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TWO CHEERS FOR EIGHTEENTH-CENTURY CONSTITUTIONALISM IN THE TWENTY-FIRST CENTURY

GEORGE THOMAS*

The sentiment that the Constitution needs to be radically altered to keep up with the times is by now a fairly old one. It originated in the early years of the twentieth century when progressives insisted that the Constitution should be viewed in Darwinian terms to allow for its adaptation to the “opinion of the age.”¹ This notion of adaptation or evolution rejected the idea of a fixed constitution. Whether it was our inherited understanding of liberty or constitutional forms such as the separation of powers, we would have to adapt these to meet the needs of political development.² While progressive arguments combined pragmatic and evolutionary justifications, both strands of thought tended to reject the notion of permanent constitutional foundations.³ Thus, progressives were often dismissive of fixed constitutional rights and limits as relics of eighteenth-century thought that needed to be reconstructed to bring our government into accord with the flow of history.⁴ In Woodrow Wilson’s words, a “[l]iving constitution[] must be Darwinian in structure and in practice,” as “[n]o living thing can have its organs offset against each other as checks, and live. On the contrary, its life is dependent upon their quick cooperation, their ready response to the commands of instinct or intelligence, their amicable community of purpose.”⁵

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1. WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 56, 172 (1908).

2. See generally HERBERT CROLY, *PROGRESSIVE DEMOCRACY* (Transaction Pub. 1998) (1914).

3. See Sidney A. Pearson, Jr., *Introduction* to CROLY, *supra* note 2, at xxvii (stating that progressives such as Croly viewed the Constitution as a “‘living Constitution,’ which is to say that it was not bound by the principles of the Founders”); WILSON, *supra* note 1, at 4 (arguing that “[t]he ideals of liberty cannot be fixed from generation to generation”). For a critique of such views, see GARY J. JACOBSON, *PRAGMATISM, STATESMANSHIP, AND THE SUPREME COURT* 17 (1977) (arguing that the “statesmanlike judge will adapt the Constitution to changing social realities without altering the meaning of the document”).

4. See JAMES W. CEASER, *NATURE AND HISTORY IN AMERICAN POLITICAL DEVELOPMENT* 62–63 (2006) (stating that “[t]o honor the Constitution was to enslave one’s mind and submit to an ancient authority”).

5. WILSON, *supra* note 1, at 56–57.

Subsequent calls for constitutional reform have often born a heavy debt to the progressives, and Wilson in particular. Consider the American Political Science Association report on responsible party government,⁶ James MacGregor Burns' call for a parliamentary government,⁷ Robert Dahl's insistence on "polyarchy,"⁸ and the Committee on the Constitutional System's desire to bring cabinet government into the fold of our constitutional system.⁹ All follow in Wilson's footsteps, seeking to alter or overcome elements of America's written Constitution—particularly its embrace of the separation of powers and checks and balances—to bring it in line with modern governance. Professor Sanford Levinson's book, *Our Undemocratic Constitution*, is partly in this vein, but only partly.¹⁰ I take him seriously when he claims to be a kindred spirit with the Founders, who themselves were cosmopolitan in outlook and insisted on "learning from experience" in creating a constitution to suit their needs.¹¹ This insistence runs throughout *The Federalist*. Moreover, in defending the Constitution, *The Federalist* speaks of "aptitude and tendency,"¹² or in the language of modern political science, probability, not certainty, recognizing that the Constitution is an imperfect experiment.¹³ This recognition led James Madison to be much less sanguine about maintaining constitutional government than Wilson,¹⁴ whose *Constitutional Government* reads as an extended quarrel with Madison. While Wilson would insist that "[g]overnment is not a body of blind forces; it is a body of men,"

6. American Political Science Association, *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties*, 44 AM. POL. SCI. REV. 1 (Supp. 1950).

7. JAMES MACGREGOR BURNS, *THE DEADLOCK OF DEMOCRACY* 327–30 (1963).

8. ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 63–89 (1956).

9. REFORMING AMERICAN GOVERNMENT: THE BICENTENNIAL PAPERS OF THE COMMITTEE ON THE CONSTITUTIONAL SYSTEM 185 (Donald Robinson ed., 1985). Much recent scholarship, however, has criticized the Wilsonian view of the separation of powers. See, e.g., JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* 196 (1994) (illustrating how the separation of powers can foster responsible and deliberative government contrary to Wilson's understanding); JESSICA KORN, *THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO* (1996) (analyzing the legislative veto to uncover the disadvantages of the Wilsonian enthusiasm for relaxing separation of powers principles in decision making); DANIEL D. STID, *THE PRESIDENT AS STATESMAN* (1998) (analyzing the Wilsonian Presidency and its effect on American policy-making).

10. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006).

11. *Id.* at 15.

12. *THE FEDERALIST* NO. 68, at 382 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

13. *Id.* NO. 85 (Alexander Hamilton), NO. 41 (James Madison).

14. *Id.* NO. 85 (Alexander Hamilton). Even Brutus, arguing against the Constitution, said we cannot strive for perfection, as even those urging ratification of this Constitution admit it is imperfect. Brutus, *To the Citizens of the State of New York* (1787), reprinted in *THE ANTI-FEDERALIST* 108 (Herbert J. Storing ed., 1985).

this was, *pace* Wilson, precisely what underpinned Madison's constitutionalism.¹⁵ That is, Madison's constitutionalism was based on the lessons of history and experience, not the ingenious musings of a theorist planning a constitution from the closet of his imagination.¹⁶

In the first section of this Essay, I suggest that the history and experience of American constitutionalism make it difficult to think of our Constitution as an eighteenth-century constitution. Yet, even so, if I found myself at Levinson's constitutional convention,¹⁷ I would caution against a progressive view of constitutional development that seeks to dissolve the essentials of eighteenth-century constitutionalism in favor of twenty-first century imperatives. All the more so as the central competitors to eighteenth-century constitutionalism, even in the early years of the twenty-first century, are rooted in variants of eighteenth-century thought, whether it is Rousseau's eighteenth-century democracy,¹⁸ Kant's eighteenth-century cosmopolitanism,¹⁹ or Hegel's eighteenth-century history (if we think of it as the "long" eighteenth century).²⁰ Thus, in the second section of this Essay, I consider those elements of eighteenth-century constitutionalism that our Constitution embraces and, I think, should be foundational to any new form of government we create in the twenty-first century. Yet, in the spirit of eighteenth-century constitutionalism itself, let me give it

15. WILSON, *supra* note 1, at 56.

16. See THE FEDERALIST NO. 37 (James Madison), *supra* note 12 (analyzing the merits of the Constitution against the historical context of its framing).

17. LEVINSON, *supra* note 10.

18. We see this reliance on eighteenth-century thought most evidently in the work of popular constitutionalists such as BRUCE ACKERMAN, *I WE THE PEOPLE: FOUNDATIONS* (1991) (arguing that American constitutionalism is a dualist democracy which is explicitly anti-foundationalist and allows the people, in unconventional acts, to transform the Constitution in unlimited ways). See also LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 51 (2004) (arguing that the Constitution should be understood as "a layman's instrument of government," as "the people" want it to be understood). These scholars have written, often brilliantly, on constitutional development and the problems of constitutional enforcement. But, in the end, they all advocate some form of popular sovereignty which can easily trump the written Constitution. For a more extensive critique of popular constitutionalism, see George Thomas, *Popular Constitutionalism: The New Living Constitutionalism*, *STUD. IN LAW, POLS. & SOC'Y* (forthcoming).

19. See, e.g., CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* (2001) (defending moral judgments from the judiciary as essential to constitutional self-government); AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* (2004) (arguing that in a democracy we must offer "mutually acceptable reasons" for the laws we enact).

20. Constitutional scholars' reliance on Hegel's philosophy of history is captured by the progressive view that history moves in a direction and, therefore, requires us to adapt with it. See WILSON, *supra* note 1, at 57 (stating that the "definitions and prescriptions of . . . constitutional law . . . are sufficiently broad and elastic to allow for the play of life and circumstance").

two cheers, withholding the third cheer in recognition that a more appealing alternative might come along.

An Eighteenth-Century Constitution?

Because the Constitution does not speak for itself, if not properly contrived, as argued in *Federalist* No. 48, the Constitution might become “a mere demarcation on parchment.”²¹ Yet to vest authority in any one body to “speak” for the fundamental law is effectively to make that body sovereign.²² Thus, the purposeful division of power within the Constitution is based on a refusal to vest sovereign authority in any single body—including in the people themselves, even if the Constitution implicitly recognizes their *revolutionary* right to alter or abolish the Constitution.²³ The very diffusion of sovereign authority—what Aristotle called the distribution of offices—speaks to the fundamental nature of the polity: it is neither “democratic” nor “undemocratic.”²⁴ Rather, the Constitution is a complex and skillfully contrived blend of liberalism and democracy characterized by tension.²⁵ This is evident insofar as natural rights and popular sovereignty both provide the foundation of our Constitution.²⁶ In this way, American constitutionalism is ordered around agonistic institutions and principles.

The ineluctable result of this, so much at the heart of eighteenth-century constitutionalism, is to make the Constitution “resistant as a

21. THE FEDERALIST NO. 48 (James Madison), *supra* note 12, at 276.

22. See George Thomas, *Recovering the Political Constitution: The Madisonian Vision*, 66 REV. POL. 233 (2004) (proposing a reexamination of the supremacy the Supreme Court holds because of its status as sole interpreter of the Constitution).

23. Madison would have put this as a preface to the Constitution along with the Bill of Rights, making this sentiment textually explicit. Even so, the people, arguably, would be bound by natural rights and reason, and thus not sovereign in a Rousseauian sense. See JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND THE FIRST AND SECOND DISCOURSES 170 (Susan Dunn ed., 2002) (arguing that the sovereign is simply the general will of all citizens, which should be exercised absent any representative intermediaries).

24. Compare NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION (2004) (positing that changes in constitutional interpretation—and, thus, the law itself—are reflective of the will of the populace, demonstrating the democratic nature of the system), with LEVINSON, *supra* note 10 (posing arguments against the inherent democratic nature of the U.S. Constitution).

25. See generally THE FEDERALIST, *supra* note 12. See also JAMES W. CEASER, LIBERAL DEMOCRACY AND POLITICAL SCIENCE 8 (1990) (discussing liberal democracy as a “fusion of two government principles”); Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 3, 6–7 (Douglas Greenberg et al. eds., 1993) (discussing liberal democracy, or constitutional democracy, as a compound form of government).

26. See GEORGE THOMAS, THE MADISONIAN CONSTITUTION (forthcoming); see also THOMAS B. MCAFEE, INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY (2000) (analyzing the role of natural rights theory and ideas of popular sovereignty in the drafting of the Ninth Amendment).

whole to any sustained settlement of the kind that either a demagogue or a sovereign authoritative point of view might try to impose.”²⁷ But this has also meant that the Constitution rarely finds coherent expression as a whole.²⁸ Rather, attempts to construct and reconstruct constitutional authority and meaning have been the historic norm.²⁹ We might characterize these attempts as an interaction between America’s small “c” constitution, which has aptly been described as America’s constitutional soul, and our large “C” formal constitution.³⁰ To be sure, debates about constitutional ideas are historically rooted in struggles to justify particular policies and political projects.³¹ But they also illuminate what it means to bring the Constitution to life.³² These ideas, moreover, have shaped how we think and speak about the Constitution, even while the Constitution shapes the horizon in which such political struggles take place.³³

As a polity, if we have a sort of constitutional faith, we have disagreed profoundly about constitutional meaning and authority, engaging in conflicted struggles over the proper ordering of constitutional values.³⁴ Many of these constitutional reconstructions

27. BRYAN GARSTEN, *SAVING PERSUASION* 208 (2006); *see also* WAYNE D. MOORE, *CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE* (1996) (arguing that multiple perspectives on constitutional meaning may exist outside of official constitutional channels). This point was vividly brought home by Madison in a letter to Jefferson in which he insisted that these political devices for maintaining the Constitution might fail: “these mechanisms ‘are neither the sole nor the chief palladium of constitutional liberty. The people, who are the authors of this blessing, must also be its guardians.’” LANCE BANNING, *JEFFERSON AND MADISON* 21 (1995).

28. Thomas, *supra* note 22 (arguing that the Constitution is inherently unsettled and under continual debate); *see also* MOORE, *supra* note 27, at 3 (“The law of the land is richly textured, not capable of being reduced to either-or propositions.”).

29. *See generally* KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES* (2004) (cataloguing instances of the construction and reconstruction of civil rights and civil liberties in American constitutional development). *See also* Wayne D. Moore, *(Re)Construction of Constitutional Authority and Meaning: The Fourteenth Amendment and Slaughter-House Cases*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 229, 229 (Ronald Kahn & Ken I. Kersch eds., 2006) (stating that “a good way to study important problems of constitutional development is through analysis of the construction and reconstruction of constitutional authority and meaning”).

30. *See* HARVEY C. MANSFIELD, JR., *AMERICA’S CONSTITUTIONAL SOUL* (1991), for a collection of essays on the nature of American constitutionalism.

31. *See* KERSCH, *supra* note 29 (tracing constitutional developments and the historical contexts of those developments); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* I (2007).

32. *See* KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* (1999) [hereinafter *CONSTITUTIONAL CONSTRUCTION*] (arguing that constitutional constructions by the political branches have been essential to American constitutional development).

33. *Id.* at 1.

34. *See generally* WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY* (2007) (discussing the range of values that may be adopted in constitutional construction).

depart significantly from our eighteenth-century Constitution, for example, the near erasure of the Ninth Amendment,³⁵ or in how we elect presidents.³⁶ Others, such as political parties, may go against original visions but are consistent with original ends.³⁷ Yet attempts to construct or reconstruct constitutional meaning and authority are frequently arguments over precisely what constitutional ends require. Even those statesmen who have been thought to radically alter the Founders' Constitution often insisted that they were simply adapting constitutional meaning and authority to original ends. In this spirit, Franklin D. Roosevelt frequently cast himself as adhering to the substantive ends of the Constitution, even while viewing constitutional forms as instrumental and, therefore, adaptable in the pursuit of foundational ends.³⁸ Erstwhile New Dealers like Robert Jackson and Felix Frankfurter often insisted that the New Deal flowed from the Founder's constitutional commitments in this manner, which would make the New Deal a constitutional "restoration" rather than a constitutional "revolution."³⁹ Such an understanding might even plausibly be manifest in Justice Cardozo's attempt to capture the spirit of the Founders: "It is not in my judgment inconsistent with what they [the Founders] would say today nor with what today they would believe, if they were called upon to interpret 'in the light of our whole experience' the constitution that they framed for the needs of an expanding future"⁴⁰ This is quite different from a "living" constitution that rejects foundations in favor of historical evolution.

35. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 252 (2004).

36. See JAMES W. CEASER, *PRESIDENTIAL SELECTION I* (1979) (noting that the method of presidential selection has undergone several alterations since the Framing of the Constitution) [hereinafter *PRESIDENTIAL SELECTION*].

37. *Id.* at 37–38.

38. For such a view, see SOTIRIOS A. BARBER, *WELFARE AND THE CONSTITUTION* 92 (2003) [hereinafter *WELFARE AND THE CONSTITUTION*]. See also Jeffrey K. Tulis, *The Two Constitutional Presidencies*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 57 (Michael Nelson ed., 8th ed. 2006) (situating the New Deal as a legitimate outgrowth of the arguments in *The Federalist*). Woodrow Wilson, in portions of *Constitutional Government*, might even be seen in this light. See WILSON, *supra* note 1.

39. See Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 *BUFF. L. REV.* 7, 73–74 (2002) (discussing Roosevelt's "Court-packing proposal" as a constitutionalization of New Deal reforms). For an examination of the New Deal as a legitimate revolution, see ACKERMAN, 2 *WE THE PEOPLE: TRANSFORMATIONS*, *supra* note 18, at 279.

40. Unpublished concurring opinion of Justice Benjamin N. Cardozo in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), reprinted in WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 136, 138 (1986).

Yet FDR also drew deeply on historical adaptation—perhaps even rejecting foundational ends.⁴¹ This sentiment is characterized by Frankfurter’s insistence, nurturing three decades of progressive thought, that “the Constitution of the United States is most significantly not a document but a stream of history.”⁴² Or Cardozo’s insistence “that the juristic philosophy of the common law is at bottom the philosophy of pragmatism. Its truth is relative, not absolute.”⁴³ This was surely true of the progressive insistence on “pure democracy,” which would require a profound reconstruction of constitutional liberty as well as an alteration, if not abandonment, of our formal constitutional structures, in favor not just of history, but History.⁴⁴ As Wilson put it: “Governments are living things and operate as organic wholes. Moreover, governments have their natural evolution and are one thing in one age, another in another.”⁴⁵ In *The New Freedom*, Wilson explains this as a necessarily progressive venture: “Progress, development,—those are modern words. The modern idea is to leave the past and press onward to something new.”⁴⁶ For Wilson, our understanding of liberty and constitutional structure must evolve—or develop—with large-scale historical change.⁴⁷

There is perhaps an understandable temptation to dispense with constitutional forms in favor of grander and nobler constitutional ends—particularly given changing historical circumstances. We might read the preamble to the Constitution for inspiration, as does Professor Levinson, as it calls us to “establish Justice” and “secure the Blessings of Liberty to ourselves and our Posterity.”⁴⁸ We would be hard pressed to find such inspiration in the mundane technicality of Article I.⁴⁹ Or, even for those swept away by the image of the Court as great defender of individual liberty, to find it in Article III, Section 2: “The judicial Power shall extend to all Cases, in Law and Equity, aris-

41. As Roosevelt argued, at times our task was “building anew on the Constitution ‘a system of living law,’” which turned on an evolving consensus, not foundational ends. KEVIN J. McMAHON, RECONSIDERING ROOSEVELT ON RACE 71 (2004); see also GARY J. JACOBSON, THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION 37 (1986) (discussing the “Transvaluation of Liberal Constitutionalism” that legal realism entails).

42. FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 2 (1937).

43. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 102 (1963).

44. CEASER, *supra* note 4, at 7, 65. Ceaser distinguishes History (with a capital “H”) from history (with a small “h”) by noting that History refers to “temporal accounts that are designed to establish a fundamental purpose or standard of right.” *Id.* at 7.

45. WILSON, *supra* note 1, at 54.

46. WOODROW WILSON, THE NEW FREEDOM 42 (1913).

47. *Id.* at 33–54.

48. U.S. CONST. pmbl.

49. *Id.* art. I.

ing under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority”⁵⁰ Demands for justice and efficiency, articulated to some degree in the Constitution’s preamble, are often behind the insistence on dramatic constitutional change aimed at bringing the Constitution up to date by making it more democratic or more effective.⁵¹ But we should notice that James Madison viewed complex constitutional forms as a means of achieving justice.⁵² Recall that in his most famous discussion of the separation of powers in *Federalist* No. 51, Madison concludes his exposition on the virtues of the separation of powers by attaching it to the sentiment that “[j]ustice is the end of government.”⁵³ This is brought more vividly to light in a subsequent sentence: “It [justice] ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.”⁵⁴ The point is that justice might be best achieved by preventing quick or authoritative action under the Constitution, particularly such action done in the name of justice. The separation of powers can be both a means and an ends: a means in preventing “usurp[ations],” an end in promoting “sober deliberation”⁵⁵ about the ends the Constitution aspires toward. Perhaps the Constitution is no longer fostering and sustaining its substantive commitments.⁵⁶ Perhaps those commitments are relics of the eighteenth century.⁵⁷ But we should be wary of constitutional change as an imperative of History.⁵⁸ As Ken Kersch describes it, this Whiggish narrative of development involves erasures that gloss over the agonistic and conflicted struggle between “liberties and liberties” and “rights and rights” that were central to forging the institutions of the “New American State.”⁵⁹ Thus, rights and liberties long protected within the terms of traditional American constitutionalism were, in accord with the progressive imperative of state-building as History, said to be no longer rights.

Yet I am open to the possibility that constitutional meaning is forged in the historical interaction between general constitutional

50. *Id.* art. III, § 2.

51. WILSON, *supra* note 1, at 56–57.

52. THE FEDERALIST NO. 51 (James Madison), *supra* note 12.

53. *Id.* at 292.

54. *Id.*

55. SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS 178 (1984).

56. WELFARE AND THE CONSTITUTION, *supra* note 38, at 118.

57. WILSON, *supra* note 1, at 56; *see also* CROLY, *supra* note 2, at 51 (discussing the Constitution as “the work of a democracy which wholly failed to understand the proper relation between popular political power and popular economic and social policy”).

58. *See supra* note 4 and accompanying text.

59. KERSCH, *supra* note 29, at 25–26.

principles and particular political and historical circumstances. This is not to say that whatever comes out of our historical debates is constitutional meaning—that is the Constitution as history. Nor is it to say that whatever meaning comes out of these great debates reveals to us the true nature of our Constitution—that is the Constitution as History. Rather, it is to offer a more tentative suggestion that confronted with particular historical circumstances, we are forced to wrestle with constitutional identity at its most foundational level. While new circumstances have often led us to develop constitutional meaning, not every such reconstruction is constitutionally grounded.⁶⁰ Constitutional meaning is not infinitely malleable; the Constitution is not a mere framework the substance of which we may alter with ever-new constructions.⁶¹ Yet the attempts to construct or reconstruct constitutional meaning and authority that I briefly canvassed above were frequently arguments over precisely what constitutional ends require.⁶² And such debates shaped how we see the Constitution, giving us a layered “text-polity” where recent constructions overlay and often conflict with earlier constructions.⁶³ Thus our eighteenth-century Constitution is overlain with nineteenth- and twentieth-century understandings that can both complement and conflict with it.⁶⁴ In looking at this interaction of constitutional continuity and change it is difficult to speak of ours as an eighteenth-century Constitution. At the same time, I think there are lessons from the eighteenth century that remain relevant.

The Lessons of Eighteenth-Century Constitutionalism

At the root of the modern constitutionalism embraced by our Constitution is the insistence on substantive limits to governmental power.⁶⁵ Thus, even in a revolutionary act where the people alter or abolish a constitution and create a new form of government, they are limited in the reach of their power.⁶⁶ Recall that the Declaration of Independence itself, that great act of a revolutionary people, spoke of

60. KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 5 (1999); *see also* *CONSTITUTIONAL CONSTRUCTION*, *supra* note 32, at 4–5 (describing construction as involving considerations outside the constitutional text itself).

61. *See* *CONSTITUTIONAL CONSTRUCTION*, *supra* note 32, at 6 (stating that “tools of interpretation . . . are meant to illuminate the text, not to alter or add to it”).

62. *See generally* Thomas, *supra* note 22.

63. JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 17 (1987).

64. *Id.*

65. MURPHY, *supra* note 34, at 10 (noting that constitutional democracy entails limits on governmental power).

66. *Id.* at 10–11.

our Constitution in these terms.⁶⁷ If popular sovereignty is one facet of the American amalgam (unlike Rousseau's version, which is "nothing but the exercise of the general will"), it has bounds.⁶⁸ The American Revolution was justified not simply because American sovereignty was being denied, "altering fundamentally the Forms of our Governments," but because "whenever any Form of Government becomes destructive of [its] ends, it is the Right of the People to alter or to abolish it"⁶⁹ This revolutionary right is rooted in the natural rights of human beings, and to "secure these rights, Governments are instituted among Men"⁷⁰ There is, then, a limit to what consent by way of popular sovereignty can legitimately achieve.⁷¹ This is evident in the thoughts of James Wilson, Thomas Jefferson, and James Madison—three of the Founders whose writings are relied on most frequently to justify popular sovereignty as trumping constitutional provisions.⁷² Interestingly, however, these thinkers often insisted that even absent the Constitution, in revolutionary rather than constitutional terms, the people are bound.

In his first lecture on jurisprudence, James Wilson insisted that "revolution principles" ought to be taught "as a principle for the constitution of the United States,"⁷³ and during the ratifying conventions he insisted that, "the truth is, that the supreme, absolute and uncontrollable authority, *remains* with the people."⁷⁴ Yet Wilson insisted that this point should legitimize the act of creating a *new* constitution based on the popular authority of the people, not the states. Indeed, at the end of his speech he insisted that the Declaration of Indepen-

67. THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776) (listing as a grievance against George III, "He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended Legislation").

68. ROUSSEAU, *supra* note 23, at 170.

69. THE DECLARATION OF INDEPENDENCE paras. 2, 22.

70. *Id.* para. 2.

71. MURPHY, *supra* note 34, at 516.

72. See, e.g., Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, in RESPONDING TO IMPERFECTION 89, 114–15 (Sanford Levinson ed., 1995) (discussing and contrasting Wilson's and Madison's ideas about popular sovereignty); see also ACKERMAN, *supra* note 18 (arguing that the Constitution embraces an anti-foundationalist "dualist democracy" where the people, acting as the people, are unbound).

73. JAMES WILSON, LECTURES ON LAW DELIVERED IN THE COLLEGE OF PHILADELPHIA (1790), *reprinted in* THE WORKS OF JAMES WILSON 69, 78–79 (Robert Green McCloskey ed., 1967).

74. JAMES WILSON, PENNSYLVANIA RATIFYING CONVENTION (1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 61, 62 (Philip B. Kurland & Ralph Lerner eds., 1987). For a discussion of Wilson suggesting his endorsement of unqualified popular sovereignty, see AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 297 (2005).

dence recognized this unalienable right of the people.⁷⁵ He quoted the second paragraph of the Declaration, emphasizing that consent legitimizes power because it obligates government to recognize unalienable rights—that is, unalienable individual rights, which are the basis of the right of self-government.⁷⁶

In a similar manner, Thomas Jefferson insisted again and again “that the earth belongs . . . to the living”⁷⁷ and, thus, that each generation has “a right to choose for itself the form of government it believes most promotive of its own happiness.”⁷⁸ Jefferson, though, also spoke of natural rights as limiting what any generation acting as popular sovereign can do. And even when James Madison insisted that the people are the best protectors of their rights, he denied any claim that the “majority is the political standard of right and wrong.”⁷⁹ Madison also spoke of rights prior to and binding upon civil society.⁸⁰ I do not wish to labor over the intricacies of these thinkers, I merely suggest that even in *creating* a constitutional order, they tended to draw on a combination of popular sovereignty and natural rights, with the latter tempering and limiting the reach of the former. Thus popular sovereignty, even outside the Constitution, existed within a foundation and was distinct from popular will.

The notion of substantive limits on government is in contrast to the insistence that rights can be structured in purely pragmatic and procedural terms, or based on “authentic” acts of popular constitutionalism. As Cass Sunstein argues, because rights are secured by government—the result of legal rules—they can be reconstructed by the government to meet the needs of history and democracy.⁸¹ To say that rights are “constructed” would hardly come as a surprise to the natural rights thinking of the Founders who insisted on precisely this point.⁸² But they were constructed to comport with the fundamental

75. WILSON, *supra* note 74, at 62.

76. *Id.*

77. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 1 THE FOUNDERS' CONSTITUTION, *supra* note 74, at 68 (emphasis omitted).

78. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 15 THE WORKS OF THOMAS JEFFERSON 42 (Paul Leicester Ford ed., 1905).

79. James Madison, The Law of Nature and Majority Rule (1785), in SELECTED WRITINGS OF JAMES MADISON 27, 28 (Ralph Ketcham ed., 2006).

80. James Madison, A Memorial and Remonstrance Against Religious Assessments, in SELECTED WRITINGS OF JAMES MADISON, *supra* note 79, at 21, 23.

81. CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 26–27 (2004).

82. See MICHAEL P. ZUCKERT, THE NATURAL RIGHTS REPUBLIC 234 (1996) (examining how natural rights thinking pervaded and shaped the new republicanism of Jefferson and Madison, situating natural rights as being prior to and the precondition of republican government).

nature of human beings, and government was legitimately constituted to protect such rights.⁸³ Thus the legal realist's insistence was novel, not in insisting that rights were constructs, but in insisting that because they were constructs we could adapt them to the needs of modern society.⁸⁴ A similar sentiment finds expression in the popular constitutionalism of Bruce Ackerman.⁸⁵ Under such a theory, popular sovereignty, when authentically expressed, cannot be limited. In Rousseau's words: "If, then, the people simply promises [sic] to obey, it dissolves itself by that act and loses its character as a people; the moment there is a master, there is no longer a sovereign, and forthwith the body politic is destroyed."⁸⁶ Yet how do we know an "authentic" act of popular will when we see it? Such vexing questions are at the root of formalizing politics in a written constitution precisely so that foundational questions do not turn on scrutinizing popular will.⁸⁷

If we take the claims of History seriously, twenty-first century constitutional development may require a virtually unchecked executive to protect and preserve our nation, which might entail a radical reconstruction of liberty.⁸⁸ It was, after all, Woodrow Wilson who insisted on expansive executive power as a means of overcoming constitutional checks in administering the will of the people.⁸⁹ In drawing out the popular potential of the presidency, Wilson insisted "[I]et him once win the admiration and confidence of the country, and no other single force can withstand him [H]e is irresistible"⁹⁰ And it was progressives like Herbert Croly who rejected the notion of separated power, insisting that "[a] thoroughly representative government is essentially government by men rather than by Law."⁹¹ Indeed, Croly went so far as to argue that "the insertion of the bill of rights in the Constitution contributed more than any other fea-

83. *Id.* at 233–34.

84. SUNSTEIN, *supra* note 81.

85. Ackerman's "dualist democracy" is rooted in unbound popular sovereignty. ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS, *supra* note 18, at 32–33. In *Transformations*, Ackerman even calls the peoples' voice "The Prophetic Voice." ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS, *supra* note 18, at 3.

86. ROUSSEAU, *supra* note 23, at 170.

87. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

88. For an analysis of this position, see Gordon Silverstein, *Constitutional Contortion? Making Unfettered War Powers Compatible With Limited Government*, 22 CONST. COMMENT. 349 (2005) (reviewing JOHN YOO, *THE POWERS OF WAR AND PEACE* (2005)).

89. WILSON, *supra* note 1, at 68–71.

90. *Id.* at 68. Of course Wilson was resisted by Henry Cabot Lodge and the Senate. STID, *supra* note 9, at 169.

91. CROLY, *supra* note 2, at 274.

ture to convert it into a monarchy of the Law superior in right to the monarchy of the people.”⁹²

This sentiment also found expression in Rousseau’s eighteenth-century democracy. In taking aim at separations in politics altogether, Rousseau claimed that if sovereignty cannot be bound, neither can it be divided:

But our politicians, being unable to divide sovereignty in its principle, divide it in its object. They divide it into force and will, into legislative power and executive power; into rights of taxation, of justice, and of war; into internal administration and foreign relations—sometimes conflating all these branches, and sometimes separating them. They make the sovereign into a fantastic being, formed of disparate parts; it is as if they created a man from several different bodies, one with eyes, another with arms, another with feet, and nothing else.⁹³

Given such an understanding, eighteenth-century constitutionalism may yet have something to teach us: maintaining some form of the separations at heart of constitutional democracy may be more prudent than ever. As Montesquieu insisted in sketching the notion of a separation of powers at the origins of modern constitutionalism, the most important separation was not between the executive and the legislature, but between both of these and the judiciary.⁹⁴ And this was of a judiciary that spoke to legal issues and not necessarily constitutional questions.⁹⁵ But we should think of such measures as precautionary rather than guaranteed. Long ago, Alexander Hamilton voiced concern over judges “embark[ing] in a conspiracy with the legislature.”⁹⁶

Furthermore, while small “d” democrats and progressives have tended to focus on and criticize the formal separation of powers, other separations that remain essential to liberal democracy may be

92. *Id.* at 55.

93. ROUSSEAU, *supra* note 23, at 171.

94. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 157 (Anne M. Cohler et al. eds. & trans., 1989) (stating that there will be no “liberty if the power of judging is not separate from legislative power and from executive power”).

95. *Id.* at 163.

96. THE FEDERALIST NO. 16 (Alexander Hamilton), *supra* note 12, at 85. Lincoln saw the *Dred Scott* decision as part of just such a conspiracy. The decision might well have been grounded in the interests of a governing coalition, but that did not make it constitutionally sound. Indeed, it was all the worse, according to Lincoln, because the Court allowed itself to be used by the likes of President Buchanan and Judge Douglas in an attempt to silence a profound constitutional dispute. Abraham Lincoln, *The Dred Scott Decision* (June 26, 1857), in *ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS* 352 (Roy P. Basler ed., 1946).

even more important. Even in parliamentary systems there is the separation between the majority and minority in parliament, as well as the separation between government and society, public and private, and church and state.⁹⁷ All of these separations are at the heart of eighteenth-century constitutional democracy even if they may take different forms in different polities. History has not rendered these separations irrelevant.⁹⁸

Turning to some of the most pressing political issues in the early years of the twenty-first century might firm up our commitment to such constitutional separations. The division between the legislature and executive may remain the most effective means of utilizing and containing executive power, while a merger of legislative and executive powers may well increase the power of the executive.⁹⁹ This could also be true of a more “democratic” president insisting on popular will as the proper foundation of power. Or take gay marriage: returning to a more robust view of federalism against the centralizing tendencies of the twentieth century may well be the best way to deal with such fraught political issues in an increasingly pluralistic society.¹⁰⁰ This increasingly pluralistic society might also need a secular constitutional creed more than ever as a means of providing us with some foundational unity.¹⁰¹

Against such notions of a national creed we also find the latest manifestation of progressive History, as we are encouraged to adapt our parochial Constitution to accord with the more cosmopolitan imperatives of global constitutionalism.¹⁰² Such imperatives fit, in part, with the universal aspirations of eighteenth-century constitutionalism

97. PIERRE MANENT, *A WORLD BEYOND POLITICS? A DEFENSE OF THE NATIONAL STATE* 10–20 (Marc LePain trans., 2006).

98. In *Our Undemocratic Constitution*, Levinson urges us to embrace many of these separations even while insisting on a more direct and nationalist view of democracy. See generally LEVINSON, *supra* note 10.

99. Wilson’s popular view of the president as a means of overcoming the separation of powers may well make for an extraordinarily powerful president limited only by popular acceptance. WILSON, *supra* note 1, at 68; see also PRESIDENTIAL SELECTION, *supra* note 36, at 170–212 (discussing Wilson’s view of the presidency).

100. SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY* 13 (2004) (noting that “subnational cultural and regional identities are taking precedence over broader national identities” in the U.S., leading to a more fragmented, pluralized society).

101. See Walter Berns, *Constitutionalism and Multiculturalism*, in *MULTICULTURALISM AND AMERICAN DEMOCRACY* 91, 108 (Arthur M. Melzer et al. eds., 1998) (arguing that a multiculturalist perspective fails to adequately recognize the foundational idea of liberty found in the Constitution).

102. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 66 (2004) (discussing “judicial globalization”).

as evinced in modern rights conventions such as the Universal Declaration of Human Rights.¹⁰³ Yes, the language of “natural rights” is absent, or obscured, but such universal rights are difficult to think of in any other terms.¹⁰⁴ We might look at what is permanent about constitutionalism, and “The Permeability of Constitutional Borders.”¹⁰⁵ This might also move us to be more attentive to the different forms constitutional democracy may take in different places—something of which eighteenth-century constitutional thinkers were acutely aware. As Alexander Hamilton put it in the last paper of *The Federalist*, openly acknowledging that the Constitution came from imperfect hands under imperfect circumstances: “I am persuaded that it is the best which our political situation, habits, and opinions will admit, and superior to any the revolution has produced.”¹⁰⁶ Thus, Hamilton captured the peculiar nature of modern constitution making at its birth. Modern constitutionalism is a self-consciously reasoned attempt to bring a polity into being.¹⁰⁷ And yet, in doing so, a constitution must accommodate the particular people it is created for, bending here and there to their habits, opinions, and circumstances—that is to say, to accident if not force. In just this manner, a constitution may embrace universal principles, but it does so for a particular people, marking its boundaries by way of the people, even while attempting to cultivate and sustain that people’s attachment to the constitution.

As theorists of eighteenth-century constitutionalism like Montesquieu and Madison argued, it may be that a constitution of our own remains the best method of protecting and fostering such rights and values.¹⁰⁸ But we should not fear to follow Professor Levinson in ask-

103. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

104. For example, the preamble reads: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,” which bears a striking resemblance to the Declaration of Independence’s natural rights. *Id.* This does not mean, however, that the U.S. should engage in a crusade for such principles abroad.

105. See Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763 (2004), for such a discussion.

106. THE FEDERALIST NO. 85 (Alexander Hamilton), *supra* note 12, at 491.

107. *Id.* NO. 1 (Alexander Hamilton).

108. As Montesquieu argued, “In addition to the right of nations, which concerns all societies, there is a political right for each one. A society could not continue to exist without a government. ‘The union of all individual strengths,’ as Gravina aptly says, ‘forms what is called the political state.’ . . . It is better to say that the government most in conformity with nature is the one whose particular arrangement best relates to the disposition of the people for whom it is established.” MONTESQUIEU, *supra* note 94, at 8 (emphasis omitted); see also James Madison, *Universal Peace* (1792), reprinted in 6 THE WRITINGS OF JAMES MADISON 88 (Gaillard Hunt ed., 1906).

ing whether or not our Constitution serves these purposes.¹⁰⁹ Indeed, if we take *The Federalist* seriously, whether our experiment has been successful may be considered an open question. It has most certainly been an imperfect experiment—a lesson that eighteenth-century constitutional thinkers insisted upon from the beginning.¹¹⁰ And yet our Constitution has been successful enough that while some change is inevitable, we should not alter it for light or transient causes. More to the point, much of what we want to keep in our Constitution—what remains best about it after two hundred years—is traced to its eighteenth-century origins.

109. LEVINSON, *supra* note 10, at 3–9.

110. See, for example, this explicit argument in THE FEDERALIST NO. 85 (Alexander Hamilton), *supra* note 12.