution [of slavery], and that they could not so resume it afterwards, elected to stand out, such an amendment of the Constitution as is now proposed, became a fitting, and necessary conclusion to the final success of the Union cause. Such alone can meet and cover all cavils. Now, the unconditional Union men, North and South, perceive its importance, and embrace it. In the joint names of Liberty and Union, let us labor to give it legal form, and practical effect.

7 COLLECTED WORKS OF LINCOLN, *supra* note 140, at 380. For the party platform on which Lincoln was commenting, see 7 *id.* at 381-82, 411.

it did with that natural constitutionalism which is evident in the strivings of Americans from the beginning.

Amendments to the Constitution, I have suggested, have tended thus far to refine, if not merely to confirm, what has already happened. Even the three Civil War Amendments, which are regarded as the most far-reaching of the twenty-six Amendments there have been to the Constitution of 1787, reflect what had already happened in this Country. The war *was* over, and now the Union victory had to be "ratified." One way or another, this was going to be done, even though it took more than a century to work out much of what was intended by the three Amendments. Even without formal amendments, most of what has happened in adjusting constitutional arrangements to the outcome of the war would probably have come about anyway, especially as Americans responded and conformed to worldwide developments in race relations. (The South African experience is instructive here.) Still, the Civil War Amendments have helped guide, or at least illuminate and define, developments in this Country for a century and a quarter now.

II.

Foremost among the developments to be "ratified" by the Civil War Amendments was the abolition of slavery—not only the raw institution itself but, as much as possible, everything that permitted (if not required) it and everything that flowed from it. One way or another, the practices, principles, and legacies of slavery were to be eliminated.

Slavery had been a critical problem in the Federal Convention of 1787 and thereafter in the Constitution itself. "Everyone" recognized in 1787 that slavery was a serious defect in the system; but it was also widely recognized that it simply had to be put up with, that it could not be immediately abolished in the Country as a whole. That those citizens who were so unfortunate in 1787 as to be personally dependent on slavery appreciated the general detestation of slavery in the United States is revealed by the precautions they took in insisting upon provisions in the Constitution that would protect aspects of slavery from immediate suppression.

All human beings resident in the United States are, according to the Civil War Amendments, to have access to the principal legal prerogatives of everyone else who lives here. The equality principle finally came to terms with slavery. In the United States this vital principle is nourished by venerable doctrines and is rein-

forced, if not even "taught," by considerable experience. One massive influence upon American opinion has been the fact that virtually anyone with productive capacities could move West, set up his own establishment, and hence be "his own man." Everyone, therefore, could readily consider himself to be as good as anyone else. Hereditary privilege, and sometimes even family attachments, fell before an openness to self-development. This openness remains, if not on some Western frontier, at least in the realm of the economic opportunities and social advancement to which we have long been accustomed, fueled as they now are by scientific discoveries and technological innovations.

The equality principle has been drawn upon in several constitutional Amendments for more than a century now. But the Civil War Amendments were particularly important here, with the Fourteenth Amendment providing, in effect, a second Bill of Rights in that it guaranteed various rights as against the States and in that it sought to bring everyone living in this Country under its coverage. Just as the Constitution of 1787 permitted the National Government to reach citizens directly without depending on the States (for example, in taxing them), so the Fourteenth Amendment permitted citizens to look to the National Government for protection against State infringements of traditional (if not even natural) rights.

The principles of the Fourteenth Amendment could not be taken with full seriousness, however, until slavery had been truly abolished. This was the objective to which the Thirteenth Amendment had been dedicated and to which the Fifteenth Amendment returned.

III.

Section 1 of the Thirteenth Amendment provides, "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."

This absolute prohibition of slavery in this Country implicitly relied upon the "created equal" statement in the Declaration of Independence, a statement that Lincoln for one had emphasized in developing his political principles in the 1850s. Just as Americans had had to put up with the Articles of Confederation arrangement in order to get on with the Revolutionary War in 1777, so too they had to put up with slavery in order to get on with the development and ratification of the Constitution in 1787. But in both cases,

these accommodations were widely recognized to be temporary expedients.

The natural inclination of Americans who had subscribed to the principles of the Declaration of Independence may be seen in the Northwest Ordinance, which had been enacted by the Confederation Congress in New York City during the same summer that the Constitution was drafted in Philadelphia. The last major provision in the Ordinance of 1787 reads,

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in 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.

It can be seen where the decisive language of the Thirteenth Amendment was taken from sixty years later.¹⁹³ Even so, the absolute prohibition of slavery in the Northwest Territory did depend on an accommodation to slavery interests in "the original states": a fugitive-slave assurance had to be added lest the institution of slavery in those States be undermined by flights of slaves to the northwest.¹⁹⁴

The Thirteenth Amendment was anticipated by executive actions taken during the Civil War, culminating (as we have seen) in the Emancipation Proclamation of President Lincoln on January 1, 1863. We have observed that this kind of executive action, reflecting considerable expansion of Presidential power, is to be expected in wartime. Even so, the Thirteenth Amendment goes further: the Emancipation Proclamation had freed slaves held in the areas still in rebellion; the Amendment provides that slavery simply "shall [not] exist within the United States." All slavery, future as well as present, is thereby forbidden and invalidated, no matter under whose auspices slaves are held in this Country.¹⁹⁵

193. In 1865, the principal draftsman of the Thirteenth Amendment was Senator Lyman Trumbull of Illinois, a State that was part of the Northwest Territory. For Lincoln's celebration of Illinois's taking the lead in ratifying this Amendment, see 8 COLLECTED WORKS OF LINCOLN, *supra* note 140, at 254-55.

194. Northwest Ordinance art. VI; see *supra* text accompanying note 29.

195. An exception is made for persons "duly convicted" of crimes. U.S. CONST. amend. XIII, § 1. Our sentiments about slavery are now such that we can be troubled by the use of the term *slavery* to designate the convicted criminal serving his sentence. (Are we not, in our understandable skittishness about certain terms, and especially *slavery*, somewhat like the Roman republics were about the use of the term *king*?) The exception here indicates not only that forced labor is still possible for convicted criminals but also that slavery should not be disguised as a system of forced labor for nominal criminals.

The abolition of slavery by the Thirteenth Amendment in 1865 is in dramatic contrast to the amendment that had been proposed by a desperate Congress in 1861 in an effort to reassure the South and thereby to head off the drive to Secession:

No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.¹⁹⁶

The Thirteenth Amendment is to be contrasted as well to the Constitution of the Confederate States of America. We noticed in Lecture No. 1 that no later State government ever again aspired to the power in the Union that the States in the Confederation exercised between 1860 and 1865. The successful Union effort to suppress those State pretensions led among us to that magnification of the national powers which has been virtually impossible ever since to reverse, especially during periods of crisis.

The Thirteenth Amendment of 1865 was followed three years later by the Fourteenth and two years after that by the Fifteenth. The Thirteenth Amendment “merely” abolished slavery and empowered Congress to make certain that the abolition would be as thorough as the Country wanted it to be. Had it been evident from the outset that the emancipated slaves would not be permanently discriminated against—if it had been evident, say, that they would be treated like the newly-arrived and hence somewhat-handicapped immigrants who are usually permitted to do as well as their talents and initiative permit—then the Fourteenth and Fifteenth Amendments might not have been resorted to by Congress. Without those two Amendments, the powers and immunities of the States might have remained, at least for a while, pretty much what they had been under the Constitution of 1787. We will never know what would have happened if the abolition of slavery had been immediately accepted in good faith in the South, just as we will never know what would have happened if another ordinance had in the 1780s, like the Northwest Ordinance, forbidden the spread of slavery to the Southwest Territory as well.

196. ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 299. Three States ratified this exercise in desperation before Secession had to be dealt with. Compare Lincoln's own proposed amendment, in his Annual Message to Congress of December 1, 1862, which provided for compensated emancipation of the slaves. 5 COLLECTED WORKS OF LINCOLN, *supra* note 140, at 530.

IV.

Whereas the Thirteenth Amendment is fairly simple and straightforward, the Fourteenth Amendment is much more complicated. Even more complicated is what has been done with the Fourteenth Amendment by courts and scholars, so much so that nothing I could say here is apt to provide more than the barest guidance to anyone familiar with the Amendment, its interpretation, and its implementation.

Still, I offer enough of an account of the Amendment to permit it to be fitted into an overall scheme of things, so that one can begin to think in a reliable manner about the Fourteenth Amendment and how it has been interpreted. It is critical, in approaching this Amendment, to remember that once the Union forces had prevailed against a radical "State Sovereignty" position in the Civil War, the States would eventually be obliged to recognize the fundamental rights of Americans, at least those great rights that had been recognized, even before the Bill of Rights, as part of the inheritance of the English-speaking peoples.

There are, in the first section of the Fourteenth Amendment, four elements. I shall consider each of these elements in turn before going on to the other four sections in the Amendment. The Amendment begins, "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."

This sentence reverses, in effect, the ruling by the United States Supreme Court a decade before in the explosive *Dred Scott Case*. The Court had ruled in effect on that occasion, despite the precedent of the Northwest Ordinance, that the Due Process Clause of the Fifth Amendment kept Congress from prohibiting the introduction of slavery into any territory of the United States. Opposition to that ruling, which deeply divided the Country, had been vital to the platform of the Republican Party in 1860. Among the things said by the Supreme Court in *Dred Scott* was that no one of African descent could, for constitutional purposes, ever be considered a citizen of the United States, whatever individual States might say or do. It was even argued on that occasion, in support of this ruling, that the authors of the still-authoritative Declaration of Independence had not meant to include anyone of African descent within the scope of the challenging pronouncement that "all Men are created equal." The most elaborate discussion of this issue may be found in the celebrated Lincoln-Douglas debates conducted in

Illinois in 1858.¹⁹⁷

Thus, this part of the Fourteenth Amendment, like the Eleventh Amendment before it and the Sixteenth and to some extent the Twenty-sixth Amendment after it, came in response to a Supreme Court ruling. A different kind of response to questionable Court rulings is the effort to change the composition of the Court, a response that is easier to make than an amendment but that may not be as reassuring because of the long-term unpredictability of the judges who may be appointed. Our general deference to "the Law" makes it likely that even a wrongheaded decision by the United States Supreme Court will be so respected, once established, that only a constitutional amendment will be considered adequate to reverse it.

The influence of a Supreme Court ruling is such that even though the Thirteenth Amendment abolished slavery in 1865, it was still believed by many that something had to be done to rid the Country of the pernicious effect of the 1857 *Dred Scott* ruling with respect to the nature of American citizenship. One consequence of the opening sentence of the Fourteenth Amendment was to require the States to surrender some of the considerable power they had had theretofore with respect to definitions of State citizenship.

V.

The drafters of the Fourteenth Amendment, once they had settled the citizenship issue, could go on to provide for the prerogatives of citizenship: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"

It seems to be generally agreed that the Fourteenth Amendment was intended to apply to the States various of the constitutional restraints that had been applied theretofore only to the General Government. If so, reliance upon the Privileges and Immunities Clause of the Amendment seems the most obvious way to carry out that intention.

There has been, for more than a half century now, considerable argument as to which restraints on government *are* to be made applicable against the States. Some say that all of the Bill of Rights should be extended to the States; others say that most of the Bill of

197. See Anastaplo, *Slavery and the Constitution*, *supra* note 168, at 732. For the text of these seven debates, which first began at Ottawa, Illinois, on August 21, 1858, see 3 COLLECTED WORKS OF LINCOLN, *supra* note 140, at 1-76, 102-44, 207-44, 283-325.

Rights should be extended; a few attempt to add to the Bill of Rights still other restraints for the States to be bound by.

It seems to me that "the privileges and immunities of citizens of the United States" binding upon the States should include at least all of them not of a peculiar federal character that may be recognized in the Bill of Rights. But it is obvious that privileges and immunities were believed to be identifiable prior to the drafting of the Bill of Rights in 1789 because there is a Privileges and Immunities Clause in Article IV of the Constitution of 1787 as well. The Bill of Rights, we should remember, did not create the rights set forth therein but, for the most part, reaffirmed long-established rights. The Ninth Amendment also reminds us that rights exist for the American people independently of their enumeration in the Bill of Rights. State constitutions can be looked to, therefore, as well as other constitutional documents (including the Constitution of 1787), to determine what rights are taken seriously by the American people.¹⁹⁸

This problem is complicated, however, by the modern tendency to rely primarily upon the courts to protect the rights we have, a tendency which, curiously enough, goes along with the refusal to take the Common Law (with the rights *it* recognized) as seriously as it once was. The emphasis in the Fourteenth Amendment is upon the making or enforcing of any law, which provides a guide to State legislatures and executives as well as to the judiciary. If there are privileges and immunities of citizens of the United States that the States are bound to respect, does not that mean that the General Government should (independent of explicit provisions either in the Bill of Rights or in the Fourteenth Amendment) also be bound to respect them?

I have suggested that the straightforward way of extending against the States the rights otherwise recognized by the Constitution is through the Privileges and Immunities Clause of the Fourteenth Amendment.¹⁹⁹ But an 1873 ruling by the Supreme Court²⁰⁰ slaughtered the Privileges and Immunities Clause of the Fourteenth Amendment and effectively removed it (for more than a century now) from serious consideration as the means for assuring restraints upon the States. This has led to one distortion after

198. On the "privileges and immunities of citizens of the United States," see 2 CROSS-KEY, *supra* note 52, at 1083-89, 1119-34.

199. This way was also available, to a limited extent, through the Republican Form of Government Guarantee in Article IV.

200. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

another as, once again, the American people have been obliged to work their way around what the Supreme Court has wrought in their pursuit of the aspirations evident in the Declaration of Independence and the Constitution of the United States.²⁰¹

VI.

Section 1 of the Fourteenth Amendment continues: “nor shall any State deprive any person of life, liberty, or property, without due process of law.” This draws upon a provision found in the Fifth Amendment. There is no reason to believe that this 1868 provision should be read differently from the 1791 provision, which, as we have seen, reminds judges in the Courts of the United States of due process obligations of long standing in Anglo-American jurisprudence. Indicative of what due process means are such references to it as that found in the Thirteenth Amendment: “crimes whereof the party shall have been *duly* convicted.”

Notice that the two Due Process Clauses cover all *persons*, not only citizens of the United States. Everyone is entitled to a fair trial when he is about to be deprived in this Country of his “life, liberty, or property.”²⁰² It can be argued that the right to a fair trial, in both criminal and civil cases, is one of the privileges and immunities of citizens of the United States—and, if so, the Due Process Clause in the Fourteenth Amendment is superfluous. But the Privileges and Immunities Clause seems to be primarily concerned with the making or enforcing of statutes that may be questionable, while the Due Process Clause looks primarily to the conduct of judicial proceedings, including Common Law cases, aside from what may be done through the use of statutes. Thus, the sequence in Section 1 of the Fourteenth Amendment (“making,” “enforcing,” and “process”) follows the sequence of the first three articles of the Constitution (Legislative, Executive, and Judicial).

Even though the Due Process Clause of the Fifth Amendment continues to be read as primarily a guide for judges (in the National Courts), the Due Process Clause in the Fourteenth Amendment has been used as the means for bringing to bear upon the State governments (not just upon State judges) an array of rights

201. The lamentable career of Dizzy Dean again comes to mind. See ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at xvii; MACHIAVELLI, *supra* note 1, at II. 20 (“[T]he ambition of man is so great that to satisfy a present wish, he does not think of the evil that in a short time results from it.”).

202. The emphasis does seem to be upon human beings, whatever consideration may be given by extension to business corporations.

due to people living in the United States. That is, the Due Process Clause has been relied upon to do what the Privileges and Immunities Clause was originally believed to do. The Supreme Court could effectively get rid of the Privileges and Immunities Clause in 1873, but it eventually felt obliged (considering certain inherent tendencies in the American regime) to find some other way to subject the States to the principles and restraints that Americans had "always" believed should be respected by all governments. These principles and restraints are invoked, we have seen, in such documents as the Declaration of Independence.

However defensible this use of the Fourteenth Amendment's Due Process Clause may have been in many ways, it has not promoted care in reading of the Constitution. When virtually identical provisions, as those in the Fifth and Fourteenth Amendments, can be read so differently, people come to suspect that the Constitution is no more than what the judges happen to say it is. If the Due Process Clause of the Fourteenth Amendment can be expanded the way it has been, there seem to be no limits upon what may be done with it. Perhaps even more significant, if the extension of rights against the States is done by means of the Due Process Clause, the primary guardian of those rights is more likely to be taken to be the courts, since due process *has* traditionally been associated with judicial proceedings. But it is evident, as we shall see when we come to Section 5 of the Fourteenth Amendment, that Congress was looked to for leadership in protecting the rights of the American people. *Dred Scott* taught thoughtful citizens that the United States Supreme Court could not be left to its own devices here.

VII.

Section 1 of the Fourteenth Amendment concludes: "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws." The principle of equality fundamental to the American regime, which can be said to go back to Magna Carta and which was proclaimed in the Declaration of Independence, is for the first time made explicit in the Constitution.

It is likely that the recently emancipated slaves were the primary concern of the framers of the Fourteenth Amendment. *They* are to have the rights that others have. But that means that all others *do* have those rights also, and perhaps have them now more firmly than ever before, whatever individual States may want to do.

The sequence of the provisions in Section 1 of the Fourteenth

Amendment suggests that they do not cover the same things. First, citizens are identified: that is the bedrock upon which everything else is built. It is then provided that State governments may not abridge the privileges and immunities of citizens. But, it seems to be recognized, due process may be denied in particular cases even though the privileges and immunities of citizens may be generally respected by the laws that are made and enforced—and so the Due Process Clause is added. But, it then seems to be recognized, although privileges and immunities may be respected and due process may be available, some persons may be mistreated by being subjected to laws that do not apply in the same way to others—and so the Equal Protection Clause is added. Or as it has recently been put by a Supreme Court Justice, this Clause “requires every State to govern impartially.”²⁰³

The Equal Protection Clause is implied, it can be said, by the Rule of Law. Perhaps, indeed, it is implied in the American constitutional system from the beginning, however much it was compromised by the institution of slavery. One way or another, it has come to be argued, the Equal Protection principle should be applied against the General Government as well.²⁰⁴

We have seen that the equality principle has been so powerful in the United States that one constitutional provision after another is looked to by those who want to see that all governments in the United States respect, for all persons, the rights that Americans have long believed are due not only to them but to all human beings in appropriate circumstances. Critical here may be that natural right—that sense of what is by nature right—to which I have already referred.²⁰⁵

Section 1 of the Fourteenth Amendment, with its disciplining of the States by bringing to bear against them the rights traditionally recognized by the American people, ushered in a significantly re-

203. *Craig v. Boren*, 429 U.S. 190, 211 (1976) (Stevens, J., concurring); see ANASTAPLO, *THE CONSTITUTIONALIST*, *supra* note 66, at 710-11 n.83.

204. This has been done, in such cases as *Bolling v. Sharpe*, 347 U.S. 497 (1954), not by making use of either the Privileges and Immunities Clause of Article IV or the Ninth Amendment, but rather by expanding the Due Process Clause of the Fifth Amendment. Nor does it seem to be appreciated that it may be prudent, as was evidently intended by the drafters of the Fourteenth Amendment, to leave in some government of the United States immunity from the full equal-protection restraints. See *infra* note 211.

205. One problem with the use of the Equal Protection Clause to accomplish what could be better done otherwise may be seen in the Reapportionment Cases: *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964). Would it not have been better if the Republican Form of Government Guarantee had been used in such cases and, even better, if done by Congress rather than by the Courts? See ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 173-74, 184-85; *infra* note 209.

vised constitutional arrangement in the United States. The Gettysburg Address, which serves as the preamble to this "new" Constitution, argues in effect that this redefined American regime was implicit from the very beginning.

VIII.

Section 2 of the Fourteenth Amendment provides that, "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." One immediate consequence of this was to increase the voting power of the Southern States in the national councils, since the emancipated slaves were now to be given full weight (not three-fifths as had originally been provided for slaves).

Thus, equality immediately proved threatening for Northerners: they could see themselves penalized substantially in Congress by their victory in the Civil War. The first sentence of Section 2 may not have been needed, since the counting for apportionment purposes would routinely include the citizens identified in Section 1. This sentence seems to be there as an introduction to what follows, the limitation placed upon those States that deny the right to vote "to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States."

This provision does *not* invalidate the denial of voting rights, but rather penalizes States that do deny those rights. Perhaps the Equal Protection Clause should invalidate such denials, but the States that did deny rights would be strengthened in Congress until an official invalidation took effect. And so Congress is empowered to deny seats to offending States.

The Northerners who controlled the Congress that wrote the Fourteenth Amendment were willing to have the emancipated slaves counted if *they* could vote. Presumably, they could as voters affect who was chosen to go to Congress and to fill various posts in State government.

IX.

Section 3 of the Fourteenth Amendment represents another attempt by the Congress to hold Southerners in check, at least for a generation. Public office, National as well as State, was denied to any person "who, having previously taken an oath . . . to support the Constitution of the United States, [had] engaged in insurrection or rebellion against the same."

We are reminded by this provision that the equality principle can be suspended, in its application, by one's circumstances or conduct. Criminals, for example, are routinely denied various civil rights. Just as slavery had kept people of African descent from full access to the privileges and immunities of Americans, so could rebellion affect the full access of others.²⁰⁶

One implication of Section 3, and of Section 4 as well, seems to be to declare secession itself to be unconstitutional, for the disability here seems to refer not only to previous but also to future rebellions.

X.

Section 3 of the Fourteenth Amendment provided for penalizing rebels in their public capacities. Section 4 provides for penalizing rebels in their private capacities, that is, "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."

Among the purposes of this provision, it would seem, was to head off any claims against the United States for the loss or emancipation of slaves, perhaps by recourse to such provisions as the Taking Clause of the Fifth Amendment. Such claims would have had little chance of success insofar as emancipation came by way of the Thirteenth Amendment. But what about losses and emancipation that had come by way of military action and executive decrees? The Fourteenth Amendment says, in effect, that people who have lost slaves cannot expect to be compensated by any public funds, National or State.

XI.

Constitutional Amendments, beginning with the Thirteenth, have taken to adding a provision empowering Congress to enforce the Amendment. Such provisions may be found in more than half of the Amendments since the Thirteenth Amendment.

Section 5 of the Fourteenth Amendment reads, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Much is left for Congress to do in working out implications of the Fourteenth Amendment. This points up the supervisory role of Congress in these matters.

206. Congress was given the power, by a two-thirds vote of each House, to remove this disability for rebellion. U.S. CONST. amend. XIV, § 3.

Does such a provision do more than the Necessary and Proper Clause does in empowering Congress? In fact, does the use of such a provision in some Amendments implicitly, however inadvertently, limit the powers of Congress with respect to the matters covered in those Amendments that do not happen to have such a provision?

What constitutes "appropriate legislation" by Congress in "enforc[ing] the provisions" of the Amendment? Is Congress limited simply to making sure that the various provisions in the Amendment are carried out? For example, Congress may act to make sure that no person is deprived of equal protection of the laws. But may Congress also act to serve the purposes for which equal protection is evidently desired? It is here that one case for the authority to use affirmative-action programs may be made. This would be authority for the majority to do on behalf of a minority at the immediate expense of the majority what could not be done on behalf of the majority at the expense of the minority. Such action would be designed to serve the interest of the entire community as well as of the minority. It can be argued that the ultimate concern of Section 5 of the Fourteenth Amendment is not to ensure State compliance with certain formal standards but rather to permit the United States to advance racial justice. It may not be enough, considering the lingering effects of centuries of deprivation of African-Americans in this Country, merely to forbid formal State actions of a certain character hereafter. Certainly, the early Congresses under the Fourteenth Amendment, including the Congress that drafted it, considered it within their power to provide special programs on behalf of the recently emancipated slaves.

XII.

The Fourteenth Amendment recognized the integrity of the Union that had been sealed in blood by the Civil War. That war had made many feel that they had a Country—the Nation which they had fought for and across. The war may even have provided Americans a depth and dignity they had not had before, with sacrifices made in 1861-1865 that should perhaps have been made in 1787-1791 in disposing of slavery at the outset in an authoritative and permanent fashion, however long that disposition might have taken at that time.

Once the integrity of the Union had been affirmed by a great war, especially through a struggle that began for the National Government as an effort to keep the Union together and ended as a

crusade against slavery, the Fifteenth Amendment naturally followed upon the Thirteenth and Fourteenth Amendments: "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."

The primary concern of both the Thirteenth and the Fifteenth Amendments is with the condition and treatment of the former slaves. This makes it likely that the Fourteenth Amendment is also very much concerned with those people, however much others may benefit as well because of the reaffirmation and application in that Amendment of various general principles.

Perhaps it was originally believed by the framers of the Fourteenth Amendment that it would guarantee voting rights for the former slaves. Those rights are taken for granted in Section 2 of this Amendment. But it seems to have become evident, fairly soon, that more direct, or explicit, provisions about something so fundamental as voting were needed. Even the Fifteenth Amendment required more than half a century to take hold. The insistence upon voting rights has proved decisive, especially when underwritten and directed by Congressional mandates. Invocations of the equality principle have made it easier to insist upon such rights.

XIII.

All branches of the General Government have contributed to accomplishing the aims of the Civil War Amendments. This is something that is much easier for the National Government than for the State Governments to do, even though the Southern States *have* been liberated by the war and its Amendments from crippling institutions.

Congress started the implementation of these Amendments with legislation in the 1860s and 1870s and has continued down to our day, culminating in the recent Civil Rights and Voting Rights legislation. African-Americans have not been the only beneficiaries of some of this legislation. Even when they have been intended as the principal immediate beneficiaries, the entire Country has benefitted from the empowerment, reassurance, and development of a significant minority within it.

The Executive, too, started implementation of these Amendments in the 1860s and 1870s. This was anticipated by the Emancipation Proclamation and was furthered by directives issued to, and promulgated by, armies of occupation in the South. Since the Second World War, executive orders have been critical in the cur-

tailment of racial discrimination in the armed forces of the United States, so much so that an African-American four-star general was widely respected as the Chairman of the Joint Chiefs of Staff in charge of the overall military direction of the 1990-1991 war in the Persian Gulf region.

The record of the Judiciary regarding civil rights matters has been spottier than that of the Congress and the Executive. Rulings by the Supreme Court in the decades following the Civil War seriously hampered what Congress had tried to do.²⁰⁷ *Plessy v. Ferguson*²⁰⁸ did not help either. The Court's most dramatic manifestation of a more enlightened position may be seen in the 1954 school-desegregation case, *Brown v. Board of Education*²⁰⁹—but *Brown* and like cases might not have been needed to the extent or in the way they were if the Court had been more sensible in its readings of the Fourteenth Amendment in the last quarter of the Nineteenth Century.

I have suggested that the affirmative-action issue has yet to be sensibly settled by the Courts. Another issue in need of sensible resolution is the status of "State action" under the Fourteenth Amendment. It is often said by the Courts that Congress, in enforcing the provisions of this Amendment, can only direct its attention to actions taken by the States that deny equal protection of the laws. Private actions, it is argued, are beyond the scope of Congress under the Fourteenth Amendment, whatever Congress may do pursuant to other powers it may have (such as the Commerce Power). But it is evident in the sequence of Civil War Amendments that Congress attempted to deal with one subterfuge after another whereby efforts might be made to deny various rights to the former slaves. If a community, by custom and other means which can have the force of law, does "informally" what it cannot

207. See *The Civil Rights Cases*, 109 U.S. 3 (1883); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

208. 163 U.S. 537 (1896).

209. 347 U.S. 483 (1954). One scholar has observed: "What finally turned the tide [against racial discrimination] were a series of legislative enactments: the Civil Rights Act of 1964 [42 U.S.C. § 2000A], the Voting Rights Act of 1965 [42 U.S.C. § 1973], and the Fair Housing Act of 1968 [42 U.S.C. § 3601]. The struggle against racial discrimination required the conscientious effort of all three branches." Louis Fisher, *The Curious Belief in Judicial Supremacy*, 25 SUFFOLK U. L. REV. 85, 113-14 (1991); see also *supra* note 205.

Suppose two American communities practice obvious racial segregation in the same activities, with one of the communities doing this with the aid of a statute and the other achieving this result through the use of public opinion. Why should not Congress, pursuant to § 5 of the Fourteenth Amendment, be able to deal the same way with both situations?

do “formally” (that is, by explicit statutory provisions), may nothing be done to check it pursuant to the Fourteenth Amendment? Congress in the 1860s believed it was authorized to supervise “private” activities bearing on race relations, but the Supreme Court in the following decades thought otherwise. Again one must consider whether the evident purposes of the Fourteenth Amendment suggest what Congress might do to deal with actions and conditions that thwart a humane national purpose.

In these and related matters it is often more sound for Congress to take the lead, for it usually can decide better than can judges how much of the “private” activity in and of a community is to be regulated and in what way. After all, is it not really the community that is often “expressing” itself through these “private” activities? And if so, is it not better to counter that form of public effort with another form of public effort of a more “official” character, something which the Congress (as the branch of government most sensitively representative of the people) is usually better equipped to develop than either the President or the Courts? The people are thereby confronted by themselves, but in a more elevated form.

13. AMENDMENTS XVI, XVII, AND XIX

I.

The Sixteenth, Seventeenth, and Nineteenth Amendments, along with the Eighteenth Amendment (which we will consider in our next Lecture along with the Amendment that repealed it, the Twenty-first), all reflect populist developments in the United States during the first quarter of the Twentieth Century.

More than forty years passed between the Civil War Amendments (1865, 1868, and 1870) and these three Amendments of 1913 and 1920. Thus, it took more than half a century to spell out the populist implications grounded in the equality principle that began to be drawn upon in the 1860s with the radically democratic response to the oligarchic features of the attempt at Secession.

The three Civil War Amendments obscure a significant fact of American constitutional history: more than a century passed (that is, from 1804 to 1913) before any amendments were fashioned primarily for changing the way the National Government worked in this Country. The Civil War Amendments, as we have seen, were directed primarily to curbing the States, and powers were given to the General Government to serve that end.

I have attempted to develop, both in my Commentary on the

Constitution of 1787 and in my Commentary on the first twelve Amendments, the order in which things are arranged, an order keyed to the matters dealt with both in the Constitution and in those Amendments. When one goes beyond the Twelfth Amendment, or for that matter when one goes beyond the Tenth Amendment, the order of the Amendments *is* determined by "history," which means that chance is likely to play a greater part, making the overall American constitutional movement more difficult to subject to rational analysis.²¹⁰

II.

A change in the way the National Government worked may be seen in the Sixteenth Amendment: "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."

This change, unlike the changes regarding the States in the Civil War Amendments and elsewhere, was primarily to *expand* the power of the National Government. In fact, we have noticed, there has never been a constitutional amendment which has curbed any of the powers originally desired by the Framers of the Constitution for the Government of the United States.²¹¹

The Sixteenth Amendment might never have been needed if the Supreme Court had not cast doubt in 1895 upon the power of Congress to tax incomes,²¹² something Congress had done during the Civil War. The difficulty perceived here had come from the provision in Section 9 of Article I of the Constitution: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." It is difficult to see, however, that an income tax violated the obvious purposes of the limitation upon "Capitation, or other direct, Tax," a limitation that aimed at uniform treatment of taxpayers throughout the several States.

The Sixteenth Amendment is still another indication that citizens can be dealt with directly by the National Government, without any mediation by the States in any way. This has been seen

210. "History" may also be responsible, at least in part, for the extra-constitutional changes, such as with respect to both judicial review and the enhancement of Executive Power, matters that we will consider further in Lecture No. 17.

211. Consider the implications of the Thirteenth and Fourteenth Amendments: they limit the National Government, but not with respect to matters of concern to the Framers. *But see supra* note 204.

212. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895).

recently in what can be done by the General Government with the National Guard of a State.

III.

The Seventeenth Amendment provides for the direct popular election of Senators, taking that power of election away from the State legislatures:

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 legislature.

This shift can be said to have been anticipated by, among other things, the highly-publicized contest between Abraham Lincoln and Stephen A. Douglas in Illinois in 1858. Although that election still depended on the State legislature, the famous debates between Lincoln and Douglas were intended to influence the choice by the people of the members of the State legislature that would in turn choose a Senator that year.

The national movement that led to direct election of Senators has been described in this fashion:

Selection of United States senators by state legislatures had been an object of criticism for many years. Direct election of senators was first proposed in 1826; and after 1893 a constitutional amendment to establish direct election was proposed in Congress every year. Even without a constitutional amendment, popular choice of senators was becoming the rule. By 1912, twenty-nine of the forty-eight states had provided either for nomination by party primaries, with the individual legislators bound to vote for their party's nominee, or for a statewide general election, the result of which was binding on the legislature.

The objectives of direct election included reducing corruption in selection of senators, elimination of national-party domination of state legislatures, and immediate representation of the people in the Senate. . . .²¹³

The stipulation in the Seventeenth Amendment that "each Senator shall have one vote" simply repeats a provision in Section 3 of Article I of the Constitution: it had been prudent to make that point there, lest it be argued that the two Senators chosen by a State legislature should have no votes on their own but rather

213. Dennis J. Mahoney, *Seventeenth Amendment*, in 4 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION*, *supra* note 4, at 1665.

should act as their State legislature directed.²¹⁴

The provision in the Seventeenth Amendment about the electors of Senators is taken from Section 2 of Article I where the qualifications of the electors of Representatives are described. We can see here, as elsewhere in the Amendments, signs of the steady democratization that may well have been implicit in the American constitutional system from its beginning. Perhaps this is evident as well in the second paragraph of the Seventeenth Amendment, where it is clear (even more than in the Constitution itself) that the temporary replacement of a Senator, pending an election, is ultimately under the control of the legislature, not of the governor.

Students of the Constitution have wondered whether the popular election of Senators has been a good thing for the Country. It is sometimes said that popular election of Senators has opened the way to more demagoguery in Senators, as well as much more costly elections, than we might otherwise have had. Or, as some have put it, all, or practically all, of the good Senators we have had in the Twentieth Century could have been chosen by their State Legislatures as well but most, if not all, of our bad Senators would not have been chosen by State legislatures.

This assessment presupposes, it seems, that the worst Senators we have had would not have been chosen by people who really knew them—and State legislators *are* much more apt to know Senatorial candidates intimately than is the man in the street. Of course, it can be answered, the man in the street is more likely to be moral, if not moralistic, in his political judgment than the professional politician. And so the question is left whether it is better in such matters to lean more toward morality or more toward competence, as each of these is ordinarily understood.

The difficulty in any recourse to a completely popular election of the President may be seen in the problem any one of us has in trying to figure out what appeal this or that questionable Senator from another State could possibly have in the State from which he is elected. We can still rely somewhat upon party and State organizations to screen our Presidential candidates for us, a screening that direct popular election would tend to discourage, just as popu-

214. That had been the way State delegations typically were expected to act in Congress under the Articles of Confederation, where the State legislature had the power of recall. Would omission of the stipulation about each Senator having one vote have raised the question whether the former power of the State legislatures had somehow been revived?

lar election of Senators and much more reliance on Presidential primaries have tended to do.

IV.

We can see in the Seventeenth Amendment, just as in the Sixteenth Amendment, that the role of the States is cut down in our constitutional system. As a result of the Sixteenth Amendment, we have seen, citizens can be dealt with directly by the United States as tax collector, without any reference at all to the States. As a result of the Seventeenth Amendment, we have also seen, citizens can directly choose their own Senators: the State legislatures are *not* to filter out and weigh popular opinions and desires in making the choice.

The qualifications of electors of Senators in a State are keyed in the Seventeenth Amendment to the broadest base possible among the various standards employed by the State in identifying electors for *its* legislature. Subsequent Amendments, beginning with the Nineteenth, whittle away at even this control of the electorate by State governments. This development may have been encouraged, if not to some degree required, by the Republican Form of Government Guarantee in the Constitution of 1787.

We can see that there may be something inevitable, or at least highly likely, about all this: once a massive change is begun, as the result of something as cataclysmic as the Civil War, it is hard to reverse the movement. In much of the Country States' Rights had come to mean Slavery and Rebellion—and so the States have found their powers steadily curtailed, both by formal constitutional amendments and by everyday political rearrangements.

Still, it is instructive to notice that the changes made thus far by constitutional Amendments do not emphasize the duties that government might have. Except for the Preamble and the Republican Form of Government Guarantee, none of the provisions for the rights of individuals in the Constitution and its Amendments require the Government of the United States *to do* anything on behalf of citizens; rather, the Government is kept, by the declaration of these rights, *from doing* certain things. Economic and social rights, as in the United Nations Declaration of Human Rights, require the government to provide various things. But it is evident that the attempt to implement such rights can be frustrating. The American approach, on the other hand, still tends to proceed on the assumption that the Constitution of the United States should do no more than empower and restrain government, leaving it up

to the people to decide both what to do with their resources and what they want their governments to do for them with the powers made available to government. I return to these matters in Lecture No. 17.

V.

The Nineteenth Amendment provides, "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." The "denied or abridged" form had been used before, as in the Fifteenth Amendment: this makes sure that neither a refusal nor a cutting down will be tolerated here.

The background to the emergence of the Nineteenth Amendment has been described in this fashion:

Political agitation for enfranchisement began in 1848, at the first women's rights convention in Seneca Falls, New York. In its Declaration of Sentiments, the convention included suffrage as one of the "inalienable rights" to which women were entitled. As the century progressed, the vote assumed increasing importance, both as a symbolic affirmation of women's equality and as a means to address a vast array of sex-based discrimination in employment, education, domestic law, and related areas. Once the Supreme Court ruled [in 1875] that suffrage was not one of the Privileges and Immunities guaranteed by the Fourteenth Amendment to women as citizens, the necessity for a state or federal constitutional amendment became apparent.

The struggle for women's rights was a response to various forces. Urbanization, industrialization, declining birth rates, and expanding educational and employment opportunities tended to diminish women's role in the private domestic sphere while encouraging their participation in the public sphere. So too, women's involvement, first with abolitionism and later with other progressive causes, generated political commitments and experiences that fueled demands for equal rights.²¹⁵

Women's suffrage did not begin in the United States with the Nineteenth Amendment. Some jurisdictions had already begun to allow women to vote well before the Nineteenth Amendment. It should be noticed that the Constitution of 1787 never kept the States from allowing women to vote. We can see, as before, that the States are not left free to implement this Amendment as they

215. Deborah L. Rhode, *Nineteenth Amendment*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra* note 4, at 1315.

wish: Congress is given power "to enforce this article by appropriate legislation."

The suffrage guarantee in the Nineteenth Amendment is, it seems to me, far more important than the Equal Rights Amendment proposed by Congress in 1972. The 1972 proposal, which barely failed of ratification by the States, provides, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Women, who need not be a "minority" in the United States, are equipped, by the use of the votes they do have, to get by means of legislation everything that they should want to get from an Equal Rights Amendment—and, in fact, Congressional and State legislation, backed up by judicial interpretations, have already accomplished much of what the Equal Rights Amendment would have, and perhaps in a "healthier" way (that is, without the kind of recrimination that has come from reliance upon judicial rather than political development of, say, abortion rights).²¹⁶

VI.

Since the Civil War there have been three principal developments (the first two of which we have already had illustrations of): the equality principle is implemented further, the States are played down, and Presidential arrangements are "tinkered with." These three developments may be related to one another. Thus, the extension of suffrage by means of the Fifteenth and Nineteenth Amendments has meant that the States have lost some of the control of elections that they originally had. The States, however important they are bound to remain, have been decisively eclipsed in their institutionalized or collective capacity.

It is well to notice again that the constitutional Amendments we have had are, by and large, consistent with the original Constitution. Many of them can be said to have been called for, or at least encouraged, by the spirit of the Constitution of 1787. This may even be said of the Civil War Amendments. That is, an explanation was needed, from the beginning, to justify the accommodations to slavery in the Constitution of 1787; but no explanation was needed to justify the abolition of slavery in 1865, especially since

216. A substantial minority of law students today mistake the Equal Rights Amendment for the Nineteenth Amendment. Does this reflect the fact that we generally regard the right to vote as the key to most, if not to all, of our other rights? For suggestions of how supporters of the Equal Rights Amendment could have more effectively used their political power in getting this amendment ratified, see *infra* Lecture No. 14, § VII.

this had already happened in most of the civilized world. In these matters, the United States often leads, but also sometimes follows, what is happening elsewhere.

VII.

I return to the significance of steadily playing down the States in our constitutional system. This can also mean playing down the Congress, with a related ascendancy of the Presidency. Consider, for example, how the Congressional prerogative with respect to the declaration of war was virtually foreclosed by the Presidential decision, announced on November 8, 1990, to transform the emergency-promoted American forces in Saudi Arabia from a "defensive" to an "offensive" capacity. Such unilateral action by the President, effectively limiting what Congress could do thereafter, would have once been generally recognized as perhaps unconstitutional in spirit.

The States and the Congress go together more than do the President and the States. However Senators are chosen, they *are* selected State by State; the same is true of members of the House of Representatives. But the tendency is more and more to turn the election of the President into a national event, even without going all the way to a direct popular election.

It has always been in Congress that the States have been most effective. For Congress does reflect, much more than any President can, the States as States. It is easy, sometimes perhaps even necessary, to identify the Nation with *the* Executive Officer, especially during a crisis. This is probably reinforced by technological developments that make it easy, as well as more interesting, to play up the drama of individual leaders *acting*. Our Presidents, however, are by and large much more like chief executives in countries around the world than our Congress is like most "parliaments" around the world. Deliberative bodies are far less exciting than chief executives, most of the time—but is it not in Congress that We the People do our most distinctive as well as our most effective "peopling" most of the time?

14. AMENDMENTS XVIII AND XXI

I.

The Eighteenth Amendment, ratified just after the First World War, provided in its first section: "After one year from the ratification of this article the manufacture, sale, or transportation of intox-

icating 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.” As one author has observed of the post-First World War era:

That was a time of great hopes and high endeavors, with the Progressive movement making successful efforts to revive income taxation, to provide for the popular election of Senators and for women’s suffrage, to institute the direct primary, initiative and referendum, and ballot reform, to regulate business, and to improve the lot of the underprivileged.²¹⁷

The United States had just fought a war that was defined, in this Country at least, as aiming to make the world safe for democracy. Now, it was widely believed in the United States, a general abstention from intoxicating liquors would help make democracy safe for the world by moderating the passions and strengthening the moral fibre of the American people. The Eighteenth Amendment, combining as it did highminded aspirations and dismal consequences, became the “Vietnam War” of our constitutional Amendments.

One of the concerns that prohibitionists had as they agitated against alcohol in this Country was that prohibition *not* be identified with the sumptuary laws familiar to the Eighteenth Century. Those laws, directed at consumption and display, were often condemned by Americans as infringements of liberty. The desire of prohibitionists not to have their efforts resisted as sumptuary laws helps account for the exclusion from the Eighteenth Amendment of any restriction upon the *consumption* of intoxicating beverages. Rather, it was argued, prohibition addressed the misconduct of the merchants of alcohol, not the morals or the personal liberty of the American people.²¹⁸

II.

The Eighteenth Amendment was an unnecessary amendment in that it followed upon misreadings of parts of the Constitution: much if not all that the Amendment was intended to accomplish could have been done by the use of Congressional powers. This

217. JAMES H. TIMBERLAKE, *PROHIBITION AND THE PROGRESSIVE MOVEMENT 1900-1920*, at 166 (1963); William F. Swindler, *A Dubious Constitutional Experiment, in LAW, ALCOHOL, AND ORDER* 53-54 (David E. Kyvig ed., 1985) [hereinafter KYVIG].

218. See TIMBERLAKE, *supra* note 217, at 145, 147, 171, 173. But see Swindler, *supra* note 217, at 55 (“[The Eighteenth Amendment] was then, and remains to date, the only constitutional attempt to incorporate a sumptuary power into the fundamental law of the land.”).

would have been, in the first decades of this century, more obvious than it was if the Commerce Clause had always been recognized in its amplitude by the United States Supreme Court.

Alcohol could be regulated, even to the extent of prohibition, by Congressional statute, without the need of any constitutional amendment, just as many narcotics, various weapons, cigarette sales, and child labor are dealt with today.²¹⁹ The suppression of child labor is particularly instructive in that it was first attempted by Congressional statute, then by constitutional amendment when the statute was said by the Supreme Court to be unconstitutional, and then again by statute when the Supreme Court reversed itself with respect to the constitutionality of child labor regulations, making it unnecessary to press further for the ratification of the proposed amendment. Since the physical and social effects of alcohol in this Country have always been far worse than those of narcotics, it would seem that if the sale of narcotics can be banned as they are by Congressional statute, so can the sale of alcohol.

It is not only the Commerce Clause that can be said to provide Congress the basis for the regulation of the manufacture and sale of alcohol. The revenue powers of Congress were looked to in the first session of the First Congress for this purpose: a tariff on the importation of molasses was justified, in part, for what it would do to help curb the manufacture and consumption of rum in this Country.²²⁰

Prohibition did not begin in this Country with the Eighteenth Amendment. It had been anticipated in more than half of the States by State-wide measures and in the Country at large, during the First World War, by the Wartime Prohibition Act. The States were understood to be exercising their traditional powers to safeguard the health and morals of their people; Congress was understood to be exercising its defense powers in curtailing the production of alcohol which used grains needed for the war effort and which undermined the efficiency of the work force. Thus, the Country was largely dry, by acts of Congress and of the States, before the Eighteenth Amendment took effect.²²¹

If the prohibitionists (who were evidently strengthened significantly by the newly-established women's suffrage) had restricted

219. In 1913, alcohol could be referred to as "a narcotic poison." *TIMBERLAKE, supra* note 217, at 170.

220. *TIMBERLAKE, supra* note 217, at 183; *see ANASTAPLO, THE CONSTITUTIONALIST, supra* note 66, at 154-57.

221. *See TIMBERLAKE, supra* note 217, at 164, 180.

themselves to State efforts and to Congressional statutes, they might have been more successful in the long run than they were, in that they could have been more discriminating in the measures they relied upon. Did recourse to a constitutional amendment make it much more likely that there would be an all-or-nothing approach, with the dire consequences for the cause of prohibition that we have seen? Care must be taken lest the Constitution and constitutional interpretations be used as repositories for a variety of social and economic reforms which are better left to statutes that can be much more easily adjusted as circumstances change.

III.

I have suggested that a constitutional amendment in this Country usually is seen following upon, rather than leading to, a general development. For example, the reliance upon preferential primaries for the popular choice of Senators preceded the Seventeenth Amendment.²²² We have seen that the much-publicized Lincoln-Douglas Debates contributed to developments here. We have also seen that the 1913 Women's Suffrage Amendment, too, was anticipated by innovations in the States, going back to what Wyoming had done in 1889 in permitting women to vote.²²³

We have noticed as well that legal prohibition of alcohol was widely practiced before the Eighteenth Amendment was ratified. Much of the impetus for prohibition at the turn of this century came from the campaign against the evils of saloons. This helped put the emphasis, as did the Eighteenth Amendment later on, not upon the morality of the drinkers but rather upon the greed and misconduct of the producers and suppliers.²²⁴

It can seem most implausible to us today that two-thirds of the Congress and three-fourths of the States could agree, with considerable enthusiasm, that the manufacture and sale of intoxicating beverages should be generally suppressed in this Country. This was in large part due, it seems, to a widespread and perhaps justified opinion about the devastating effects of alcohol consumption in the Nineteenth Century. We get some notion of what that devastation must have looked like by noticing today the problems that the Russians have with alcohol and that we have with drugs.

222. See *supra* Lecture No. 13, § III.

223. See WYOM. STAT. § 8-4-103 (1977) (Declaring December 10 "Wyoming Day" in recognition of "the action of the Wyoming territorial governor on December 10, 1869, in approving the first law found anywhere in legislative history which extend[ed] the right of suffrage to women."); *supra* Lecture No. 13, § V.

224. See TIMBERLAKE, *supra* note 217, at 125.

We will see, further on, how shifts in public opinion contributed to the repeal of the Eighteenth Amendment.

IV.

The terms of the Eighteenth Amendment do not pose much of a problem in figuring out what was intended. It was recognized, however, that Congress would have to be relied upon to determine what should be considered "intoxicating liquors." This Congress did in the Volstead Act of 1919,²²⁵ which also provided means for enforcing the prohibitions of the Eighteenth Amendment.

Some have argued that the Amendment, instead of using the term *intoxicating liquors*, should have referred to and thus forbidden various forms of alcohol, such as *beer*, *rum*, *whiskey*, and *wine*. One may wonder, as well, whether intoxicating pills and powders should have been considered within the scope of the term, *for beverage purposes*.²²⁶ But these do not seem to have been difficult problems in enforcing this Amendment.

In critical respects, moreover, the Eighteenth Amendment was self-executing, once its year of grace had run.²²⁷ The restriction in the Amendment upon exportation seems to have served at least two purposes: It would be easier to control the domestic sales of alcohol if none could be made for export either, since the potential diversion to the domestic market of alcohol said to be manufactured for export would always have been a problem. Also, some of the prohibitionists saw the American development as the forerunner of a salutary worldwide movement. They did not want to permit the foisting upon the rest of the world of what was now recognized to be harmful in the United States.

Questions were raised, as the Volstead Act was prepared and enforced, whether the absolutist character of the Eighteenth Amendment overrode various other constitutional provisions, including those which recognized the effects of treaties and which enshrined (as in the Bill of Rights) traditional guarantees. Certainly, constitutional interpretations and relations, as well as the

225. 41 Stat. 305 (1919); see Dennis J. Mahoney, *Volstead Act*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra* note 4, at 1978-79.

226. This formulation did permit the continued use of intoxicating liquors for medicinal, sacramental, and other such purposes. TIMBERLAKE, *supra* note 217, at 183.

227. U.S. CONST. amend. XVIII, § 1. This grace period was intended, in part, to permit holders of stocks of alcohol to dispose of them by sale or otherwise, whether in this Country or abroad. Also, it was suspected by some, that the grace period was intended to permit those with sufficient resources to accumulate a substantial supply, perhaps even a lifetime supply, for their personal use.

general political system in this Country, were substantially shaken up by attempted implementations of the Eighteenth Amendment.

Symbolic perhaps of the distortions following upon this Amendment are the directions laid down in the third section of the Eighteenth Amendment:

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.

This kind of provision also came to be used in Amendments XX, XXI, and XXII. There was thereby some thirty years of burdening the Constitution with decidedly unconstitutional language, language that could be adequately provided for (as it is now) in the Congressional resolution submitting a proposed amendment to the States for their ratification.

Thus, it can be said, the purpose of Section 3 of the Eighteenth Amendment could have been accomplished without adding that section to the Amendment just as the principal purpose of the Eighteenth Amendment itself could have been accomplished (and, indeed, perhaps better accomplished) without adding that Amendment to the Constitution.

V.

This, then, was what came to be known as The Noble Experiment—first, sincerely, by its proponents; later, sardonically, by its critics. This became, in some ways, *the* American Issue. The alcohol prohibition movement was largely rooted in the Protestant churches in this Country.²²⁸ Some may be tempted, therefore, to regard it to have been in spirit, even if not in terms, a partial modification of the Religion Clauses of the First Amendment.

Certainly, religious enthusiasm stimulated and sustained the prohibition movement, just as it had done a half-century before with the slavery-abolition movement. Prohibitionists, in their determination to stamp out the evils of the intoxicating-liquors industry, were themselves intoxicated by what they believed that Law could accomplish.

They did try to eliminate the slavery of addiction to alcohol by the Eighteenth Amendment, just as had been done for the slavery of the African race by the Thirteenth Amendment. In both cases,

228. See, e.g., TIMBERLAKE, *supra* note 217, at 1-4, 125-27.

the War Powers of the Government of the United States were used to anticipate what constitutional amendments later aimed at. One would not be allowed to become a slave voluntarily, it seems to have been argued, so why should one be allowed to become enslaved by alcohol, even if voluntarily? And, it could also have been argued, it is the *blessings*, not the *curses*, of liberty that the Constitution is designed to serve.

Opponents to national prohibition questioned it on several accounts:

As in the debates over state prohibition, the opponents of the amendment argued that drinking was a deeply rooted custom and that many people, especially wage earners and persons of foreign stock, would regard prohibition as a violation of their personal liberty and refuse to obey it. The result, they warned, would be to discredit the law.²²⁹

Senator Henry Cabot Lodge, of Massachusetts (one of the States that refused to ratify the Eighteenth Amendment), predicted:

As a measure of prohibition the practical difficulties . . . will cause it to fail, and my own belief is that in a very short time we shall settle down to a condition like that presented by the Amendments which attempted to confer full political rights upon the negroes of the United States, where the constitutional provision is entirely disregarded.²³⁰

Consider, also, Lincoln's position with respect to both alcohol and slavery: he (as both a non-drinker and an anti-slavery man) had reservations about the imprudent, and hence unpolitical, measures advocated by both the prohibitions and the abolitionists of his day.²³¹

Others even argued that since the proposed amendment would control private and personal conduct and destroy a species of property, it was somehow inappropriate for the Constitution. This led in turn to questions about how the Amendment should be ratified, with some insisting that only the people themselves could approve such an innovation.²³² All this reminds us of an old question: Are there any amendments that would be improper, if not impossible, to add to the Constitution? We shall return to this question in my last Lecture.

229. TIMBERLAKE, *supra* note 217, at 177.

230. *Id.* (quoting CONG. REC., 65 Cong., 1st Sess. 5587 (1918)).

231. *See supra* note 178.

232. *See* TIMBERLAKE, *supra* note 217, at 62. One problem with this argument is that it assumed that the State legislatures could *not* do by ratifying a constitutional amendment what they could do in prohibiting alcohol in their respective States.

The United States can be said to have "turned eighteen" in more ways than one with this Amendment. It did "grow up" somewhat with this experiment, for it led to a traumatic loss of innocence. The perhaps quixotic effort made here, with the nobility that it represented, may have been unprecedented in the Western world, at least in modern times.

VI.

Loss of innocence may be seen in the social and political turmoil that contributed to the prompt repudiation of the Eighteenth Amendment. *Repeal* became as generally known a term as *Prohibition* had been, enlisting enthusiasms of its own.

The movement for repeal probably had at its roots the appetite that many have always had for alcohol, an appetite that is considered so natural by some people that the United States could look ridiculous abroad for what it was trying to do. It may well be, however, that national prohibition worked much better in the 1920s than it is now recognized to have done, reducing significantly the waste and damage associated with alcohol consumption, waste and damage that we can still see among us in large measure. We also have considerable experience with and testimony of people who have benefitted immeasurably by personally turning away from alcohol. Such people do not consider their liberty infringed, but rather enhanced, by having given up alcohol.

Even so, a critical perceived consequence of Prohibition was the breakdown of law and order in this Country, including the corruption of public officials connected with crime, something we are quite familiar with because of what has been happening with respect to drugs in recent decades.²³³ The morale, tastes, and dedication to law-abidingness of citizens were undermined by the struggle over compliance. And, it is said, the Mob was permanently established in American life.

Thus, several serious consequences of the Eighteenth Amendment outlasted the Amendment itself.

VII.

A shift in American sentiment doomed, first, national prohibition and, then, most longstanding State restrictions on the sale of alcohol. This was due, in part, to the general disillusionment that

233. See, e.g., Swindler, *supra* note 217, at 61; George Anastaplo, *Governmental Drug-Testing and the Sense of Community*, 11 NOVA L. REV. 295 (1987).

evidently set in after the Great War; in part, to the Great Depression, which left many people thirsting for diversion that promised to cheer them up in gloomy times.

This shift in sentiment reflected a shift in power from a middle-class, largely rural and small-town America to a nation in which the poor, the foreign-born, and the city dweller became much more important. The region strongest for Prohibition remained the South of the Old Confederacy.²³⁴

One account of the coming of Prohibition ends with observations that sum up the development I have been describing:

Out of an earnest desire to revitalize and preserve American democracy, middle-class Americans had turned to prohibition as one means of achieving their goal. And having secured prohibition, they now believed that they were passing into a new era of humanity, a new era of struggle, progress, and achievement. It remained to be seen, however, whether in adopting such a perfectionist measure they had overreached themselves; whether in trying to impose a rigid standard of sobriety on the entire nation by law they had undertaken something that the working classes would not accept and that they themselves would often not obey. If so, they would either have to try to enforce the law through measures that smacked of tyranny, or they would have to acquiesce in a defiance of the law that would only create worse evils than the law was designed to cure. In either case the result would be reaction, not progress.²³⁵

The advocates of Repeal presented themselves as enemies of tyranny, making much of free choice and individuality.

The Twenty-first Amendment has been the only Amendment ratified by State conventions rather than by State legislatures. Congress, which designates the mode of amendment-ratification, selected the convention mode "because proponents of repeal feared that anti-liquor sentiment was dominant in many State legislatures because of the overrepresentation [at that time] of rural areas."²³⁶

Congress can provide for the use of State conventions in such a way as to turn the selections of delegates for those conventions into a popular referendum on the matter being considered. The only other time this was done, also in order to permit the people rather than the State legislatures to decide the issue at hand, was when the Constitution itself was up for ratification in 1787-1788. If the

234. See *TIMBERLAKE*, *supra* note 217, at 228.

235. *Id.* at 184.

236. Dennis J. Mahoney, *Twenty-First Amendment*, in 4 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION*, *supra* note 4, at 1928.

proponents of the Equal Rights Amendment had anticipated in 1972 the organized resistance they eventually encountered, they would have been well-advised to have chosen the State-conventions mode of ratification. This would have permitted, in effect, a national referendum on an issue that women, as voters, probably could have controlled instead of having to rely upon largely male State legislatures elected in other circumstances and on other issues.

The Twenty-first Amendment was proposed by Congress in February 1933, after Franklin Roosevelt had been elected President but before he took office. It was ratified by December 1933. Repeal was seen by many as a new beginning, mandated by the people directly, just as the Constitution of 1787 had seemed to be one hundred and fifty years before. The despotism of Prohibition was no doubt more benevolent in intention than that of George III, but it was widely condemned as despotism nevertheless.

VIII.

The first section of the Twenty-first Amendment comes right to the point: "The eighteenth article of amendment to the Constitution of the United States is hereby repealed."

The second section of this Amendment reinforces whatever power that the States may have always had to regulate the alcohol industry within their borders: "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."

The second section of the Eighteenth Amendment had provided, "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." Both Amendments, then, took care not to interfere with efforts by the States to develop their own prohibition measures. Various readings of the Commerce Clause, which had limited what the States could do to interfere with "interstate commerce," were in effect set aside insofar as they bore upon State regulation of the trade in alcohol.²³⁷ This confirmed what Congress had done by statute, before the Eighteenth Amendment, to empower the States to deal on their own with "interstate commerce" in alcohol.

The Twenty-first Amendment refers to the Eighteenth Amendment by number, thereby implicitly numbering all of the Amend-

237. See Swindler, *supra* note 217, at 56, 57-58, 63.

ments, something which had been anticipated by the numbering of the Thirteenth, Fourteenth, Fifteenth, and Sixteenth Amendments. (The designation, *this Constitution*, is used in the body of the Constitution but not in any of the Amendments, where *the Constitution* is again and again referred to.) The series of Amendments, especially when numbered, may thus be seen as a whole, perhaps as a separate constitutional effort ranging across two centuries. But if the series *is* a whole, it is only as a collection of fragments, responding to one challenge after another rather than incorporating the coherent constitutional "message" that the Constitution of 1787 (and perhaps also the Bill of Rights) does. Even so, as we have seen, the Amendments do illuminate many features of the Constitution of 1787.

IX.

Students of the Prohibition Era are often dubious about any effort today to use the law for "allegedly moral ends."²³⁸ It does seem that the Prohibition experience reinforced in this Country a widespread questioning of the propriety of attempting to legislate morality among us.

The questioners here tend to forget that morality has always been critical to the law both as a condition of law-abidingness and as an end of many laws.²³⁹ It has not been only the Prohibitionists among us, therefore, who have assumed that the community is entitled, and perhaps even obliged, to care for the people's moral condition, especially if that people is to be able truly to govern itself.

One may see throughout the Constitution and its Amendments repeated indications of moral concerns and standards. Various moral and physical failings or vices are ruled out, or at least disapproved of, in those documents, such as high crimes and misdemeanors, felonies, and treason. Morality for us includes respect for liberty (or excellence) and for equality (or justice), however muted these concerns have sometimes been with respect to the status and treatment of slaves and Indians. Various of the rights we claim, such as freedom of speech and of the press, imply duties that accompany the privileges protected. The religious freedom we insist upon is also intimately related to morality.

238. Paul L. Murphy, *Societal Morality and Individual Freedom*, in KYVIG, *supra* note 217, at 78. Similar complaints may be heard with respect to right-to-life, school-prayers, and other efforts.

239. Thus, the Ten Commandments legislated, or at least confirmed, the morality of Moses' day. On the "legislation of morality," see ANASTOPOLO, *HUMAN BEING AND CITIZEN*, *supra* note 11, at 46, 74.

The Common Law, which is very much taken for granted by the Constitution and the Bill of Rights, is, along with religion, a significant carrier of morality in this Country. The Common Law attempts, through the arguments of lawyers and the opinions of judges, to apply enduring natural-right teachings to the ever-changing circumstances of the day.²⁴⁰

Considerable power still remains in the Government of the United States, despite the repeal of the Eighteenth Amendment, to control the production and sale of alcohol in this Country. For example, this power permits Congress to address the abuses of alcohol advertising, just as it has done for cigarette advertising, in an effort to protect the young and the weak from exploitation. We have yet to appreciate the extent to which beer advertising on radio and television has corrupted not only professional but also college athletics in this Country.²⁴¹

But, then, we have yet to appreciate the extent of corruption visited upon us by television itself. Our ineptness with respect to such matters reflects the fact that all too many of us do tend to believe that moral training and the moral tone of the community are beyond both the legitimate purview and the effective control of the community itself. Both self-confidence and self-restraint are needed if morality is to continue to be usefully legislated, however discouraging the ill-fated American experience with Prohibition is believed to have been.

15. AMENDMENTS XX, XXII, XXIII, AND XXV

I.

We return, with these Amendments, to the place of the President in the American constitutional system.

A large part of the space devoted to Amendments since 1787 deals with the President. Some of that is done indirectly, as in Amendments II, III, IV, and XIV. Even more is done directly, as in Amendment XII. None of the constitutional Amendments that bear upon the President are offered as empowerments of the Executive Branch. The considerable changes made since 1787 in the influence and hence powers of the President do not rely upon constitutional amendments.

240. Consider the implications of § 5 of the Northwest Ordinance about what are considered generally accepted legal arrangements that government can properly draw upon. *See also supra* note 68.

241. On the abolition of broadcast television, see ANASTAPLO, *AMERICAN MORALIST*, *supra* note 12, at 245-74.

We have seen that the Civil War was significant in this expansion of Presidential influence. The President became most critical during that war, in that the continued existence of the Country very much depended on extensive military activities—and that naturally made much more of the Commander-in-Chief.

A Presidency enhanced in this way, however, may still have relatively little effective control over serious domestic developments in this Country, except perhaps in an economic crisis that is so severe as to be warlike.

II.

The Twentieth Amendment designates when the terms of office both of the President and of Members of Congress should end and when Congress should assemble. The Amendment provides as well for what is to happen if the President-elect should die before his term begins and for related matters.

Some of the matters addressed in this Amendment, it is further provided, can be dealt with otherwise, or can be supplemented, by Congress. All of the matters addressed by the Twentieth Amendment had been left by the Federal Convention to Congress to handle as it chose from time to time. To a considerable extent, then, this Amendment was unnecessary.

In fact, surprisingly little of Amendment XX is immune from Congressional rearrangement: it is again and again said that Congress may "by law" alter the dispositions made there. It does seem to be unalterable, however, that the terms of the President and Vice President "shall end at noon on the 20th day of January": that is, Congress cannot "appoint a different day" in the fashion that it can for its January 3rd date of assembly.

Congress, it seems, is to be kept from fiddling with the President's term of office. So long as Congress "assemble[s] at least once in every year," it does not seem to matter as much when Congress does assemble, perhaps partly because Congress can usually be expected to be largely the same from one term to another.

Also unalterable by Congress is the provision, "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." It is an odd feature of this Amendment that nothing is said directly, but only by implication, about "the time fixed for the beginning of the term of the President." Indeed, nothing is said about when any of the terms referred to *begin*, only about when they should *end*. This seems to be due primarily to the need to

have existing terms cut down when the Amendment goes into effect.

One might question the prudence of removing from Congress the power to consider who should be President if the President-elect dies before he takes office. The Vice President-elect in these circumstances, who can be rather unimpressive, often has not had the seasoning that service as Vice President *can* provide.

III.

The Twenty-second Amendment reflects the determination by the Republican Party to repudiate the invincible Franklin Roosevelt by establishing as the permanent law of the land the two-term limit that George Washington had established as custom. The Amendment was prepared by the only Congress controlled in both Houses by Republicans since the Hoover Administration more than a half-century ago. It is, strictly speaking, not a two-term limit but rather a two-and-a-half term limit, permitting the President ten years altogether.

This limitation is not likely to mean much in practice: a decade of running for, and serving as, President is probably more than enough for any man: he is likely by then to have done all that *he* can do for the Country.²⁴² Nevertheless, it is true that there can be a crisis which makes it appear that only the incumbent can serve effectively as President, but that is almost always an illusion. The serious crisis we could really have some day because of this Amendment would turn around the argument that the description here, *acted as President*, includes service as the "Acting President" provided for in the Twenty-fifth Amendment. Although it should

242. See ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 92. I have not heard one argument for terms limitations for Members of Congress that is inspired by considering what has happened to politicians' schedules: something *is* to be said for requiring our more talented political men and women to retire from time to time to more leisurely activities. Whatever terms limitations there are should not be designed to keep Members from returning to Congress after they have had time to think properly about the problems of the Country.

We return to the problem of Presidential terms limitations by noticing what the eminently pious Roman Catholic churchman, John Henry Newman, confided to his diary:

It is not good for a pope to live twenty years. It is an anomaly and bears no good fruit; he becomes a god, has no one to contradict him, does not know facts, and does cruel things without meaning it.

KENNETH L. WOODWARD, *MAKING SAINTS: HOW THE CATHOLIC CHURCH DETERMINES WHO BECOMES A SAINT, WHO DOESN'T, AND WHY* 363 (1990). It may be prudent *in our circumstances* to continue to have, if we are to begin to know the candidates who offer themselves, long campaigning periods for the presidency.

not be read thus, the argument could still be made, not without some plausibility, especially by the ambitious.

An exception from the two-term limitation is made for the incumbent either at the time the Amendment was proposed to the States or at the time it was ratified (for the remainder of the incumbent's term). The latter provision avoids an upheaval in mid-term; the former provision, as well as perhaps the latter provision, keeps personalities out of the decision by Congress and the States in considering the Amendment. Besides, it was Franklin Roosevelt, not Harry Truman (the incumbent when the Amendment was proposed), that the Republican Party was finally getting even with.

The Republican Party, it seems, is also largely responsible for the recent agitation for terms limitations for Members of Congress as well as for State legislators.²⁴³ It hardly makes sense, however, to permanently exclude from the legislative councils of the Country our more experienced elders. The January 1991 debates in Congress about the prospects of a Persian Gulf war pointed up the usefulness of having there some members with recollections of similar circumstances they had confronted as members of Congress a generation before, something that the currently proposed twelve-year limitation would deprive us of. What other major enterprise in this Country, or government elsewhere around the world, thus deprives itself of seasoned personnel?

The agitation for terms limitations reflects the spirit of equality and mobility (or liberty) among us. It is to be hoped that Congress, if only out of self-interest, will resist those who would, with perhaps the best of intentions, subvert the institutional memory of Congress.²⁴⁴

IV.

The Twenty-third Amendment, to which I return in my next Lecture, provides that "[t]he District constituting the seat of government of the United States," the place we call the District of Columbia,

shall appoint . . . [a] number of electors of President and Vice

243. Terms limitations are periodically suggested for judges, but these proposals often meet the resistance that proposals for court-packing and jurisdiction-stripping do, namely that they threaten the vital independence of judges.

244. It should be noticed that even if the convention mode of proposing amendments is resorted to by State legislatures to develop a terms-limitation amendment, Congress will still have considerable control over what happens in the preparation and promulgation of any proposed terms-limitations amendment. See Anastaplo, *Constitution at Two Hundred*, *supra* note 130, at 1053-60.

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

.....

The vote of the people of this District, so far as this Amendment is concerned, applies only to the election of the President and Vice President, *not* to the choice of members of the Senate or of the House of Representatives. It was evidently believed by the framers of this Amendment that these people, who have long had a say in their local government, should be able to participate as well in national elections. But the only national election that now counts, it sometimes seems, is the Presidential election.²⁴⁵

In some ways, however, the Twenty-third Amendment is little more than a token recognition of the political rights of the residents of the District. The few electoral votes for President and Vice President to which they are entitled here will rarely have a significant effect on the outcome of a Presidential election. Residents of the District would obviously have much more effective say about those who could look out for their interests if they could choose voting members of Congress.

Even with respect to Presidential elections, the residents of the District are not to be fully like citizens in the States, for they can have no more votes than the least populous State. This means, in practice, three votes. A constitutional amendment was proposed by Congress in 1978 to have the District of Columbia treated as a State for national elections purposes, but that failed of ratification. The power rests in Congress to admit the District to the Union as a regular State. This is something that Congress is able to do without either Presidential approval or the approval of the States (except perhaps the States which originally ceded the land used for the District).²⁴⁶

Whatever the effect of the Congressional-empowerment section added to various Amendments since the Thirteenth, it does seem superfluous here. The opening sentence of the Amendment pro-

245. The original expectation of the Framers of the Constitution seems to have been that residents of the District would remain citizens of the States from which they came, in most cases only temporarily, to serve in the National Government. See, e.g., *Dennis J. Mahoney, District of Columbia*, in 2 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION*, *supra* note 4, at 569 ("The Framers of the Constitution apparently did not foresee a large permanent population in the distinct district from the population of the surrounding states.").

246. Republicans are most reluctant to have the District converted to a State because it is so heavily Democratic. This means, among other things, two more liberal Democrats in the Senate.

vides that the District's appointment of electors shall be done "in such manner as the Congress may direct." That alone should assure Congress of all the power it needs to enforce provisions of this Amendment.

V.

The Twenty-fifth Amendment is devoted to Presidential succession, Presidential disability, and Vice Presidential replacement.

The dominant concern here is that the Country be able to identify who properly exercises, at any particular moment, the powers of the President. This is especially important when much is made of the President as Commander-in-Chief.

This concern does not account, however, for the provision in this Amendment for a Vice President whenever that office is vacant. Before the Twenty-fifth Amendment was added to the Constitution, succession to the Presidency in such circumstances was prescribed by an act of Congress. This usually meant that the Speaker of the House was next in line, which could be "certain" enough.

But this could mean a shift of the Presidency from one political party to another, something which is now considered somewhat dubious. Besides, this could also mean that the new President might be too much under the influence of the Congress which had in effect selected him. This seems to offend modern sensibilities nurtured by more and more reliance upon the Presidency.

The Framers, on the other hand, drafted a Constitution which leaves Congress in charge of the Country, at least so far as the Branches of the General Government are concerned. It is likely, we have noticed, that they expected that most of the time the President would be chosen by the House of Representatives after an inconclusive casting of ballots by the Presidential electors in the several States. We have also noticed that the rise and discipline of political parties changed that.

VI.

However much Congress has been eclipsed by the President in the Twentieth Century, it is still difficult to avoid ultimate reliance upon Congress to determine who should at any particular moment be, or at least act as, President. This is evident in the extended provision in the Twenty-fifth Amendment for Presidential disability, something which may account better for the Vice Presidential-replacement provision than anything I have said thus far.

The provision for filling the vacated office of Vice President may

be justified primarily as a condition for the most efficient response to Presidential disability. It is much easier to have the Vice President than, say, the Speaker of the House of Representatives temporarily take over the office of a disabled President. This is related to another provision in the Twenty-fifth Amendment, the creation of the position of Acting President.²⁴⁷

The addition of a disability provision was spurred by recollections of the protracted, debilitating illness of Woodrow Wilson, the death in office of Franklin Roosevelt, and the illnesses of Dwight Eisenhower. The Amendment was ratified four years after John Kennedy's assassination.

Any disability provision, if it is to anticipate instances in which the President may not only be unaware of his disability but may even contest the opinions of others that he *is* disabled, is bound to be complicated. Amendment XXV provides in part:

Sec. 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.

Sec. 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 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,

247. U.S. CONST. amend. XXV, §§ 3, 4. This is preceded, in § 1, by the designation as *President*, of any Vice President who permanently replaces a President who is removed from office, dies, or resigns. This designation formally confirmed what had been the practice ever since Vice President John Tyler succeeded William Henry Harrison in the Presidency in 1841.

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.

We can see here another reason for having a Vice President on hand, rather than relying on either the Speaker of the House of Representatives or the President pro tempore of the Senate to be next in line: if Congress is obliged to settle any disability dispute between the President and the person next in line (in association with "the principal officers of the executive departments"), it would hardly do to have the one next in line be stationed in the Congress. The complications in the disability provision invite speculations regarding the assumptions about human nature implicit in this Amendment.

The two-thirds vote of both houses of Congress required if the Vice President is to prevail over the President here is the same proportion needed for the Senate to remove a President from office after impeachment by the House of Representatives. The Twenty-fifth Amendment cannot be used to "remove" an unwilling President (by declaring him disabled) when those who would "remove" him do not have at least both the House of Representatives votes needed (a majority) to impeach him and the Senate votes needed (two-thirds) to convict him upon an impeachment.

VII.

The provision in the Twenty-fifth Amendment for replacement of the Vice President can remind us of the mode originally intended for the selection of both the President and the Vice President by the "Electoral College."²⁴⁸ That is, it was expected that selections would be made not directly by the people at large but rather after thoughtful deliberation by electors chosen, one way or another, by the people.

I have suggested that, considering how their running mates have come to be chosen by Presidential candidates since the Second World War (if not well before), it would now make more sense to

248. The term *Electoral College* is not used in the Constitution of 1787. It is used in the Confederate Constitution of 1861. See CONFEDERATE CONST. of 1861, art. VII, § 2.

have the newly-elected President nominate a Vice President in the manner prescribed in the Twenty-fifth Amendment when there is a vacancy in the office of Vice President. I suspect we would usually get better Vice Presidents that way, Vice Presidents who would at least *seem* to be somewhat less the products of chance than all too many have been. No constitutional amendment would be needed to bring about this reform, since the Presidential candidates of the major parties could let it be understood that their running mates for election purposes would resign immediately upon inauguration, or perhaps just before being sworn in, permitting the newly-installed President to send to the Congress his nominee for Vice President.

Whatever may be done about reforming the Vice President-selection process, it is hardly likely that any approach to Presidential selection that depends on the judgment of any deliberative body would be generally accepted today. Rather, it may be that all that thoughtful citizens can do these days is to keep the United States from resorting to direct popular elections of Presidents, an innovation that we do hear agitated from time to time. It remains difficult to determine what the consequences of such a change might be. Is it not likely to confirm, if not even to reinforce, certain questionable tendencies implicit in the Presidency, at least in the Twentieth Century? Particularly troublesome here would be any further strengthening of the President in his relations with Congress.

VIII.

One formidable obstacle to any effort to cut the Presidency down to constitutional size is that modern Presidential politics "plays" much better on television than does Congressional politics. Television dotes on the Presidency; it does not matter whether the incumbent is personally hated or loved by the mass media.

The President is easy to dramatize; the Congress tends to be boring. "All" the Congress does is *talk* (or deliberate); the President *acts* (with little or no *show* of deliberation required). That which can be readily presented by television in an "interesting" way affects what we are now apt to consider *government* to be.

Whether what television usually presents is truly interesting is another question. But it can come to dominate what people take to be significant, and this can affect what political men do and how they present themselves. It can also affect our education as well as theirs, going along with, and promoting, shallower politics, if not a shallower people. Consider, for example, the recent report that to-

day "only 51 percent of American adults read a newspaper each day, down from 73 percent in the 1960s."²⁴⁹

The modern ascendancy of the Presidency is related also to the movement toward universal suffrage, something which we will examine in our next Lecture. Who the President is, or how extensive the franchise is, may matter less if it should be recognized that a somewhat representative and seriously deliberative body is really in charge of the Country.

IX.

The key question now may not be who precisely is President or when his term begins or who can vote for him. Rather, it must be asked, what is the President to be able to do?

The presumptuousness of Presidents, especially during the past half-century, has been disturbing. This should be contrasted with the deference toward Congressional authority displayed repeatedly by George Washington and Dwight Eisenhower.

Presidential presumptuousness had been dramatically exposed during the Iran arms-Contra aid scandal in 1987. The prerogatives of the Congress were usurped by that Administration in what it did in selling arms and "appropriating" money in a clandestine fashion. A decade earlier there had been the Watergate scandal, which had seen clumsy attempts by another Administration to usurp the prerogatives of the electorate during a Presidential election campaign.²⁵⁰

Despite the chastening effects of those two dubious episodes, the Presidency has once again exhibited in recent years a spirit foreign to that expected by the Framers of the Constitution, but this time in a form that is, at least so far, less obviously dubious to the people at large who do not yet appreciate the enormity and implications of the damage done by us in our Gulf War. We are still too captivated both by the brilliance of our efforts and by the evils of our principal adversary on that occasion.²⁵¹

249. Greta Camille Guest, "Flipping Through The Fax," U.S. AIR MAG., Feb. 1991, at 20.

250. See ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 317 n.85.

251. The disturbing presumptuousness of Presidents was displayed most recently in how the Bush Administration (by United Nations Security Council resolutions, by the shipment of more and more troops to Saudi Arabia after the original emergency consignment, and by the issuance of one ultimatum after another) so manipulated matters, including American public opinion, as to make it very difficult for Congress to do anything in January 1991 but authorize an immediate use of massive force, on the scale of a major war, against a country of less than twenty million people. We see in this recent episode, a remarkable failure in imagination on our part, including moral imagination, however no-

It should be evident from these developments both what the 1787 Framers were fearful of at the hands of anyone who wields the powers of the Commander-in-Chief and how profound transformations (including an incipient Caesarism) can take place in a constitutional regime without any authorization by formal amendment of the Constitution.

16. AMENDMENTS XXIII, XXIV, AND XXVI

I.

The Declaration and Resolves of the First Continental Congress, October 14, 1774, includes the following passage:

That the inhabitants of the English colonies in North-America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following RIGHTS: . . .

That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled 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, subject only to the negative of their sovereign, in such manner as has been heretofore taxed and accustomed

It is this ancient "right of the people to participate in their legislative council" that underlies the movement in the United States toward universal suffrage evident in the Twenty-third, Twenty-fourth, and Twenty-sixth Amendments. I suggested in my last Lecture that the modern ascendancy of the Presidency is related to this movement.

This movement toward universal suffrage may be seen also in several of the Amendments we have already discussed, including those assuring the vote for emancipated slaves and their descend-

ble our intentions may have been. See ANASTAPLO, *AMERICAN MORALIST*, *supra* note 12, at xvi-xix, 225.

Is not the tendency of Presidential government toward plebiscitary democracy, the unreliability of which is suggested by what the contemporary deference to public opinion polls does to the exercise of prudence? The current Russian situation is instructive here. Consider, also, this warning from Machiavelli: "[I]f there be no enemy outside, [a republic] will find one at home, as it seems necessarily happens in all great cities." MACHIAVELLI, *supra* note 1, at II.20. War may suspend, but it does not eliminate, deep divisions at home. See also *id.*, at II.25; WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE FOURTH* act 4, sc. 5.

ants and for women. The growing recourse to universal suffrage is manifested in several ways.

It is most obvious in making the vote available to more and more groups in the Country, including those that were once excluded on the basis of race, gender, or age. It is also obvious in the making of more and more public posts subject to selection by the electorate, while at the same time keeping qualifications for such posts to a minimum. We now have popular elections of Senators; there is the agitation, from time to time, for popular election of the President that we have noticed.

Following upon, and reinforcing, this movement toward universal suffrage is the growing reliance upon increasingly sophisticated public opinion polls. As more and more depends on divining what the public believes, and what it believes it wants, the fewer moderating factors there are likely to be in the development of public policies.

II.

We return now to the Twenty-third Amendment which we have already considered for what it tells us about the role and influence of the President today. Presidential selection is the primary concern in this Amendment on behalf of the residents of the Federal District.

It is taken for granted in the Twenty-fifth Amendment, as it is in the other Amendments dealing with voting rights, that for the most part voters will be designated, and the conduct of elections will be provided for, by local governments. Local election laws are devised in the District of Columbia by Congress or by whatever local government may be authorized by Congress for the District.

These local election laws and their application are subject to review, by the Congress and Courts of the United States, in the light of constitutional standards, whether the standards are of a general character or are primarily concerned with elections. In addition, Congress has always had, under the Constitution, power (rarely exercised) to modify considerably the election laws of the States, even when such laws are constitutional.

Congress attempted to go even further than the Twenty-third Amendment on behalf of the residents of the District of Columbia by proposing, in 1978, a constitutional amendment to this effect:

For purposes of representation in the Congress, election of the President and Vice President, and article V of this Constitution,

the District constituting the seat of government of the United States shall be treated as though it were a State.

Congress would have provided for the exercise of the electoral rights of the people of the District pursuant to this amendment.

This proposed amendment of 1978, which failed ratification, would have repealed the Twenty-third Amendment. It remains to be seen whether Congress will, in furtherance of the principal purpose of this proposed amendment, exercise the power it does have to admit the District of Columbia to the Union as a State.

We are reminded by these considerations of the role of the legislature (whether National or State and Local) in directing all kinds of activities, including electoral, executive, judicial, and Constitution-amending activities.

III.

We have seen that the voting referred to in the Twenty-third Amendment applies only to the election of the President and Vice-President. The officers dealt with in the Twenty-fourth Amendment are expanded:

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.

Even so, such expansion leaves this Amendment with less coverage than others such as the Fifteenth and the Nineteenth (and, later, the Twenty-sixth) Amendments, which apply to all elections in the United States, State as well as National.

The Twenty-fourth Amendment is the only constitutional provision thus far which explicitly recognizes the role of political parties in the American political system. This it does by governing "primary or other election[s]." The primary elections referred to are those in which the candidates of political parties are chosen. This precaution was believed necessary here because of the efforts once made in some States to circumvent anti-discrimination prohibitions, by having the critical election choices made by privileged voters in party primaries, not in general elections governed by those prohibitions.

It does not seem that the poll tax was a significant restriction upon voting by the time the Twenty-fourth Amendment was ratified in 1964. That tax can stir up ancestral memories of repression, however, which have been evident in the sometimes violent contro-

versy the past decade in Great Britain about a levy *called* a poll tax by its opponents.

IV.

The Twenty-fourth Amendment, with its elimination of the "failure to pay any poll tax or any other tax" as a factor in any voter's eligibility (at least in national elections), testifies to the now prevalent opinion that financial considerations or economic interests should not bear upon one's eligibility or power to vote.

Why did not this Amendment cover State elections as well? The taxes dealt with *were* State revenues, sometimes fairly substantial revenues, with control of access to the ballot as an important aspect of the efforts to collect the needed money. May Congress regulate State control of access to the ballot? If it can, it would want to consider the legitimate uses of this power by the States, which can include property and other qualifications for a variety of special local elections.

We must wonder whether the deep-rooted drive for equality in this Country is likely to undermine, if not a respect for discriminating choices, at least any conditions designed to make sensible choices more likely.²⁵² Thus we have seen educational requirements ruled out as a basis for voters' eligibility, in part because they have obviously been used on occasion to exclude certain people arbitrarily and unfairly.

Corrective measures here have come from both Congress and the Courts. It is now generally accepted that whatever advantages the wealthy and the educated may have in practice, there should be no special provision for them in the law. But we have gone further than this, in effect, perhaps without recognizing what is happening. This may be seen in the elimination, both by amendments and by changes in practice, of institutional arrangements that had been intended to encourage, as well as to permit, formal deliberation, especially in choices of officers of government such as Senators and Presidents.

Whatever restrictions there had once been on voters' qualifications, including education and moral restrictions, were restrictions imposed from the beginning of the Republic by the States. By and large, the Constitution of 1787 relied upon republican States to designate and qualify voters. The efforts of the Nation for two centuries now, whether by amendments or by statute, have tended

252. For exchanges relating to these matters, see sources cited *supra* note 11.

both to expand the electorate and to nullify State restrictions. Less and less provision is made, or is permitted to be made, by law for the calibre of voters as such. This means that we must take our general educational system more seriously, if only to help people learn to whom, if not to what, they should defer in making the important political decisions they do.

V.

The Twenty-sixth Amendment provides,

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.

With this provision, the final Amendment to the Constitution thus far, we have probably taken assurances for the rights of people as voters about as far as we can go.

We are not apt to set the voting age much lower than eighteen. Students in high schools and grade schools do participate in school elections and student councils. But the lowering of the general voting age to eighteen had been prompted, in large part, by the eligibility of eighteen-year-olds for military conscription. If the draft age should ever be lowered, Congress on its own might want to lower the general voting age as well, arguing that this is an exercise by Congress of a power necessary and proper to carry into execution its war powers.²⁵³

It is only when youngsters go off to war, or live apart from their parents, that they are apt to exhibit much concern about a right to vote. To give "unemancipated" children the vote simply adds, in the typical situation, to the votes that their parents control. Even so, the young have considerable influence because of their tastes (as in music) and because of their considerable spending power.

We notice that the Twenty-sixth Amendment applies to State as well as to National elections. The principal spur to the speedy formulation and ratification of this Amendment in 1971 was the prospect of an impending general election which would have had, because of Congressional and Judicial developments, different constituencies for the National and State officers on the ballots of various States, an awkward situation indeed. This Amendment does

253. It may not contribute to proper military morale to have involuntary recruits with diverse privileges keyed to age differences. May the Republican Form of Government Guarantee also bear on this, especially considering how critical the dedication to some form of equality is among us?

testify once again to the American impulse to include as many as possible, as soon as possible, in the national political body.

VI.

Restrictions on voting remain to this day, including requirements with respect to registration and residency. Related questions have to do with the extent and significance of subdivisions within a State and, for that matter, with whether or how the States themselves should count in national elections.

What should the status of resident aliens be in American elections? Is it not sensible that they should be able to have a say in those local elections in which such an element as property ownership or having children in the school system is the key to the eligibility of voters?

It has long been evident to the American people that other rights and various conditions and privileges are related to the right of suffrage. No matter what one's condition (for example, mental incompetency), one is entitled to, say, due process of law when one is about to be deprived by some government of life, liberty, or property in this Country. But the right to the vote has always depended somewhat on legislative determination, probably necessarily so.

We have seen again and again that once any group gains effective access to the ballot, other privileges and immunities are apt to follow. We can see, for example, how women have been able, because of their obvious voting strength, to secure by legislation the rights and privileges that had been sought through the Equal Rights Amendment. And whatever Congress and the State legislatures do not provide, enterprising Courts (which *are* aware of election returns) are likely to supply, drawing on the Fourteenth Amendment.

VII.

Who "We the People" are, including what follows from this identification, has been spelled out for two centuries now. Consider, for example, the recent report that New York City, perhaps the greatest metropolis in the Western World, now has a majority of minorities. It is said to be "the most ethnically and racially diverse city in the world."²⁵⁴

Having expanded our electorate to virtually its natural limit, we

254. Edward B. Fiske, *Minorities A Majority in New York*, N.Y. TIMES, Mar. 22, 1991, at B1.

have seen that this extension includes expanding significantly the scope of the matters that the electorate decides directly. A related development has been the restriction of the powers of States as separate entities, a development that goes back to the Civil War Amendments.

We have done all this, we suspect, without adequate provision for either the quality or the civic attachments of the electorate. Should we not want the thoughtfulness, not the number, of the people voting to be our principal concern? How would we regard these matters if there were here, as in some other countries in the Western World, penalties or inducements designed to promote a higher rate of participation by the people in elections? Is anyone who has to be encouraged to vote not likely to care enough to inform himself properly about the issues under consideration?

We have seen in the Twentieth Century that making our system more and more democratic (but not by going as far as was done in ancient Athens, where key officials could be routinely chosen by lot) does not automatically help us to solve our most pressing problems. Radical democratization may even intensify those problems, if not bring on some of its own.

The growing democratization of the election process in this century is now being matched, at least in this Country, by more and more efforts to limit the activities of government. Now that almost all of the adults legally in this Country are able to vote and to choose more officers directly (including judges in many States), some advocates are looking, as solutions to our deepening problems, to more and more shackling of the governments that the people can choose. The people are encouraged to do more and more of the legislating themselves, which is what much of the constitutional amending currently advocated amounts to.

This development, reinforced by growing reliance on public opinion polls, suggests that we may be moving from a republican regime grounded in representative legislatures to a plebiscitary democracy in which much is made of Presidents and other executive officers who cannot fail to disappoint the expectations of those who depend on them, both at home and abroad. This has been most recently evident in the calamities visited upon people in Iraq, especially upon those (such as the Kurds) who have not yet learned that one should not put much trust in princes, even when one of them happens to be a President of the United States.

17. THE CONSTITUTION IN THE TWENTY-FIRST CENTURY

I.

There have not been, for two decades now, any amendments to the Constitution, except perhaps for the 1992 "ratification" by State legislatures of the 1789 Congressional-pay proposal. Two amendments proposed by Congress during this period—the Equal Rights and District of Columbia proposals—failed of ratification.

Informal constitutional adjustments continue to be made, of course, and some of these can eventually have the effect of formal amendments. We have seen, for example, what has become of the original reliance on State electors for the selection of Presidents. The emergence of political parties is reflected in how Presidents are in fact selected, with the actions of State electors having long been little more than a formality that could (perhaps should) be eliminated. Less dramatic have been some of the technical changes in the jurisdiction and activities of the Courts of the United States.

We should be aware, furthermore, of how limited in effect various formal amendments have been. Some amendments have been precise enough to be easily enforced by a people determined to use them, such as the ban on slavery in the Thirteenth Amendment, the provision for women's suffrage in the Nineteenth Amendment, and the electoral empowerment of eighteen-year-olds in the Twenty-sixth Amendment.

But many of the most illustrious amendments, those that make up the Bill of Rights, had little if any immediate effect after their ratification. This is not only true of the Tenth Amendment, which has long been recognized by many as mostly a truism (to the effect that the government of the United States indeed has the powers it has), but it is true of most of the first eight Amendments as well, confirming as they did various rights that the American people of 1789 had always believed they were entitled to and were already exercising.

It is again useful to notice that the Constitution and its Amendments presuppose an established constitutional and legal system. The Amendments ratified from time to time have, in order to avoid repudiation, either confirmed rights already recognized or adjusted arrangements in a way consistent with the overall system. American experience with the Eighteenth Amendment illustrates what is likely to happen if an amendment does not fit in with what is already there.

II.

When we look ahead to the Twenty-first Century, it is instructive to notice the amendment proposals that might be considered during the next two to three decades, the opening quarter of the upcoming century.

Some proposals are likely to be impulsive responses, all too often exploited by the cynical, to passing provocations, such as the amendment advocated as a response to occasional desecrations of the Flag. The immediate stimulus in these cases can be a judicial interpretation of the Constitution. Judicial interpretations that have affected the implementations of treaties, public school prayers, and access to abortion have in turn led to amendment proposals.

We hear considerable talk of balanced-budget and legislative terms-limitations amendments. Both would be troublesome if ratified: the first (another exercise in constitutional frivolity) because it is not likely to work, thereby disillusioning and perhaps demoralizing people; the second because it *is* likely to "work," thereby crippling the government of the United States.

Those who recognize how a balanced-budget amendment could readily be circumvented by both legislatures and executives suggest other ways of accomplishing their purposes. One proposal is that a limitation be placed on the amount of taxation that is permitted annually. But circumvention is likely here also, as may be seen in how State governments have had to work their way around such limitations. In fact, no mechanical rule or formula can take the place in such matters of political judgment, on the part of both the people and their government, if there is to be sound guidance of the economy in varying circumstances. Such guidance depends on sensible assessments not only of the causes and consequences of deficits but also of the costs, consequences, and desirability of balancing the national budget at any particular time.²⁵⁵ Here, as elsewhere, myths and misinformation have to be reckoned with. Many of these questions about economic and fiscal policies are really

255. Much the same can be said about the balance-of-trade problems. Consider, for example, the difficulties that the Japanese face if they continue to supply us abundant tangible goods without opening their markets so as to permit us to compensate them with something other than promises. Until the Japanese do this, Japanese capitalists and workers will continue to subsidize the American standard of living. This eventually may lead to very high costs in Japan, making that country uncompetitive when it tries to sell goods abroad. In the meantime, however, Japanese stocks are a good investment for Americans.

questions about human nature, which are better addressed directly, and preferably by legislatures.

Those who recognize that terms limitations for legislators can truly be crippling look to other remedies to deal with what they conceive to be the underlying problem. One set of remedies has to do with changes that could reduce the advantages of incumbency, including limitations on political contributions and campaign expenditures. Various of these remedies, too, are more appropriate for legislation than for constitutional amendments, especially since experiments are apt to be needed.

It is often said that those who hold legislative offices today are virtually impossible to defeat. But this is *not*, as many seem to believe, because incumbents are immune from public scrutiny and control. On the contrary, incumbents these days tend to be very sensitive, perhaps unduly so, to the opinions of their constituents. Indicative of what has long been happening is the fact that incumbents do say quite different things on the issues of the day, depending on precisely where they are from and what electorate they depend on. Public opinion polling makes it easier for each incumbent to tailor his words and deeds to the opinions and desires of his constituents. It should be instructive, moreover, to consider what changes there really have been, in recent decades, in the average length of service of national legislators.²⁵⁶

It is likely, or so it seems to me, that most if not all of the constitutional-amendment matters being agitated these days would be much better dealt with through legislation that can be readily adjusted and, if need be, discarded as circumstances change.

III.

I do not mean, by my reservations about the proposed amendments of our day, to suggest that the Constitution is now perfect, but only that most proposals we hear for its amendment either would not get far, or would not be likely to have the effects intended by their proponents, or would do better as legislative proposals.

I myself continue to believe, for example, that much is now to be

256. I recall that when I first became aware of political things, the accepted wisdom of that day was that the South dominated Congress because it tended to keep its Members there much longer than Northern constituencies. Is the complaint today, then, that constituencies outside of the South have learned from Southern examples? Be that as it may, should long-term service in the bureaucracy be permitted after terms-limitations are imposed upon the legislators who are supposed to direct and supervise the bureaucrats?

said for routinely choosing all Vice Presidents the way that the office of Vice President is filled when it falls vacant between elections. The mode provided in the Twenty-fifth Amendment, which induces the President to nominate someone that the Congress is likely to approve, would make it far more likely that greater care would be used in selecting Vice Presidents than we have witnessed during the hurly-burly of our quadrennial political conventions in recent decades. The mode I propose harkens back, in spirit, to the original Electoral College mode of selecting Presidents.

Also to be encouraged are serious proposals that would restore effective local government. It is hard to deny that much is likely to be lost when the Country is made up of a quarter of a billion people, instead of the three million of 1787. Can the American Union be effectively "broken up" for certain purposes? Or do we need, instead, to consider further integrating both Canada and Mexico into our economic, if not political, Union? Can only an effective world government permit the responsible elimination of national armed forces that would make executive power less needed and local autonomy more feasible?

Neither a humane world government (in which countries *would* likely be represented by their chief executives) nor effective local autonomy seems to be immediately available. But neither would have to be looked to as much as they are if there could be greater reliance among us upon personal (but not an apolitical) self-sufficiency and integrity, something that each of us should be able to do something about wherever we happen to be.

IV.

Most of the concerns we encounter these days for constitutional amendments take the form of curbing either the Congress or the Courts. How deep these concerns really run may be questioned, especially if the American people should, by and large, be fairly well satisfied with their way of life.

Far less is heard these days about the need to place curbs upon the Presidency.²⁵⁷ Rather, various of the changes suggested (such as the line-item veto, terms limitations for Congress, and the direct

257. Still, one does encounter more and more people who resent what they take to be the unseemly, intimidating aspects of such executive agencies as the Internal Revenue Service. I suspect that it would be good for the moral sense of the community if taxes were not collected in such a way as to provoke all too many intelligent taxpayers to be less candid in dealing with their governments than they are in financial dealings with others. The *amount* of money paid should not be the critical issue here.

election of the President) would tend to strengthen the Presidency even more than it has naturally been in an era of perpetual crisis. Transformation of our National Government into a parliamentary system, dominated in effect by the President, is sometimes advocated as a means of avoiding institutional "deadlock." This transformation (with or without proportional representation) would require radical changes, with unpredictable consequences, in our deep-rooted bicameral legislative arrangements as well as in our way of choosing the President. Furthermore, a parliamentary system depends for political stability on public opinion less volatile than ours can sometimes be. Experiments along these lines might better be made first in a few of our States.

Should the Presidency, in the system we now have, be confined? Or should it be recognized for what it has become and perhaps has to be? What is the status, for example, of the 1973 War Powers Resolution?²⁵⁸ Should not more reliance be placed upon the exclusive Congressional power to declare war? Congress already has the power to curb adventurous Presidents, beginning with the severe cuts it can make in military and other appropriations. What is needed here, then, are not constitutional amendments but rather the willingness of an alert Congress, urged on by an informed people, to exercise properly the power with which Congress has been entrusted by the Constitution.

The constitutional lessons of the recent Gulf War are yet to be drawn. The more we see of the disastrous consequences of that war, some of which (already apparent) were predicted and others of which will take years to observe, the sounder the much more cautious pre-war Congressional judgment appears to have been on that occasion. Much of the high-minded talk about a new world order we once heard from "hard-liners" is already being shown up as hollow moral posturing—and innocent people in the Middle East (or, at least, people probably as innocent as we are) have suffered grievously by the hundreds of thousands in part because of what we have and have not done.

The moral sensibilities of our leaders need to be rigorously questioned in such situations. Fundamental to our capacity to govern ourselves, and fundamental also to our power to provide our leaders the curbs and guidance they need, are our right and ability to judge the governments upon which we do have to rely. Critical to

258. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (1973), codified at 50 U.S.C. § 1544 (1988); see ANASTAPLO, *THE CONSTITUTION OF 1787*, *supra* note 2, at 113-15, 316 n.78.

our ability to judge properly are our character and education as a people.

V.

I have touched upon various institutional reforms that have been suggested in this Country from time to time. This survey has not been offered as exhaustive but rather as illustrative of the issues here. I attempt thereby to suggest how such constitutional-amendment proposals should be assessed.

Other amendment proposals look more to the assertion of the personal rights of citizens. What, for example, remains to be mined out of the Ninth Amendment? Can the Courts be relied upon to develop "the right of privacy"? Or is that better left to the Legislatures of this Country (State as well as National) to deal with? Certainly, much has been done, and continues to be done, by statute. A reliable assessment of what the Courts should do here could well begin with a careful study of the political as well as the legal and constitutional consequences of the judicial intervention in the abortion controversy in recent decades.

One vital right implicitly recognized by the Ninth Amendment should be reaffirmed (reaffirmed, but not exercised) from time to time. That is the great right of revolution dramatically exercised in Magna Carta. Sober reaffirmations of this right and duty serve to remind us that there are standards—enduring moral and political standards grounded in "the Laws of Nature and of Nature's God"—that can and should be looked to in judging what our governments do.

VI.

Still another kind of constitutional amendment is likely to be proposed more and more in the coming decades: amendments providing for various social and economic "rights." Models are available in numerous constitutions and declarations around the world. These include rights to a living wage, to education, to medical treatment, and to family assistance.

In some respects the expositions of these rights presuppose a political system that is not itself examined. Are not the constitutional amendments that might be relied upon here likely to be either unduly confining or simply ineffectual? Most people in this Country still tend to believe that the objectives sought to be served by such declarations are better dealt with through the constantly changing political process and by the maintenance of a sound econ-

omy which permits a steady rise in the general standard of living, a standard of living which in turn permits both governments and private parties to address the dislocations and misery perhaps inevitable in any large-scale institutional arrangements. Whether part of that misery, of rich and poor alike, can be traced back to the generally-accepted article of faith that we *should* become more and more comfortable is a question that we should consider seriously in the coming decades.

One consequence of the virtually universal adult suffrage we now have in this Country for citizens is that underprivileged groups can better make themselves felt in the political process, if only they can be organized to do so. The powers of the Government of the United States are recognized to be so extensive that that government now can do whatever we believe needs to be done to serve the social and economic needs of the American people.

It remains to be seen, however, whether artificial constitutional barriers will be erected that will interfere with what may need to be done with affirmative-action, population-control, moral-training, cultural-enrichment, and other such programs. Both National and State Governments have much to do here, however skeptical we should all remain about what Government *can* do. Our underlying need is (and perhaps always has been) with respect to education, looking to the best that is available.

By and large, we must insist, the Constitution should not be understood to keep us from doing what is good and sensible.

VII.

What, then, are the amendments we truly need? They would genuinely be *amendments* in the sense of *making things better*.

The moral judgment, including the sense of civility, of our people should be a constant concern. This includes that reaffirmation of natural right to which I have several times referred in the course of these Lectures. Virtue is more likely these days than two centuries ago to be seen primarily in terms of private rather than of public conduct. Much more needs to be made among us of civic virtue, hearkening back to the time when the best people in this Country, who were generally recognized to be such, went mostly into politics and into the ministry (a different form, perhaps, of politics).

A mature people, morally and politically, is less likely to be imposed upon by its leaders. Consider, for example, how we have been deliberately manipulated in recent years by images of such

despicable characters as Willie Horton (1988) and Saddam Hussein (1990-1992). Irresponsible sloganeering has usurped the place of serious discussion.

Vital to the proper training of our people, generation after generation, is that the community should be persuaded that it *is* entitled and obliged to do much here, both directly and indirectly. In such training the emphasis should be placed more on *duties* than on *rights*. Even so, a proper regard for rights can promote a sense of dignity—and that in turn can contribute to taking one's duties seriously.

The problem of the integrity of our people can be critical here. Charles de Gaulle, in dealing with the French once asked: "How can you be expected to govern a country which has 246 kinds of cheese?"²⁵⁹ Similarly, we can ask, how is it possible to train our people properly when the dramatic arts (including sports) and public discourse are as fragmented and polluted by selling as ours have become? That we put up with so much relentless, if not brutal, exploitation of our legitimate interest and attention is remarkable. What is not remarkable is that our experience in and ability for serious discussion should be deteriorating, especially as we become more and more accustomed to being entertained and less and less resentful of being exploited. Instead, we are much more likely to resent, if not even to penalize, those who presume to question our tastes, our illusions, and our transformation into mere consumers.

A self-confident community depends in the modern world on a constitution that a people recognizes should and can be read with care, a constitution that is, because of its scope, useful in a variety of circumstances. It *is* remarkable that extended discussions of the Declaration of Independence, of the Constitution of 1787, and of its Amendments can have the respectable audiences they have had during one Bicentennial celebration after another since 1976. The American language and experience still permit, if not encourage, our politics to be sensible.

I have heard that love sentiments are easier to convey in Italian or modern Greek or Spanish than in English. Has this, if true, helped to keep Americans from becoming too skilled in matters of love? Have we, as perhaps the preeminent self-governing community in modern times, been better off in being "naturally" better at politics than at something so promising and yet so self-absorbing and distracting as love? To what extent is our escalating appetite

259. CONTEMPORARY QUOTATIONS 266 (James B. Simpson ed., 1964).

for personal self-expression (both in public and in private) an ill-conceived attempt to make up for growing deficiencies among us with respect to both politics and love? Particularly to be guarded against by a self-governing people is any deficiency in knowing what in human beings and in citizens is truly to be cherished.²⁶⁰

260. What is the relation between an emphasis on love and a radical inwardness (or an emphasis upon the right of privacy)? What are the Christian influences here? See *supra* note 172. On how republicans put the erotic as well as family ties to public use, see ANASTAPLO, *THE ARTIST AS THINKER*, *supra* note 13, at 48-49, 51-56, 366 n.75, 391 n.79. Does capitalism, with its welcomed productivity, tend to encourage and legitimate self-centeredness and hedonistic self-love, if not simply selfishness? Institutionalized love for humanity (that is, organized charity) attempts to compensate for this tendency. It seems, in any event, that nature requires a community to have *some* public life. If the properly political is depreciated, then there may be an exposure to public view of much that should be private. It is prudent to notice that the erotic may be critical for philosophy. See *supra* Lecture No. 9, §§ II, XVI; see also *supra* notes 130-31.

APPENDIX A

LETTERS EXCHANGED BY THOMAS JEFFERSON AND JOHN ADAMS (1814)

[From Thomas Jefferson to John Adams]

[430] Monticello July 5. [18]14.

DEAR SIR

Since mine of Jan. 24. yours of Mar. 14 was recieved. It was not acknoleged in the short one [from me] of May 18. [delivered] by Mr. Rives, the only object of that having been to enable one of our most promising young men to have the advantage of making his bow to you. I learned with great regret the serious illness mentioned in your letter: and I hope Mr. Rives will be able to tell me you are entirely restored. But our machines have now been running for 70. or 80. years, and we must expect that, worn as they are, [431] here a pivot, there a wheel, now a pinion, next a spring, will be giving way: and however we may tinker them up for awhile, all will at length surcease motion. Our watches, with works of brass and steel, wear out within that period. Shall you and I last to see the course the seven-fold wonders of the times will take? The Attila of the age [Napoleon Bonaparte] dethroned, the ruthless destroyer of 10. millions of the human race, whose thirst for blood appeared unquenchable, the great oppressor of the rights and liberties of the world, shut up within the circle of a little island of the Mediterranean [Elba; he was later banished to St. Helena, in the South Atlantic], and dwindled to the condition of an humble and degraded pensioner on the bounty of those he had most injured. How miserably, how meanly, has he closed his inflated career! What a sample of the Bathos will his history present! He should have perished on the swords of his enemies, under the walls of Paris.

'Leon piagato a morte
Sente mancar la vita,
Guarda la sua ferita,
Ne s'avilisce ancor.

Cosi fra l'ire estrema
rugge, minaccia, e freme,
Che fa tremar morendo
Tal volta it cacciator.'

Metast[asio,] *Adriano* [in *Siria*, II, 11]

['The lion stricken to death
realizes that he is dying,
and looks at his wounds from which
he grows ever weaker and weaker.

[Then with his final wrath
he roars, threatens, and screams,
which makes the hunter
tremble at him dying.']

But Bonaparte was a lion in the field only. In civil life a cold-blooded, calculating unprincipled Usurper, without a virtue, no statesman, knowing nothing of commerce, political economy, or civil government, and supplying ignorance by bold presumption. I had supposed him a great man until his entrance into the Assembly des cinq cens, 18. Brumaire (an 8.) [Nov. 9, 1799]. From that date however I set him down as a great scoundrel only. To the wonders of his rise and fall, we may add that of a Czar of Muscovy [Alexander I] dictating, *in Paris* [in 1814], laws and limits to all the successors of the Caesars, and holding even the balance in which the fortunes of this new world are suspended. I own that, while I rejoice, for the good of mankind, in the deliverance of Europe from the havoc which would have never ceased while Bonaparte should have lived in power, I see with anxiety the tyrant of the ocean [England] remaining in vigor, and even participating in the merit [432] of crushing his brother tyrant. While the world is thus turned up side down, on which side of it are we? All the strong reasons indeed place

us on the side of peace; the interests of the continent, their friendly dispositions, and even the interests of England. Her passions alone are opposed to it. Peace would seem now to be an easy work, the causes of the war being removed. Her orders of council will no doubt be taken care of by the allied powers, and, war ceasing, her impressment of our seamen ceases of course. But I fear there is a foundation for the design intimated in the public papers, of demanding a cession of our right in the fisheries [off the northern coast of North America]. What will Massachusetts say to this? I mean her majority, which must be considered as speaking, thro' the organs it has appointed itself, as the Index of it's will. She chose to sacrifice the liberty of our seafaring citizens, in which we were all interested, and with them her obligations to the Co-states; rather than war with England. Will she now sacrifice the fisheries to the same partialities? This question is interesting to her alone: for to the middle, the Southern and Western States they are of no direct concern; of no more than the culture of tobacco, rice and cotton to Massachusetts. I am really at a loss to conjecture what our refractory sister will say on this occasion. I know what, as a citizen of the Union, I would say to her. 'Take this question ad referendum. It concerns you alone. If you would rather give up the fisheries than war with England, we give them up. If you had rather fight for them, we will defend your interests to the last drop of our blood, chusing rather to set a good example than follow a bad one.' And I hope she will determine to fight for them. With this however you and I shall have nothing to do; ours being truly the case wherein 'non tali auxilio, nec defensoribus istis Tempus eget.' ['We do not, at this time, want such aid as that, nor such defenders.' Virgil, *Aeneid*, II, 521.] Quitting this subject therefore I will turn over another leaf.

I am just returned from one of my long absences, having been at my other home for five weeks past. Having more leisure there than here for reading, I amused myself with reading seriously Plato's republic. I am wrong however in calling it amusement, for it was the heaviest task-work I ever went through. I had occasionally before taken up some of his other works, but scarcely ever had patience to go through a whole dialogue. While wading thro' the whimsies, the puerilities, and unintelligible jargon of this work, I laid it down often to ask myself how it could have been that the world should have so long consented to give reputation to such nonsense as this? How the soi-disant Christian world indeed should have [433] done it, is a piece of historical curiosity. But how could the Roman good sense do it? And particularly how could Cicero bestow such eulogies on Plato? Altho' Cicero did not wield the dense logic of Demosthenes, yet he was able, learned, laborious, practised in the business of the world, and honest. He could not be the dupe of mere style, of which he was himself the first master in the world. With the Moderns, I think, it is rather a matter of fashion and authority. Education is chiefly in the hands of persons who, from their profession, have an interest in the reputation and the dreams of Plato. They give the tone while at school, and few, in their after-years, have occasion to revise their college opinions. But fashion and authority apart, and bringing Plato to the test of reason, take from him his sophisms, futilities, and incomprehensibilities, and what remains? In truth, he is one of the race of genuine Sophists, who has escaped the oblivion of his brethren, first by the elegance of his diction, but chiefly by the adoption and incorporation of his whimsies into the body of artificial Christianity. His foggy mind, is forever presenting the semblances of objects which, half seen thro' a mist, can be defined neither in form or dimension. Yet this which should have consigned him to early oblivion really procured him immortality of fame and reverence. The Christian priesthood, finding the doctrines of Christ levelled to every understanding, and too plain to need explanation, saw, in the mysticisms of Plato, materials with which they might build up an artificial system which might, from it's indistinctness, admit everlasting controversy, give employment for their order, and introduce it to profit, power and pre-eminence. The doctrines which flowed from the lips of Jesus himself are within the comprehension of a child; but thousands of volumes have not yet explained the Platonisms engrafted on them: and for this obvious reason that nonsense can never be explained. Their purposes however are answered. Plato is canonized; and it is now deemed as impious to question his merits as those of an Apostle of Jesus. He is peculiarly ap-

pealed to as an advocate of the immortality of the soul; and yet I will venture to say that were there no better arguments than his in proof of it, not a man in the world would believe it. It is fortunate for us that Platonic republicanism has not obtained the same favor as Platonic Christianity; or we should now have been all living, men, women and children, pell mell together, like beasts of the field or forest. Yet 'Plato is a great Philosopher,' said La Fontaine. But says Fontenelle 'do you find his ideas very clear?' 'Oh no! he is of an obscurity impenetrable.' 'Do you not find him full of contradictions?' 'Certainly,' replied La Fontaine, "he is but a Sophist." Yet immediately after, he exclaims again, 'Oh Plato was a great Philosopher.' Socrates had reason indeed to complain of the misrepresentations of Plato; for in truth his dialogues are libels on Socrates.

[434] But why am I dosing you with these Ante-diluvian topics? Because I am glad to have some one to whom they are familiar, and who will not receive them as if dropped from the moon. Our post-revolutionary youth are born under happier stars than you and I were. They acquire all learning in their mothers' womb, and bring it into the world ready-made. The information of books is no longer necessary; and all knowledge which is not innate, is in contempt, or neglect at least. Every folly must run its round; and so, I suppose, must that of self-learning, and self sufficiency; of rejecting the knowledge acquired in past ages, and starting on the new ground of intuition. When sobered by experience I hope our successors will turn their attention to the advantages of education. I mean of education on the broad scale, and not that of the petty *academies*, as they call themselves, which are starting up in every neighborhood, and where one or two men, possessing Latin, and sometimes Greek, a knowledge of the globes, and the first six books of Euclid, imagine and communicate this as the sum of science. They commit their pupils to the theatre of the world with just taste enough of learning to be alienated from industrious pursuits, and not enough to do service in the ranks of science. We have some exceptions indeed. I presented one to you lately, and we have some others. But the terms I use are general truths. I hope the necessity will at length be seen of establishing institutions, here as in Europe, where every branch of science, useful at this day, may be taught in its highest degrees. Have you ever turned your thoughts to the plan of such an institution? I mean to a specification of the particular sciences of real use in human affairs, and how they might be so grouped as to require so many professors only as might bring them within the views of a just but enlightened economy? I should be happy in a communication of your ideas on this problem, either loose or digested. But to avoid my being run away with by another subject, and adding to the length and ennui of the present letter, I will here present to Mrs. Adams and yourself the assurance of my constant and sincere friendship and respect.

TH: JEFFERSON

[From John Adams to Thomas Jefferson]

Quincy July 16. 1814

DEAR SIR

I recd. this morning your favour of the 5th. and as I can never let a Sheet of your's rest I sit down immediately to acknowledge it.

[435] Whenever Mr. Rives, of whom I have heard nothing, shall arrive he shall receive all the cordial Civilities in my power.

I am sometimes afraid that my "Machine" will not "surcease motion" soon enough; for I dread nothing so much as "dying at top" and expiring like Dean Swift "a driveller and a Show" or like Sam. Adams, a Grief and distress to his Family, a weeping helpless Object of Compassion for Years.

I am bold to say that neither you nor I, will live to see the Course which "the Wonders of the Times" will take. Many Years, and perhaps Centuries must pass, before the current will acquire a settled direction. If the Christian Religion as I understand it, or as you understand it, should maintain its Ground as I believe it will; Yet Platonic Pythagoric, Hindoo, and cabbalistical Christianity which is Catholic Christianity, and which has prevailed for 1500 Years, has recd. a mortal Wound of which the Monster must finally

die; Yet so strong is his constitution that he may endure for Centuries before he expires. Government has never been much studied by Mankind. But their Attention has been drawn to it, in the latter part of the last Century and the begining of this, more than at any former Period: and the vast Variety of experiments that have been made of Constitutions, in America in France, in Holland, in Geneva in Switzerland, and even in Spain and South America, can never be forgotten. They will be studied, and their immediate and remote Effects, and final Catastrophys noted. The result in time will be Improvements. And I have no doubt that the horrors We have experienced for the last forty Years, will ultimately, terminate in the Advancement of civil and religious Liberty, and Ameliorations, in the condition of Mankind. For I am a Believer, in the probable improvability and Improvement, the Ameliorabi[l]ity and Amelioration in human Affairs: though I never could understand the Doctrine of the Perfectability of the human Mind. This has always appeared to me, like the Phylosophy or Theology of the Gentoos, viz. "that a Brachman by certain Studies for a certain time pursued, and by certain Ceremonies a certain number of times repeated, becomes Omniscient and Almighty."

Our hopes however of sudden tranquility ought not to be too sanguine. Fanaticism and Superstition will still be selfish, subtle, intriguing, and at times furious. Despotism will still struggle for domination; Monarchy will still study to rival nobility in popularity; Aristocracy will continue to envy all above it, and despize and oppress all below it; Democracy will envy all, contend with all, endeavour to pull down all; and when by chance it happens to get the Upper hand for a short time, it will be revengefull bloody and cruel. These and other Elements of Fanaticism and Anarchy will yet for a long time continue a Fermentation, which will excite alarms and require Vigilance.

Napoleon is a Military Fanatic like Achilles, Alexander, Caesar, [436] Mahomet, Zingis Kouli, Charles 12th. etc. The Maxim and Principle of all of them was the same "Jura negat sibi cata [i.e., nata], nihil non arrogat Armis." ["He denies that laws were made for him; he arrogates everything to himself by force of arms." Horace, *Ars Poetica*, 122.]

But is it strict, to call him An Usurper? Was not his Elevation to the Empire of France as legitimate and authentic a national Act as that of William 3d. or the House of Hanover to the throne of the 3 Kingdoms or as the Election of Washington to the command of our Army or to the Chair of the States.

Human Nature, in no form of it, ever could bear Prosperity. That peculiar tribe of Men, called Conquerors, more remarkably than any other have been swelled with Vanity by any Series of Victories. Napoleon won so many mighty Battles in such quick succession and for so long a time, that it was no Wonder his brain became compleatly intoxicated and his enterprises, rash, extravagant and mad.

Though France is humbled, Britain is not. Though Bona is banished a greater Tyrant and wider Usurper still domineers. John Bull is quite as unfeeling, as unprincipled, more powerful, has shed more blood, than Bona. John by his money his Intrigues and Arms, by exciting Coalition after coalition against him made him what he was, and at last, what he is. How shall the Tyrant of Tyrants, be brought low? Aye! there's the rub. I still think Bona great, at least as any of the Conquerors. "The Wonders of his rise and fall," may be seen in the Life of King Theodore, or Pascall Paoli or Rienzi, or Dyonisius or Mazzionelli, or Jack Cade or Wat Tyler. The only difference is that between miniatures and full length pictures. The Schoolmaster at Corinth, was a greater Man, than the Tyrant of Syracuse; upon the Principle, that he who conquers himself is greater than he who takes a City. Tho' the ferocious Roar of the wounded Lion, may terrify the Hunter with the possibility of another dangerous leap; Bona was shot dead at once, by France. He could no longer roar or struggle growl or paw, he could only gasp the grin of death. I wish that France may not still regret him. But these are Speculations in the Clouds. I agree with you that the Milk of human kindness in the Bourbons is safer for Mankind than the fierce Ambition of Napoleon.

The Autocrator [of Russia] appears in an imposing Light. Fifty Years ago English Writers, held up terrible Consequences from "thawing out the monstrous northern

Snake." If Cossacks and Tartars, and Goths and Vandalls and Hunns and Ripuarians, should get a taste of European Sweets, what may happen? Could Wellingtons or Bonapartes, resist them? The greatest trait of Sagacity, that [Czar] Alexander [of Russia] has yet exhibited to the World is his Courtship of the United States. But whether this is a mature well digested Policy or [437] only a transient gleam of thought, still remains to be explained and proved by time.

The "refractory Sister" [Massachusetts] will not give up the Fisheries. Not a Man here dares to hint at so base a thought.

I am very glad you have seriously read Plato: and still more rejoiced to find that your reflections upon him so perfectly harmonize with mine. Some thirty Years ago I took upon me the severe task of going through all his Works. With the help of two Latin Translations, and one English and one French Translation and comparing some of the most remarkable passages with the Greek, I laboured through the tedious toil. My disappointment was very great, my Astonishment was greater and my disgust was shocking. Two Things only did I learn from him. 1. that Franklins Ideas of exempting Husbandmen and Mariners etc. from the depredations of War were borrowed from him. 2. that Sneezing is a cure for the Hickups. Accordingly I have cured myself and all my Friends of that provoking disorder, for thirty years with a Pinch of Snuff.

Some Parts of some of his Dialogues are entertaining, like the Writings of Rousseau: but his Laws and his Republick from which I expected most, disappointed me most. I could scarcely exclude the suspicion that he intended the latter as a bitter Satyre upon all Republican Government, as Xenophon undoubtedly designed by his Essay on Democracy, to ridicule that Species of Republick. In a late letter to the learned and ingenious Mr. Taylor of Hazelwood, I suggested to him the Project of writing a Novel, in which The Hero should be sent upon his travels through Plato's Republick, and all his Adventures, with his Observations on the principles and Opinions, the Arts and Sciences, the manners Customs and habits of the Citizens should be recorded. Nothing can be conceived more destructive of human happiness; more infallibly contrived to transform Men and Women into Brutes, Yahoos, or Daemons than a Community of Wives and Property. Yet, in what, are the Writings of Rousseau and Helvetius wiser than those of Plato? "The Man who first fenced a Tobacco Yard, and said this is mine ought instantly to have been put to death" says Rousseau. "The Man who first pronounced the barbarous Word "Dieu," ought to have been immediately destroyed," says Diderot. In short Philosophers antient and modern appear to me as Mad as Hindoos, Mahomitans, and Christians. No doubt they would all think me mad; and for any thing I know this globe may be, the bedlam, Le Bicatre [i.e., Bicêtre] of the Universe.

After all; as long as Property exists, it will accumulate in Individuals and Families. As long as Marriage exists, Knowledge, Property and Influence will accumulate in Families. Your and our equal Partition of intestate Estates, instead of preventing will in time augment the Evil, if it is one.

The French Revolutionists saw this, and were so far consistent. When [438] they burned Pedigrees and genealogical Trees, they annihilated, as far as they could, Marriages, knowing that Marriage, among a thousand other things was an infallible Source of Aristocracy. I repeat it, so sure as the Idea and the existence of PROPERTY is admitted and established in Society, Accumulations of it will be made, the Snow ball will grow as it rolls.

Cicero was educated in the Groves of Academus where the Name and Memory of Plato, were idolized to such a degree, that if he had wholly renounced the Prejudices of his Education his Reputation would have been lessened, if not injured and ruined. In his two Volumes of Discourses of Government We may presume, that he fully examined Plato's Laws and Republick as well as Aristotles Writings on Government. But these have been carefully destroyed; not improbably, with the general Consent of Philosophers, Politicians and Priests. The Loss is as much to be regretted as that of any Production of Antiquity.

Nothing seizes the Attention, of the staring Animal, so surely, as Paradox, Riddle, Mystery, Invention, discovery, Mystery, Wonder, Temerity.

Plato and his Disciples, from the fourth Century Christians, to Rousseau and Tom Paine, have been fully sensible of this Weakness in Mankind, and have too successfully grounded upon it their Pretensions to Fame. I might indeed, have mentioned Bolingbroke, Hume, Gibbon Voltaire Turgot Helvetius Diderot, Condorcet, Buffon De La Lande and fifty others; all a little cracked! Be to their faults a little blind; to their Virtues ever kind.

Education! Oh Education! The greatest Grief of my heart, and the greatest Affliction of my Life! To my mortification I must confess, that I have never closely thought, or very deliberately reflected upon the Subject, which never occurs to me now, without producing a deep Sigh, an heavy groan and sometimes Tears. My cruel Destiny seperated me from my Children, allmost continually from their Birth to their Manhood. I was compelled to leave them to the ordinary routine of reading writing and Latin School, Accademy and Colledge. John alone was much with me, and he, but occasionally. If I venture to give you any thoughts at all, they must be very crude. I have turned over Locke, Milton, Condilac Rousseau and even Miss. Edgeworth as a bird flies through the Air. The Praeceptor [by Robert Dodsley], I have thought a good Book. Grammar, Rhetorick, Logic, Ethicks mathematicks, cannot be neglected; Classicks, in spite of our Friend [Benjamin] Rush, I must think indispensable. [Rush advocated dropping Greek and Latin from the school curriculum, except for the few students who would go to college.] Natural History, Mechanicks, [439] and experimental Philosophy, Chymistry etc at least their Rudiments, can not be forgotten. Geography Ast[ron]omy, and even History and Chronology, tho' I am myself afflicted with a kind of Pyrrhonism in the two latter, I presume cannot be omitted. Theology I would leave to Ray, Derham, Nicuenteyt and Payley, rather than to Luther Zinzindorph, Sweedenborg Westley, or Whitefield, or Thomas Aquinas or Wollebius. Metaphysics I would leave in the Clouds with the Materialists and Spirtualists, with Leibnits, Berkley Priestley and Edwards, and I might add Hume and Reed, or if permitted to be read, it should be with Romances and Novels. What shall I say of Musick, drawing, fencing, dancing and Gymnastic Exercises? What of Languages Oriental or Occidental? of French Italian German or Russian? of Sanscrit or Chinese?

The Task you have prescribed to me of Grouping these Sciences, or Arts, under Professors, within the Views of an enlightened Economy, is far beyond my forces. Loose indeed and indigested must be all the hints, I can note. Might Gramar, Rhetoric, Logick and Ethicks be under One Professor? Might Mathematicks, Mechanicks, Natural Phylosophy, be under another? Geography and Astro[no]my under a third. Laws and Government, History and Chronology under a fourth. Classicks might require a fifth.

Condelaacs course of Study has excellent Parts. Among many Systems of Mathematicks English, French and American, there is none preferable to Besouts Course La Harps Course of Litterature is very valuable.

But I am ashamed to add any thing more to the broken innuendos except Assurances of the continued Friendship of

JOHN ADAMS

[These two letters are copied from THE ADAMS-JEFFERSON LETTERS 430-39 (Lester J. Cappon ed., 1971). The beginning of each page in the Cappon edition is indicated in this Appendix by its page number in brackets. The original spelling and punctuation are left unchanged, except where indicated by brackets. Brackets are also used to enclose explanatory material.]

APPENDIX B

THE CONFEDERATE CONSTITUTION (1861)

CONSTITUTION OF THE CONFEDERATE STATES OF AMERICA

We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquility and secure the blessings of liberty to ourselves and our posterity—invoking the favor and guidance of Almighty God—do ordain and establish this Constitution for the Confederate States of America.

ARTICLE 1.

Section 1.

All legislative powers herein delegated shall be vested in a Congress of the Confederate States, which shall consist of a Senate and House of Representatives.

Section 2.

1. 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 be citizens of the Confederate States, and have the qualifications requisite for electors of the most numerous branch of the State Legislature; but no person of foreign birth, not a citizen of the Confederate States, shall be allowed to vote for any officer, civil or political, State or Federal.

2. No person shall be a representative, who shall not have attained the age of twenty-five years, and be a citizen of the Confederate States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and Direct Taxes shall be apportioned among the several States which may be included within this Confederacy, 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 slaves. The actual enumeration shall be made within three years after the first meeting of the Congress of the Confederate 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 fifty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of South Carolina shall be entitled to choose six; the State of Georgia ten; the State of Alabama nine; the State of Florida two; the State of Mississippi seven; the State of Louisiana six; and the State of Texas six.

4. When vacancies happen in the representation from any State, the Executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their speaker and other officers, and shall have the sole power of impeachment; except that any judicial or other federal officer, resident and acting solely within the limits of any State, may be impeached by a vote of two-thirds of both branches of the Legislature thereof.

Section 3.

1. The Senate of the Confederate States shall be composed of two Senators from each State, chosen for six years by the legislature thereof, at the regular session next immediately preceding the commencement of the term of service; and each Senator shall have one vote.

2. 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.

3. No person shall be a Senator who shall not have attained the age of thirty years, and be a citizen of the Confederate States; and who shall not, when elected, be an inhabitant of the State for which he shall be chosen.

4. The Vice-President of the Confederate States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. 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 Confederate States.

6. 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 Confederate States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

7. 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 Confederate States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment and punishment according to law.

Section 4.

1. The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof, subject to the provisions of this Constitution; but the Congress may, at any time, by law, make or alter such regulations, except as to the times and places of choosing Senators.

2. 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.

1. 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.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds of the whole number, expel a member.

3. 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.

4. 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.

1. The Senators and Representatives shall receive a compensation for their services to be ascertained by law, and paid out of the treasury of the Confederate 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.

2. No Senator or Representative shall, during the time for which he was elected, be

appointed to any civil office under the authority of the Confederate States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the Confederate States shall be a member of either House during his continuance in office. But Congress may, by law, grant to the principal officers in each of the Executive Departments a seat upon the floor of either House, with the privilege of discussing any measures appertaining to his department.

Section 7.

1. 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.

2. Every bill which shall have passed both Houses, shall, before it becomes a law, be presented to the President of the Confederate 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. The President may approve any appropriation and disapprove any other appropriation in the same bill. In such case he shall, in signing the bill, designate the appropriations disapproved; and shall return a copy of such appropriations, with his objections, to the House in which the bill shall have originated; and the same proceedings shall then be had as in case of other bills disapproved by the President.

3. Every order, resolution or vote, to which the concurrence of both Houses may be necessary (except on a question of adjournment) shall be presented to the President of the Confederate States; and before the same shall take effect, shall be approved by him; or being disapproved by him, shall be re-passed by two-thirds of both Houses according to the rules and limitations prescribed in case of a bill.

Section 8.

The Congress shall have power—

1. To lay and collect taxes, duties, imposts and excises, for revenue necessary to pay the debts, provide for the common defence, and carry on the Government of the Confederate States; but no bounties shall be granted from the treasury; nor shall any duties or taxes on importations from foreign nations be laid to promote or foster any branch of industry; and all duties, imposts and excises shall be uniform throughout the Confederate States:

2. To borrow money on the credit of the Confederate States:

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes; but neither this, nor any other clause contained in the constitution, shall ever be construed to delegate the power to Congress to appropriate money for any internal improvement intended to facilitate commerce; except for the purpose of furnishing lights, beacons and buoys, and other aids to navigation upon the coasts, and the improvement of harbors, and the removing of obstructions in river navigation, in all which cases, such duties shall be laid on the navigation facilitated thereby, as may be necessary to pay the costs and expenses thereof:

4. To establish uniform laws of naturalization, and uniform laws on the subject of bankruptcies throughout the Confederate States; but no law of Congress shall discharge any debt contracted before the passage of the same:

5. To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures:
6. To provide for the punishment of counterfeiting the securities and current coin of the Confederate States:
7. To establish post offices and post routes; but the expenses of the Post Office Department, after the first day of March, in the year of our Lord eighteen hundred and sixty-three, shall be paid out of its own revenues:
8. 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:
9. To constitute tribunals inferior to the Supreme Court:
10. To define and punish piracies and felonies committed on the high seas, and offences against the law of nations:
11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water:
12. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years:
13. To provide and maintain a navy:
14. To make rules for the government and regulation of the land and naval forces:
15. To provide for calling forth the militia to execute the laws of the Confederate States, suppress insurrections, and repel invasions:
16. 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 Confederate 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:
17. To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of one or more States, and the acceptance of Congress, become the seat of the Government of the Confederate 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, dockyards, and other needful buildings: and
18. 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 Confederate States, or in any department or officer thereof.

Section 9.

1. The importation of negroes of the African race, from any foreign country, other than the slaveholding States or Territories of the United States of America, is hereby forbidden; and Congress is required to pass such laws as shall effectually prevent the same.
2. Congress shall also have power to prohibit the introduction of slaves from any State not a member of, or Territory not belonging to, this Confederacy.
3. 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.
4. No bill of attainder, *ex post facto* law, or law denying or impairing the right of property in negro slaves, shall be passed.
5. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.
6. No tax or duty shall be laid on articles exported from any State, except by a vote of two-thirds of both Houses.
7. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.
8. 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.

9. Congress shall appropriate no money from the treasury except by a vote of two-thirds of both Houses, taken by yeas and nays, unless it be asked and estimated for by some one of the heads of Department, and submitted to Congress by the President; or for the purpose of paying its own expenses and contingencies; or for the payment of claims against the Confederate States, the justice of which shall have been judicially declared by a tribunal for the investigation of claims against the government, which it is hereby made the duty of Congress to establish.

10. All bills appropriating money shall specify in federal currency, the exact amount of each appropriation, and the purposes for which it is made; and Congress shall grant no extra compensation to any public contractor, officer, agent or servant, after such contract shall have been made or such service rendered.

11. No title of nobility shall be granted by the Confederate 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.

12. 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 petition the government for a redress of grievances.

13. 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.

14. 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.

15. 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.

16. 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 offence, to be twice put in jeopardy of life or limb; nor 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.

17. 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 defence.

18. 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 so tried by a jury shall be otherwise re-examined in any court of the Confederacy, than according to the rules of the common law.

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

20. Every law, or resolution having the force of law, shall relate to but one subject, and that shall be expressed in the title.

Section 10.

1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; make anything but gold and silver coin a tender in

payment of debts; pass any bill of attainder, or *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility.

2. 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 Confederate States; and all such laws shall be subject to the revision and control of Congress.

3. No State shall, without the consent of Congress, lay any duty on tonnage, except on sea-going vessels, for the improvement of its rivers and harbors navigated by the said vessels; but such duties shall not conflict with any treaties of the Confederate States with foreign nations; and any surplus revenue thus derived, shall, after making such improvement, be paid into the common treasury. Nor shall any State 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. But when any river divides or flows through two or more States, they may enter into compacts with each other to improve the navigation thereof.

ARTICLE II.

Section 1.

1. The executive power shall be vested in a President of the Confederate States of America. He and the Vice-President shall hold their offices for the term of six years: but the President shall not be re-eligible. The President and Vice-President shall be elected as follows:

2. 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 Confederate States, shall be appointed an elector.

3. 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 Confederate 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 case of the death, or other constitutional disability of the President.

4. 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.

5. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the Confederate States.

6. 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 Confederate States.

7. No person except a natural born citizen of the Confederate States, or a citizen thereof at the time of the adoption of this Constitution, or a citizen thereof born in the United States prior to the 20th of December, 1860, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years, and been fourteen years a resident within the limits of the Confederate States, as they may exist at the time of his election.

8. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of 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.

9. 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 Confederate States, or any of them.

10. Before he enters 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 Confederate States, and will, to the best of my ability, preserve, protect, and defend the Constitution thereof.”

Section 2.

1. The President shall be commander-in-chief of the army and navy of the Confederate States, and of the militia of the several States, when called into the actual service of the Confederate 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 Confederate States, except in cases of impeachment.

2. 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 Confederate 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 courts of law or in the heads of Departments.

3. The principal officer in each of the Executive Departments, and all persons connected with the diplomatic service, may be removed from office at the pleasure of the President. All other civil officers of the Executive Department may be removed at any time by the President, or other appointing power, when their services are unnecessary, or for dishonesty, incapacity, inefficiency, misconduct or neglect of duty; and when so removed, the removal shall be reported to the Senate, together with the reasons therefor.

4. The President shall have power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session; but no person rejected by the Senate shall be reappointed to the same office during their ensuing recess.

Section 3.

1. The President shall from time to time, give to the Congress information of the state of the Confederacy, 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 Confederate States.

Section 4.

1. The President, Vice-President, and all civil officers of the Confederate States, shall be removed from office on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

Section 1.

1. The judicial power of the Confederate 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.

1. The judicial power shall extend to all cases arising under this Constitution, the laws of the Confederate 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 Confederate States shall be a party; to controversies between two or more States; between a State and citizens of another State where the State is plaintiff, between citizens claiming lands under grants of different States, and between a State or the citizens thereof, and foreign States, citizens or subjects; but no State shall be sued by a citizen or subject of any foreign State.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a 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.

3. 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.

1. Treason against the Confederate 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.

2. 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.

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.

1. The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and shall have the right of transit and sojourn in any State of this Confederacy, with their slaves and other property; and the right of property in said slaves shall not be thereby impaired.

2. A person charged in any State with treason, felony, or other crime against the laws of such State, 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.

3. No slave or other person held to service or labor in any State or Territory of the Confederate States, under the laws thereof, escaping or lawfully carried 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 slave belongs, or to whom such service or labor may be due.

Section 3.

1. Other States may be admitted into this Confederacy by a vote of two-thirds of the whole House of Representatives, and two-thirds of the Senate, the Senate voting by States; 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.

2. The Congress shall have power to dispose of and make all needful rules and regulations concerning the property of the Confederate States, including the lands thereof.

3. The Confederate States may acquire new territory, and Congress shall have power to legislate and provide governments for the inhabitants of all territory belonging to the Confederate States, lying without the limits of the several States; and may permit them, at such times, and in such manner as it may by law provide, to form States to be admitted into the Confederacy. In all such territory, the institution of negro slavery as it now exists in the Confederate States, shall be recognized and protected by Congress, and by the territorial government; and the inhabitants of the several Confederate States and Territories, shall have the right to take to such territory any slaves, lawfully held by them in any of the States or Territories of the Confederate States.

4. The Confederate States shall guaranty to every State that now is or hereafter may become a member of this Confederacy, 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 is not in session) against domestic violence.

ARTICLE V.

Section 1.

1. Upon the demand of any three States, legally assembled in their several conventions, the Congress shall summon a convention of all the States, to take into consideration such amendments to the Constitution as the said States shall concur in suggesting at the time when the said demand is made; and should any of the proposed amendments to the Constitution be agreed on by the said convention—voting by States—and the same be ratified by the Legislatures of two-thirds of the several States, or by conventions in two-thirds

thereof—as the one or the other mode of ratification may be proposed by the general convention—they shall thenceforward form a part of this Constitution. But no State shall, without its consent, be deprived of its equal representation in the Senate.

ARTICLE VI.

1. The government established by this Constitution is successor of the Provisional Government of the Confederate States of America; and all the laws passed by the latter shall continue in force until the same shall be repealed or modified; and all the officers appointed by the same shall remain in office until their successors are appointed and qualified, or the offices abolished.

2. All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the Confederate States under this Constitution as under the Provisional Government.

3. This Constitution, and the laws of the Confederate States, made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the Confederate States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

4. The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the Confederate 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 Confederate States.

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

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

ARTICLE VII.

1. The ratification of the conventions of five States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

2. When five States shall have ratified this Constitution, in the manner before specified, the Congress under the Provisional Constitution, shall prescribe the time for holding the election of President and Vice-President; and for the meeting of the Electoral College; and for counting the votes, and inaugurating the President. They shall also prescribe the time for holding the first election of members of Congress under this Constitution, and the time for assembling the same. Until the assembling of such Congress, the Congress under the Provisional Constitution shall continue to exercise the legislative powers granted them; not extending beyond the time limited by the Constitution of the Provisional Government.

EXTRACT FROM THE JOURNAL OF THE CONGRESS OF THE CONFEDERATE STATES OF AMERICA (MONTGOMERY, ALABAMA)

Congress, March 11, 1861

On the question of the adoption of the Constitution of the Confederate States of America, the vote was taken by yeas and nays [in the Congress that drafted the Constitution]; and the Constitution was unanimously adopted, as follows:

Those who voted in the affirmative being Messrs. Walker, Smith, Curry, Hale, McRae, Shorter and Fearn, of Alabama, (Messrs. Chilton and Lewis being absent;) Messrs. Morton, Anderson and Owens, of Florida; Messrs. Toombs, Howell Cobb, Bartow, Nisbet, Hill, Wright, Thomas R. R. Cobb and Stephens, of Georgia, (Messrs. Crawford and Kenan being absent;) Messrs. Perkins, de Clouet, Conrad, Kenner, Sparrow and Marshall,

of Louisiana; Messrs. Harris, Brooke, Wilson, Clayton, Barry and Harrison, of Mississippi, (Mr. Campbell being absent;) Messrs. Rhett, Barnwell, Keitt, Chesnut, Memminger, Mills, Withers and Boyce, of South Carolina; Messrs. Reagan, Hemphill, Waul, Gregg, Oldham and Ochiltrie, of Texas, (Mr. Wiggfall being absent.)

A true copy:

J. J. HOOPER.

Secretary of the Congress.

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