
Law, Constitution, and Culture

*More than 'Parchment Barriers':
The Ethical Center of
American Constitutionalism*

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Much has been written in the past century about the state of American constitutionalism and the political culture that serves as its animating force. Some scholars have argued that American constitutionalism has evolved so far from its founding principles that political practice today would be unrecognizable by the eighteenth-century Framers. These critics submit that the way to restore constitutionalism to its original form lies in insisting that public officials, and especially judges, abide by the Framers' constitutional intent.

Before one can assess such claims, it is necessary to analyze several aspects of American constitutionalism. We must understand not only what constitutionalism is, but also what is required to maintain a constitutional order over time. This analysis must include attention to the historical, theoretical, and ethical characteristics of constitutionalism. More specifically, it involves developing an understanding of the relationship between liberty and power as well as that between the written and unwritten constitutions. Within the context of the unwritten constitution, central problems of order are discovered. These relate to the kind of character and personality re-

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quired of political leaders and citizens alike for constitutional government to be possible.¹

Relating the insights that follow from an analysis of the unwritten constitution to recent American politics, it becomes evident that the movement away from the Framers' decentralized republic toward a highly centralized mass democracy is due to what some political theorists call deculturation or degeneration. American political degeneration is illustrated by the increasing tendency to substitute the political ideas of Hobbesian or Rousseauistic naturalism for the Framers' assumptions about human nature and political life. These types of naturalism tend to view human beings and politics in abstract ahistorical ways that undermine the moral realism that gave rise to American constitutionalism. One of the consequences of this substitution is not only the centralization of power but the proliferation of public policy that replaces inner (i.e., ethical) control with social (i.e., state) control. Taken together, these characteristics mark a crisis of American constitutionalism that is especially evident in judicial politics. It would seem premature, then, if not imprudent, to suggest that the restoration of American constitutionalism can be inspired by the doctrine of originalism as if the problem were a matter of intellectually embracing abstract principles or subscribing to a particular method of constitutional interpretation.

For the restoration of American constitutionalism to be possible, the political culture underlying American politics will have to be infused with the kind of moral realism that gave it life in the eighteenth century. The restoration of moral realism will itself require the presence of individuals who possess what Claes Ryn calls the "constitutional personality," comprising the personality type and imagination that make constitutionalism possible in the first place. Only if this personality type should again become prevalent in American politics would something like originalism have any chance of shaping political conduct.

Restoration of moral realism necessary for revival of constitutionalism.

¹ The dependence of constitutionalism on certain traits of personal character—the "constitutional personality"—and more generally on the "unwritten constitution" of social habits is explained in Claes G. Ryn, "Political Philosophy and the Unwritten Constitution," *Modern Age*, Vol. 34, No. 4 (1992). This article extends arguments that are more fully developed in Claes G. Ryn, *Democracy and the Ethical Life: A Philosophy of Politics and Community*, 2nd. exp. ed. (Washington, D.C.: The Catholic University of America Press, 1991; 1978).

With such individuals setting the tone in society, it is more likely that ahistorical rationalism and romanticism will be avoided and that political life will be conducted as an attempt at creative renewal of America's constitutional experience. In this way American constitutional history can become a living past that incorporates historical experiences of sound order in contemporary political life by deeply embedding them in imagination and consciousness. When change is necessary, leaders who possess the constitutional personality are equipped to build on the experiential foundation of the American past in a way that synthesizes old and new. Change can flow from continuity with previous generations of Americans who, in their particular circumstances, groped toward the continuation and further realization of civilized life. This is to argue for a brand of originalism that maintains fidelity to the Framers' constitution by making their achievement not the end or culmination of the quest for a justly ordered political community but a fundamental part of an ongoing effort to promote the common good and an ethically centered life.²

Power and Liberty

Relationship between political power and liberty paradoxical.

The relationship between political power and liberty is paradoxical. On the one hand, as John Jay states in *Federalist 2*, [n]othing is more certain than the indispensable necessity of government; and it is equally undeniable, that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers.

To avoid anarchy, some degree of liberty must be forfeited. On the other hand, government cannot be trusted in every instance to use power in accordance with justice and the common good. Lord Acton's dictum that "power tends to corrupt, and absolute power corrupts absolutely" points to the danger of unbridled political power.³ In short, governments must have adequate power to govern but not so much power that tyranny results. This insight is not mathematical in nature. Rather, it provides a sense of proportion, a general impression

² The sense in which the common good and the ethical as well as constitutional order need to be understood as historically evolving is discussed at length in Ryn, *Democracy*, esp. Ch. XIII.

³ Letter to Bishop Mandell Creighton, April 2, 1887.

of what is prudent given human flaws and the seduction of power. It rests on a classical-liberal view of human nature and human society connected to the older classical and Christian view of the human condition. While Acton's dictum supports limited government, it does not explicitly say why he finds government necessary, which is to check and restrain human will and appetite. Still, the need for government is implicit, for, if Acton is correct that human beings need to be limited and checked when they wield power, it follows that they must likewise be limited and checked when they exercise liberty. Human nature being a mix of higher and lower inclinations, power and liberty considered in the abstract are morally neutral. They acquire their moral or immoral quality from the type of human will that utilizes them in specific human actions. The quantity of power available to governments (something that written constitutions define) matters, as Acton suggests, but it matters less than the quality of character of those who exercise power (something that is influenced by the unwritten constitution). Tyrants rule tyrannically not simply because they have tremendous power and tend to expand it at every opportunity, but because they use the power at their disposal for purposes that are inconsistent with the proper ends of politics, such as justice, happiness, and virtue. In some circumstances (e.g., a dire national security crisis) it may be possible for a political ruler to exercise, temporarily, a degree of power that exceeds the limits set by the constitution, and may even come close to unlimited power, without using that power tyrannically. As a general rule, however, it makes sense to limit and check the power of government because even in the case of dire emergencies it is difficult to imagine power that is nearly absolute being exercised in accordance with justice. Acton's statement about power is followed by the comment that "Great men are almost always bad men." This may push the point too far, but it is generally consistent with Madison's view expressed in *Federalist* 47 that concentrated power is the very definition of tyranny. Madison's skepticism regarding concentrated power is qualified somewhat as well as justified, in part, by his statement in *Federalist* 10 that "Enlightened statesmen will not always be at the helm."

Power and liberty considered in the abstract are morally neutral.

In his "Letter to a Member of the National Assembly,"

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liberty and
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restraint.*

Edmund Burke addresses the problem of power and liberty by pointing to the existence of a direct relationship between liberty and ethical restraint:

Men are qualified for civil liberty in exact proportion to their disposition to put moral chains upon their own appetites; in proportion as their love of justice is above their rapacity; in proportion as their soundness and sobriety of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the counsels of the wise and good, in preference to the flattery of knaves. Society cannot exist unless a controlling power upon will and appetite be placed somewhere, and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things, that men of intemperate minds cannot be free. Their passions forge their fetters.⁴

Influenced by Burke, the Harvard professor Irving Babbitt (1865-1933) emphasizes that liberty has moral and cultural prerequisites that emanate from the ethical center of mankind's inner life. Men and women are intuitively aware of an ever-present conflict at the center of their experience between two competing qualities of will. Morally unconstrained will, which Babbitt terms "vital impulse" (*élan vital*), is toward self-indulgence or arbitrariness for oneself or one's group. The "higher" or "ethical" will, which is a constant will to promote the universal good, is experienced in particular situations as an "inner check" on merely selfish impulse or as "vital control" (*frein vital*). For Babbitt, as for Burke, liberty is possible and desirable to the degree that morally constrained will is prevalent in a particular society. To the degree that man's merely impulsive self predominates, however, more control by government becomes necessary.⁵

In short, political and social order depend on the influence in society of universal values that are, obviously to varying degrees, represented in religious, artistic, philosophical, and political traditions and insights. Political philosophers refer to

⁴ Edmund Burke, "Letter to a Member of the National Assembly" (1791), in *Further Reflections on the Revolution in France*, ed. Daniel E. Ritchie (Indianapolis: Liberty Fund, 1992), 69.

⁵ See the works of Irving Babbitt, especially *Rousseau and Romanticism*, introduction by Claes G. Ryn (New Brunswick and London: Transaction Publishers, 1991) and *Democracy and Leadership*, foreword by Russell Kirk (Indianapolis: Liberty Classics, 1979)..

moral universality in variegated language. Heraclitus refers to the common (*xynon*), Plato to the ground of being (*aition*), Cicero and Aquinas to natural law (*jus naturale*), Augustine to the city of God (*Civitas Dei*). Whatever specific language symbols they use, they are drawn to and are trying to articulate a common center of higher values, which brings order, happiness, harmony, justice, and love to life. These values are a community-forming spirit and substance; they make unity and harmony possible without destroying diversity and local idiosyncrasy. They serve to unify individuals in community without imposing an artificial ahistorical uniformity on them. They reconcile unity and diversity by pulling individuals and groups, with their particular personalities and characteristics, toward a common human ground.⁶

Political and social order require moral universality embodied in historical experience.

Attempts further to realize these values build up a reservoir of historical experience from which the life of later generations can be enriched. Men and women who contributed to the development of civilization by searching for, and to some degree realizing, higher values in their particular thought, practical conduct, and artistic expression provide examples for others to emulate. Insofar as individuals are able to resist the ephemeral and fleeting pleasures of morally unformed vital impulse and will to power (*libido dominandi*) and to follow instead the higher will to refrain, civilization and its specific fruits, e.g., liberty, community, justice, beauty, become possible.

Human life also includes self-indulgent forces that pull individuals away from community toward disharmony, misery, tyranny, injustice, and the like. The tension between these forces and what is highest in man is, to use the Voegelinian term, the “metaxic” (“in-between”) experiential context for political philosophy and constitutional politics. William Butler Yeats captures a sense of the tension between these centripetal and centrifugal forces and how the latter can destroy unity in his poem *The Second Coming*. A falcon flies in wider and wider circles, eventually reaching a point where he cannot hear the falconer’s call. At that point,

⁶ For an in-depth philosophical discussion of how universality and diversity can be harmonized, see Claes G. Ryn, *A Common Human Ground: Universality and Particularity in a Multicultural World* (Columbia and London: University of Missouri Press, 2003). Ryn provides, among other things, a philosophical basis for the notion of *e pluribus unum* in the American constitutional tradition.

Things fall apart; the center cannot hold;
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.⁷

Yeats's metaphors can be used together with Irving Babbitt's notion of the ethical center to explain not only the tension between ordered liberty and anarchy/tyranny but also the tension between constitutional order and anarchy/tyranny. For a constitutional order to "hold"—in other words, for it to produce the fruits of a just political order—the individuals who live in a particular constitutional society such as the United States must remain near enough to the ethical center to hear its call and respond to its pull. They must be attuned to what is best in their particular history and traditions because these provide not only experience with constitutional government, but a sense of what is possible in their specific historical context.

*Consciousness
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A constitutional order will tend to disintegrate if the tradition that gave rise to it begins to wither and is replaced by nothing more than an abstract and reductionistic ideological travesty. What binds individuals together in community is not some ahistorical "principles" of justice or rights but specific concrete historical patterns, structures, and experiences that bring universality to life in concrete particulars. Burke's political theory suggests that consciousness of these ordering experiences is maintained through traditions and prejudices, including a society's constitution, both written and unwritten. Generations are linked together by a type of historical continuity that makes prudent change possible. A society that has lost consciousness of its history has lost access to the primary source of standards with which to distinguish what is central and beneficial from what is chimerical and deleterious. The greater this loss of historical consciousness and of the substance of moral life, the more pretentious the society is apt to become.⁸

⁷ William Butler Yeats, *The Second Coming*, in *The Hundred Classic Poems*, ed. William Harmon (New York: Columbia University Press, 1998), 207.

⁸ For a discussion of pretense in the American Civil War era see Walter A.

It will be argued here that the United States is reaching a point of extreme pretentiousness and, in particular, that it increasingly exhibits democratic or populist pretense. This pretentiousness is now pervasive in American politics but is especially so in judicial politics where, ironically, courts are less inhibited than the other branches of government by popular sentiment. Democratic pretense in judicial politics is most evident in Supreme Court rulings regarding reapportionment and privacy rights. To subject democratic pretense to a critical analysis that connects American politics and constitutionalism with their traditional sources and seeks to restore consciousness of the ordering center of American constitutionalism may provide a basis for a constitutional imagination and creativity very different from that employed by democratic pretense.

What complicates the problem of constitutionalism is that the above-mentioned "center" of human conduct is not fixed or unmovable; neither is it theoretically knowable as some kind of Archimedean point. Our metaxic existence as humans means that we live within the tension between centripetal and centrifugal motivational forces. Moreover, the modern epoch, not least with respect to the development of liberalism, has been defined in large part by a quest for emancipation from authority, which breeds and is bred by a desire to move away from any normative center.⁹ The objective of much of modern life whether it is philosophy, art, religion, or life generally, has been to reject traditional ethical limits and boundaries and to set the individual free to act as his own ethical center. Rousseau is a primary figure in the emancipation of modern man from traditional limits and historical identity. As Babbitt's analysis of Rousseau illustrates, the substitution of the vital impulse for the will to refrain and discriminate deprives both the ethical life and constitutionalism of the spiritual vitality they need to thrive.

Modernity might have had some chance of elevating civilized life if it had grounded individuals ethically in something

McDougall, *Throes of Democracy: The American Civil War Era 1829-1877* (New York: HarperCollins, 2008).

⁹ For a more detailed analysis of the problem of the modern revolt from authority, see Robert A. Nisbet, *Tradition & Revolt* (New York: Random House, 1968) and Nisbet's *The Present Age: Progress and Anarchy in Modern America* (Indianapolis: Liberty Fund, 1988).

higher than abstract Enlightenment reason or romantic sentiment. Civilization will not flourish without a socially vibrant cultivation of restraint. John C. Calhoun, following Burke, relates the problem of liberty to the ethical life.

Liberty . . . when forced on a people unfit for it, would, instead of a blessing, be a curse, as it would in its reaction lead directly to anarchy—the greatest of all curses. No people, indeed, can long enjoy more liberty than that to which their situation and advanced intelligence and morals fairly entitle them.¹⁰

Yet the contemporary tendency is to disregard the ethical prerequisites for liberty and constitutional government and to measure progress by the degree to which individuals are emancipated from traditional restraints. Americans have virtually lost the sense of human nature and cultural identity that emerged from the Western and American past.

Political constitutions carve out boundaries of government authority, but liberty ultimately depends on the unwritten constitution of a given people, the web of traditions, mores, customs, and prejudices that can never be exhaustively articulated in a written document. Forrest McDonald explains that the American Constitution “presupposes certain external institutional arrangements, and it presupposes as well an understanding about the nature of man and society and about what, in the realm of government, is possible and desirable.”¹¹ The written constitution is a legal and formal representation of what has already been constituted by patterns of historical life in a particular political community or civilization. Russell Kirk explains that

the American Republic possesses an underlying unwritten constitution—of which the written Constitution of the United States is an expression. The written Constitution has survived and has retained authority because it is in harmony with laws, customs, habits, and popular beliefs that existed before the Constitutional Convention met at Philadelphia—and which still work among Americans today. The written Constitution produced by the delegates from the several states drew upon the political experience of the colonies, upon their legacy of Eng-

Liberty ultimately depends on a people's unwritten constitution.

¹⁰ John C. Calhoun, “A Disquisition on Government,” in *Union and Liberty: The Political Philosophy of John C. Calhoun* (Indianapolis: Liberty Fund, 1992), 42.

¹¹ Forrest McDonald, “I Have Seen the Past and It Works,” in *Derauling the Constitution*, ed. Edward B. McLean (Wilmington: ISI Press, 1995), 30.

lish law and institutions, upon the lessons of America under the Articles of Confederation, upon popular consensus about certain moral and social questions. Thus the Constitution was no abstract or utopian document, but a reflection and embodiment of political reality in America. Once ratified, the Constitution could obtain the willing compliance of most Americans because it set down formally and in practical fashion much of the “unwritten” constitution of American society.¹²

Orestes Brownson adds that the “nation must exist, and exist as a political community, before it can give itself a [written] constitution.” He agrees with Joseph de Maistre¹³ that constitutions are “generated, or developed, not created *de novo*, or made all at once.”¹⁴ In their highest form, political constitutions reflect the ethical center, adherence to which makes liberty possible. They are one of the primary means in political life by which members of a society can attune themselves to the centripetal forces that originally engendered their society’s constitutional order. They give specific political form to the historical experience that engenders nations and civilizations.

*Constitutions
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novo.”*

This understanding of written and unwritten constitutions contrasts sharply with the general claim of social contract theorists who submit that social compacts and exist prior to the political community as features of man’s natural condition. For the social contract theorists it is the formation of formal legal structures that gives birth to a particular society.¹⁵ Nations, in this view, are “founded” by right-minded individuals who create a political system based on abstract principles. Nations do not develop organically, as Burke, Brownson, and

¹² Russell Kirk, *The Roots of American Order*, foreword by Forrest McDonald (Wilmington: ISI Books, 2003; 1974), 416.

¹³ See Joseph de Maistre, “Essay on the Generative Principle of Political Constitutions,” in *The Works of Joseph de Maistre*, ed. Jack Lively (New York: Schocken Books, 1971), 147-181.

¹⁴ Orestes Brownson, *The American Republic with an Introduction by Peter Augustine Lawler* (Wilmington: ISI Press, 2003), 91-92. For an account of the early American republic that contrasts sharply with that of Brownson, see Jay Winik’s *April 1865: The Month That Saved America* (New York: HarperCollins, 2001). Winik seems incapable of conceiving of the early republic as a nation because power was not, to his mind, sufficiently centralized.

¹⁵ For Hobbes’s argument about why society is impossible in the state of nature, see *Leviathan*, part I, chapter 13. For Locke, those who are not part of the formation of the social contract remain in the state of nature. See *Second Treatise* (Indianapolis: Hackett, 1980), 48.

de Maistre claim. In the Hobbesian framework, human beings are capable of social and political behavior only after they have been legally constituted under a sovereign. Prior to that, they exist as an undifferentiated socially inorganic mass of individuals who are driven by fear of pain and violent death. In the state of nature and at the point of forming a political entity, individuals have no historical identity, no shared traditions or civilization that tell them who they are or what way forward would make sense given their particular history. They are a people *without* a coherent, meaningful history. They are unconnected to previous generations. They are what Burke calls “flies of a summer.”¹⁶ They are not drawing upon an historical experience of order as the foundation for the social compact because such experience does not exist.¹⁷ Consequently, there is nothing that binds humans in community or gives life historical texture or purpose. There is only fear of the *summum malum*. Liberty, in the Hobbesian imagination, is emancipation from primitive fear. It is not a condition advanced by ethical restraint, as Burke claims, nor does it provide the opportunity to live according to the common good. Like Burke, Hobbes believes that government is necessary to protect liberty. Unlike Burke, Hobbes dismisses the notion that liberty has ethical prerequisites or that it presupposes historical identity. Also, Hobbes does not believe that power needs corresponding ethical restraints. There is no ethical center in Hobbes’s political theory that enervates raw selfish will and draws individuals to a *summum bonum*; instead, individuals are ethically emasculated and stripped of their historical identity. In the state of nature there is little but centrifugal impulses, which produce violent anarchy. Hobbes imagines that from this ahistorical state of nature can be derived a political order that owes nothing to ethical striving. Human beings who are by nature incapable of exercising ethical restraint are transformed by the social contract, which redirects the natural fear of violent death to fear of the leviathan. Self-restraint is possible in civil society because of the fear of *summum malum*. Hobbes sees no role for the older

¹⁶ Burke, *Reflections on the Revolution in France* (Indianapolis: Hackett, 1987), 83.

¹⁷ A society that has lost consciousness of its history has in effect reached the same point.

classical and Christian notion of ethical responsibility. People exercise only what Folke Leander calls the “prudential inner check”—i.e., self-restraint based on enlightened self-interest. They do not possess the ethical will that Babbitt terms the “Inner Check,” which transcends selfish calculation.¹⁸ This aspect of Hobbes’s political theory brings to mind T. S. Eliot’s *Choruses From the Rock*:

They constantly try to escape
From the darkness outside and within
By dreaming of systems so perfect that no one will need to
be good.

Eliot’s insight is followed by the admonishing line:

But the man that is shall shadow
The man that pretends to be.¹⁹

To follow Hobbes’s vision of political and social life is to discount the possibility of historical variations among cultures and communities that call for corresponding variations of political power and organization. Something like American federalism, which developed organically as a consequence of the unwritten constitution of colonial America, is unthinkable as an outgrowth of Hobbes’s abstractly conceived state of nature. Hobbes’s ahistorical social contract theory ignores the particulars of historical experience. As is the case with John Rawls’s political theory, human beings are assumed to be capable of forming a viable political community without having a sense of their own historical identity.

Searching for a prudent balance between liberty and order requires attention both to the historical situation of a given people and to the larger historical record of civilizations. In other words, to estimate the amount of liberty that a society can exercise responsibly requires an understanding of its unwritten constitution, which embodies important aspects of its historical life. The American Framers were acutely aware of the historical-cultural dimension of their political order. They were classically educated men who knew a great deal about the human condition from historical evidence, and this learn-

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¹⁸ See Folke Leander, *The Inner Check* (London: Edward Wright, 1974), 13-28. Leander draws on Benedetto Croce’s notion of a self-interest that is purely “economical.”

¹⁹ T. S. Eliot, *The Complete Poems and Plays 1909-1950* (New York: Harcourt Brace & Company, 1950), 106.

ing helped them shape a constitutional framework that suited American circumstances.²⁰ The following famous statement by Madison in *Federalist* 51 rests on a wealth of historical evidence regarding human nature, government, and liberty, and it reflects the early American experience with and understanding of political power.

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

*Need to
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nature itself.*

The need to limit both government and the governed is due to human nature itself. The human condition makes this insight apply universally, but the particular way in which societies configure their political institutions must vary with their historical-cultural circumstances. Burke's notion of liberty as dependent on moral restraint is consistent with Madison's view of human nature and government. Madison and the Framers apply general insights about human nature, government, and liberty to the specific circumstances of eighteenth-century America. They take what they see as relevant from ancient and medieval civilizations as well as from modern political experience and ideas.²¹ They recognize existing political arrangements in the America of their time as reconstituting older political insights in the light of more recent insights.²² The 1789 Constitution is a further reconstitution of the American and Western political tradition. Hamilton's *Federalist* 9 states that the "science of politics . . . has received great improvement. The efficacy of various principles is now well understood,

²⁰ See M. E. Bradford, *Founding Fathers* (Lawrence: University Press of Kansas, 1994) and E. Christian Kopff, "Open Shutters on the Past: Rome and the Founders," in *Vital Remnants: America's Founding and the Western Tradition*, ed. Gary L. Gregg (Wilmington: ISI Books, 1999), 71-98.

²¹ For a detailed analysis of the classical, Judaeo-Christian, and modern antecedents of the American constitutional order see Russell Kirk, *Roots of American Order*.

²² The argument set forth here differs significantly from those made by the contributors to *Our Peculiar Security: The Written Constitution and Limited Government*, editors Eugene W. Hickok, Gary L. McDowell, and Philip Costopoulos (Lanham: Rowman & Littlefield, 1993).

which were either not known at all, or imperfectly known to the ancients.”

The movement from the first American national constitution, the Articles of Confederation, to the second, the 1789 Constitution, is part of the evolution of the American constitutional order. It marks a change in the specific legal characteristics of American constitutionalism, but it does not represent a radical break from what existed previously. The Senate, for example, is largely derived from the Articles of Confederation and its concern for state interests. That the particular form of constitutional politics changed as a result of the 1787 Constitutional Convention is obvious. For example, the national government ceased to be based on legislative supremacy; the new constitution added a national judiciary and an independent executive. But these changes were new institutional manifestations of the existing unwritten constitution in changing circumstances. Thus the adoption of the 1789 Constitution can be seen as an act of creative continuity. The Constitution established a government that was partly new and partly old. America’s national political institutions were reconfigured, but still reflected the existing underlying ethos. The creation of the 1789 Constitution was an act of Burkean conservation. Burke stated that “in what we improve we are never wholly new; in what we retain we are never wholly obsolete.”²³

The pedigree of the national government under the new constitution was similar to those of the existing state governments. The *Federalist Papers* and *The Records of the Federal Convention of 1787* are filled with references to specific characteristics of state governments and constitutions. This is not to say that the Framers mimicked state constitutions any more than the republics of ancient Greece and Rome, but that they used them, and the unwritten constitution on which they rested, to chart a general course for creating a new republican constitution. They used them to call to mind who they were as a historically formed people. The framers of the Articles of

²³ Burke, *Reflections*, 30. For an examination of the strong preference for continuity and resistance to “innovation” in the British-American constitutional tradition see Joseph Baldacchino, “The Unraveling of American Constitutionalism: From Customary Law to Permanent Innovation,” *Humanitas*, Vol. XVIII, Nos. 1 & 2 (2005).

Confederation and the framers of the 1789 Constitution were republicans with a certain view of human nature and society who sought to limit and decentralize power and to protect local and regional autonomy. The interests of states and regions of the country weighed heavily in the framing of the Constitution. That political power was more centralized in the 1789 Constitution than in the Articles of Confederation does not change the fact that protecting sectional interests was a central purpose behind both documents. The unwritten constitution of the time greatly limited the extent to which power could be centralized in the national government. Nothing could have been more alien to the Framers than a Hobbesian-style political system; it was almost unthinkable to them; it was simply outside the purview of the unwritten constitution of the time, foreign to their historical identity.²⁴ The reason political power has become radically centralized in the twentieth and twenty-first centuries is that the unwritten constitution has changed. Americans have rather dramatically altered their view of life and the world. A major reason why America became so much less decentralized and community-oriented and more accepting of centralization is that a change in how Americans understand moral virtue had occurred.²⁵ The related infusion of populist and progressive ideology in American culture has brought a sharp diminution in the importance attached to local and sectional associations. A concentration of power in the national government is viewed with far less trepidation than it was in late eighteenth-century America. The written document of the Constitution looks in its main structural features largely the same as it did in 1789, but the direction that constitutional practice has taken in the past hundred years shows that the Framers' conception of republican government has passed and

²⁴ For a contrary view on Hobbes and the American Founding, see Walter Berns, *Taking the Constitution Seriously* (Lanham: Madison Books, 1987).

²⁵ On the intimate connection between traditional Western character-ethics and a decentralized society and the equally intimate connection between modern sentimental moralism and a centralized society, see Claes G. Ryn, "Virtue: Real or Imagined," in the *Unbought Grace of Life: Essays in Honor of Russell Kirk*, ed. James Person (La Salle, Ill.: Sherwood Sugden, 1994). An excellent book demonstrating significant change in American political thinking and corresponding political conduct with regard to foreign policy is Walter McDougall, *Promised Land, Crusader State: The American Encounter with the World Since 1776* (Boston: Houghton Mifflin, 1997).

the era of populist democracy has arrived.²⁶ The underlying transformation of the unwritten constitution renders efforts to return to the Framers' original intent problematic. This is especially the case if the Framers' intent is construed as reified principles born of abstract rationalism.

If Burke and Madison are correct about human nature and its relation to government and liberty, then government must limit and restrain human will and appetite, but government is not the only required source of restraint. Likewise, government needs to be restrained by legal and constitutional checks, but these are not the only way that government needs to be limited. Formal legal and political restraints on power and liberty will function well only if they form part of a larger culture that fosters the character traits and imagination that created constitutional government in America and is capable of sustaining it. Benedetto Croce refers to the personality type that fosters and preserves liberty as that of "true men." They are "representatives of liberty" who share a quality of will regardless of their particular differences.²⁷ Moreover, the quoted statements by Acton, Burke, Calhoun, and Madison, as well as two centuries of American experience with constitutional politics, suggest that a constitutional people must continuously search for the proper balance between liberty and limiting political order; the balance has to be adapted to the evolution of a people's historical identity and the exigencies of political and social life.

A constitutional people must continuously search for proper balance between liberty and limiting political order.

A civilizing type and degree of liberty requires appropriate governmental limits on human will, and government power, to be itself appropriately limited, requires a type and degree of liberty that is consistent with the needs of civilized life. Madison seems to recognize this latter point when he states in *Federalist* 51: "A dependence on the people is, no doubt, the primary control on government. . . ." The ability of the people to control the government is not limited to their role in elections.

²⁶ For an examination of the rise of populism and nationalism, see John Lukacs, *Democracy and Populism* (New Haven, Yale University Press, 2005). The sharp contrast between populist, "plebiscitary" democracy and the constitutional republicanism of the Framers is explained in depth in Ryn, *Democracy*.

²⁷ Benedetto Croce, *History as the Story of Liberty*, with a foreword by Claes G. Ryn (Indianapolis: Liberty Fund, 2000), 252.

In 1789 the franchise was limited to male property owners, and even they were constitutionally empowered to directly elect only members of the House of Representatives and presidential electors. What Madison means by “dependence on the people” is probably what Hamilton in *Federalist* 84 refers to as “the general spirit of the people.” This spirit, along with the spirit of the government and public opinion, is considered by Hamilton to be “the only solid basis of all our rights.” What is this “solid basis” if not the unwritten constitution? Madison’s argument in *Federalist* 51 quoted above is predicated on the view that parchment barriers, including the stipulation that elections be held, will not be enough to restrain a tyrannical will to power. Institutional devices like checks and balances will contribute to good government and liberty over an extended time only if individuals of a certain character type, Croce’s true men, can exercise influence. Madison states in *Federalist* 57:

The aim of every political constitution is, or ought to be, first, to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust.

Not only must ambition counteract ambition, but representatives must also possess the quality of character described in *Federalist* 10. They must be wise, love justice, be patriotic, and be disinclined to sacrifice the common good to partial or temporary interests. In short, the written constitution must be animated by an unwritten constitution that makes constitutional government possible by ethically preparing the leadership class and the citizenry for the work of constitutional politics.

Not only must ambition counteract ambition, but representatives must possess virtuous character.

The Constitutional Center

It has been suggested here that political wellbeing depends on an ordering center, a quality of will beyond competing selfish interests. The evolution of a constitution, how it functions in political practice and how it is interpreted by those who operate under it, can be shaped by either the centripetal or centrifugal forces. That is to say, one or the other can become the prevailing influence. The quality of leadership is crucial. It has been argued above that Hobbes’s political theory aligns itself

with the centrifugal forces. It assumes the possibility of building political order without the benefit of ethical wisdom and conduct or an already existing historical identity. Rousseau's political theory puts romantic sentimentalism in the place of the older classical and Christian emphasis on inner restraint, and it rejects historically developed structures as a sound basis for political order. Thus, his political theory is morally unrealistic, providing a merely imaginary political unity. In practice, his theory too aligns with the centrifugal forces. Both Hobbes's utilitarianism and Rousseau's romanticism are wholly at odds with American constitutionalism as it existed in 1789. They assume views of human nature radically different from those held by the Framers, and their alternate views tend to generate highly centralized societies rather than the kind of decentralized republic assumed and favored by the Framers. This is the case with Rousseau because his notion of virtue is not conceived as based on difficult self-discipline, on strength of character, but on yielding to humanitarian sentiment. Rousseauistic virtue does not concern an improvement of self but an improvement of society. Claes Ryn summarizes the connection between Rousseau's understanding of virtue and his politics.

Abstract moralism is less interested in improving self than in improving others. And the need to take concrete action is somehow always transferred elsewhere, typically to government, which acquires ever new responsibilities and becomes ever more centralized.²⁸

As new attitudes towards life take hold in the American mind and imagination, the Framers' constitutionalism with its unwritten constitution fades from memory. It ceases to be a living force animating American political conduct. American political imagination, like Yeats's falcon, circles in a widening gyre away from the experiential ethical center of American constitutionalism. It may be that the falcon, sensing emancipation from the falconer, flies in even wider gyres, eventually reaching too far from the falconer to hear his call. Conversely, the falcon may respond to the falconer's faint voice and heed his call.

²⁸ Claes G. Ryn, "Political Philosophy," 306.

In both personal and political life, individuals must be governed by something higher than mere self-interest.

In a vibrant constitutional order individuals maintain contact with the ethical center, which, to repeat, is not sentimental or abstract but a matter of character. In both personal and political life individuals must be governed by something higher than fear of the *summum malum*, mere self-interest, or an ethereal “general will.” A constitution like the American reflects respect for a higher law. It is designed to frustrate those who insist on getting their way because they have majority support, ideological certitude, or strong passion. Constitutional restraints and procedures, at their best, stem from and breed a personality type that is willing to wait, is tolerant of opposing interests and views, and that is able to navigate toward compromise and consensus—all of this for the sake of the *summum bonum*. Calhoun makes a similar point in his *Disquisition on Government*. He explains that properly constitutional government, which he understands as based on rule by “concurrent majority,” has and develops a “common centre of attachment.” Particular interests recognize that to be successful in politics they must work out their differences, look for what they have in common. The particular interest “sees and feels that it can best promote its own prosperity by conciliating the goodwill, and promoting the prosperity of others.” As individuals and groups move toward the common center of attachment, they participate in “purifying and elevating the character of the government and the people, morally, as well as politically.”²⁹ Calhoun may not always have behaved accordingly as a statesman, but his political theory acknowledges the importance of the ethical life and stresses the need to protect and strengthen the centripetal forces in politics. It is essential to counteract and defuse the greed and selfishness that sometimes threaten to overwhelm the common good.

Madison and the Framers were well aware of the lower side of human nature. Their philosophical anthropology has a largely classical and Christian pedigree. Man was made in the image and likeness of God, but he was also a fallen creature. This is not to say that the political philosophy of the Framers did not incorporate aspects of Enlightenment thought.³⁰ But

²⁹ Calhoun, 39.

³⁰ Henry F. May distinguishes between the “moderate Enlightenment,” the “skeptical Enlightenment,” the “revolutionary Enlightenment,” and the

they stayed well clear of the more radical and Jacobin side of the Enlightenment. They drew primarily from the Scottish Enlightenment and from ideas that they could reconcile with what appealed to them in the classical and Christian traditions. Strong evidence for this view is that in crafting the Constitution they devoted so much attention to restraining and checking human will and power. Yet they did not consider all the ways in which government can be restrained and limited.

Political parties are one example of an American political development, largely unforeseen by the Framers, that plays a significant role in checking rulers. Having a loyal opposition is taken for granted in modern constitutional politics. The ruling party must be aware that they are being watched and scrutinized by members of an opposing party who are in constant competition for power. Policies and laws are debated not only while they are being crafted in Congress but also during their implementation, at which time they are scrutinized for, among other characteristics, how well they achieve their purpose or how consistent they are with the Constitution. Partisanship of the worst kind can certainly undermine good government and something like Calhoun's "common centre of attachment." Pursuit of purely partisan advantage can interfere with policies and laws that serve the common good and are consistent with the Constitution. But this is to say that what is true for constitutional politics generally is true for party politics in particular: political conduct can range from merely selfish and intentionally destructive to noble and constructive. That political parties were not part of the Framers' initial design does not make them anathema to American constitutionalism. Parties will subvert or enrich constitutional politics depending on the quality of their participation in politics. To the extent that they serve the proper ends envisioned by the Framers, including the need for checks and balances, political parties fall within the gamut of the American constitutional center and can enrich the written and unwritten constitution. To that extent, party politics can be seen as being in creative continuity with American constitutionalism.

"didactic Enlightenment" in *The Enlightenment in America* (Oxford: Oxford University Press, 1976).

Constitutions not only tame lower inclinations but try to enlist them on the side of the common good.

Knowing precisely the proper balance between liberty and power in a given society is not possible because political life is dynamic and changing and because any point of apparent equilibrium is never in the same place for long. Every society is different. Even within particular societies circumstances keep changing. For example, political leaders come and go over time. Some are more trustworthy and responsible than others; yet constitutions must place permanent or nearly permanent limits on power in order to bias decision-making in favor of the common good. Constitutions attempt to direct power to a higher end than the narrow interest of rulers or factions, including majority factions. As Calhoun has argued, constitutions not only tame lower inclinations like greed and selfishness but at their best try to enlist them on the side of the common good. The highest aspiration of a constitutional society is to replace lower human inclinations to the greatest extent possible with higher ethical purposes.³¹ These ends cannot be served without *effective* limits and boundaries, that is to say, more than parchment barriers to tyranny. At the same time, the preservation of legal and constitutional limits and boundaries requires prudent change as historical circumstances change: change that must not, however, move so far outside of what centers constitutional life that it becomes destructive of the very spirit of constitutionalism.

How, then, can permanence and change be reconciled? To some extent it is possible to use statutory law and constitutional amendment to adjust to changing circumstances. Yet these legal means require the hand of true men and women, and they need some degree of flexibility and discretion to adapt to new situations. If flexibility and discretion are necessary, to what degree, if any, is the Constitution's meaning and application flexible? To what extent can a constitutional people adjust its fundamental law to meet the challenges of historical life? Is its meaning fixed, or are members of Congress, the president, and the courts free to adjust its meaning as they see fit? If public officials can read new meaning into the Constitution, does it

³¹ For a discussion of enlightened self-interest as a possible support for the common good and for an examination of the relationship in a constitutional regime between enlightened self-interest and a more genuine, ethical concern for the common good, see Ryn, *Democracy*, esp. 20-26.

cease to be an effective check on government? Can innovation and limited government be reconciled?

Limited Government and the Unwritten Constitution

Answering these questions requires an understanding of the relationship between the written and unwritten constitutions. There are paper boundaries and limits, what the Framers called “parchment barriers” (*Federalist* 48), and there are unwritten boundaries and limits that are not so much legal as they are cultural, ethical, and religious. The preservation of a constitutional order depends, to a great extent, on the preservation of the unwritten boundaries and limits. This assumes the presence of individuals who live and embody them, who are drawn to what has here been called the constitutional center. Thomas Jefferson tended to place his hope for liberty and good government in parchment barriers and constitutional amendments. He inclined to a point of view that Thomas Paine took to an extreme when he wrote, “Our peculiar security is in possession of a written Constitution.” Jefferson recognized that constitutional change was necessary, but he cautioned, “Let us go on then perfecting it [the Constitution], by adding, by way of amendment to the Constitution, those powers which time & trial show are still wanting.”³² Because of sentiments like these, Jefferson is commonly cited as a supporter of a strict reading of the Constitution and as an opponent of judicial activism.³³ He is often regarded as an advocate of small, limited government. But, as Babbitt has remarked, he “was for diminishing to the utmost the role of government, but not for increasing the inner control that must, according to Burke, be in strict ratio to the relaxation of outer control.”³⁴

Like Jefferson, George Washington, in his Farewell Address, urged: “If, in the opinion of the people, the distribution . . . of the constitutional powers be in any particular wrong, let

³² Thomas Jefferson, “Letter to Wilson Cary Nicholas, September 7, 1803,” in *Thomas Jefferson: Writings* (New York: Library of America, 1984), 1140.

³³ See, for example, William J. Quirk and R. Randall Bridwell, *Judicial Dictatorship* (New Brunswick: Transaction Publishers, 1995).

³⁴ Irving Babbitt, *Democracy and Leadership*, 277.

Constitutional and legal barriers to tyranny dependent on cultural, moral, and religious restraints.

it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation.”

But, far more than Jefferson, Washington recognized that the efficacy of formal constitutional and legal barriers to tyranny is dependent on cultural, moral, and religious habits of restraint.

Thus, in his Farewell Address, Washington added:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked: Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

It is substantially true that virtue or morality is a necessary spring of popular government. The rule, indeed, extends with more or less force to every species of free government. Who that is a sincere friend to it can look with indifference upon attempts to shake the foundation of the fabric?³⁵

As a consequence of their inattention to the need for internal restraints, Jeffersonians are somewhat limited in their ability to respond to specific evils. Like Hobbes, they tend to fall back on legislation and public policy as the remedy for political and social disorder. This is a variant of the Hobbesian reliance on power. A Jeffersonian preference for small government turns out to be easily transformed into reliance on government for social amelioration. In this regard recent American politics can be said to have been conducted on Jeffersonian grounds regardless of which political party has controlled Congress, the presidency, or the federal judiciary. The proliferation of the state becomes an ineffective substitute for the civilizing and harmonizing effect of personal virtue and community. This is,

³⁵ Washington's Farewell Address, 1796, www.nhinet.org/ccs/docs/farewell1796.htm.

as Babbitt notes, to substitute social control for self-control. It is not as paradoxical as it may appear, then, that people who today think of themselves as Jeffersonians are frequently also believers in Big Government. The Jeffersonian trust in “parchment barriers” contrasts sharply with Brownson’s view, expressed in 1874.

We believe nothing in what are called constitutional guaranties. Power can break through or ride over any constitutional barriers the wit or the wisdom of statesmen can erect, and tyrannize, if so disposed. The simple fact is, the temporal or secular order is incomplete, and never does or can suffice by itself alone for good government, any more than man, who is dependent for every breath he draws, nay, for his very existence, on the creative act and efficacious presence of his Creator, can suffice for himself alone.³⁶

Brownson believes that written constitutions are dead letters without the submission of human will and political power to a higher spiritual authority. His specific response to the problem of political and spiritual order centers on Catholic Christianity, but alternative foundations can be found in the works of such thinkers as Plato, Aristotle, Cicero, Burke, Babbitt, and Voegelin.

Written constitutions are dead letters without submission of human will to a higher spiritual authority.

The connection between the unwritten constitution and the operation of more formal legal and political institutions has been acknowledged from ancient times. Plato, Aristotle, and Cicero, like Burke, believed that the specific form of a political regime mattered, but they also recognized that justice and happiness and the general wellbeing of society depended on a certain cultural and moral ethos—that is to say, a proper unwritten constitution. The degeneration of regimes in Plato’s *Republic*, for example, reflects the degeneration of culture—what Voegelin calls “deculturation”—which manifests the gradual loss of ethical self-restraint. When deculturation appears, it is another way of saying that the unwritten constitution has degenerated; it has drifted from the ethical center.

If American political leaders and their intellectual allies are no longer willing to abide by prescribed constitutional

³⁶ Brownson, “Constitutional Guaranties,” in *The Works of Orestes A. Brownson*, vol. XVIII (Detroit: H.F. Brownson, 1905), 260.

principles and processes, that is indicative of the deculturation of their society. Rather than responding to a perceived need for change by promoting constitutional amendments or by addressing the moral and cultural roots of social and political disorder, these leaders and intellectuals obscure the meaning of the constitution by reformulating and reinterpreting it to fit their partisan and ideological interests. To the extent that they bother to advance an historical understanding of the constitution, including a view of its original conception and evolution, they interpret the constitution to be what they want it to be. They adopt an attitude similar to what Herbert Butterfield calls the Whig interpretation of history.³⁷

Traditional restraints increasingly viewed as outmoded obstacles to democracy and freedom.

As deculturation spread, American society began to lose its constitutional consciousness and its ability to resist the same development. More and more, the centrifugal inclinations of man's lower nature animated political forces. In our era the will to power has relied greatly on humanitarian sentiments to mask its designs. A stated need to serve social justice and relieve human suffering has been used to justify stretching and bending constitutional meaning. The political imagination has been recast in a way that raises expectations regarding what can be accomplished by political means. Moral and political realism have been put on the defensive while idealism and even utopianism have become influential in shaping political attitudes. The philosophy underlying constitutionalism—importantly, that human nature is morally flawed and that human beings need to be restrained—has been rejected increasingly as a relic of a past dark age that suppressed human creativity and enlightenment. It has become common to think that a new age of light and progress is being born that will show traditional restraints to have been obstacles to democracy, equality, and freedom. The idealism and optimism of this new age was captured early in Thomas Paine's statement that "We have it in our power to begin the world over again. . . . The birthday of a new world is at hand. . . ." ³⁸ How illustrative of the change that has over-

³⁷ Herbert Butterfield, *The Whig Interpretation of History* (New York: W.W. Norton, 1965). Justice Black's opinion in *Wesberry v. Sanders* is a good illustration of what Butterfield means by a Whig interpretation of history.

³⁸ Thomas Paine, *Common Sense and Other Political Writings*, ed. Nelson F. Adkins (Indianapolis: The Bobbs-Merrill Company, 1953), 51.

taken American society that the spirit of Paine and the spirit of the Framers of the U.S. Constitution should have been so different.

Law making and policy making alone are thus unlikely to stem the accelerating departure from the Constitution of the Framers. The ancient and modern thinkers just cited explain how it is possible for a once healthy society to degenerate even though few major changes have been made to its written constitution. To a superficial observer, the society may appear politically rather healthy—as experiencing economic and military success—although its written constitution is a dead letter. Plato addresses the issue in the *Republic*. In the degeneration of regimes, advanced spiritual decline is indicated by a desire for money-making out of proportion with what the good life requires. In reference to money-making oligarchic men, Socrates remarks, “the more they value it, the less they value virtue” (550e). Likewise, in a regime where the “spirited element” of the soul predominates, love of military victory and the honor it brings are out of proportion with the needs of the good life. In the final stage of decline, before tyranny takes over, no single passion or interest is privileged, but all desires are treated equally as if virtue were a matter of yielding to the passion of the moment. This condition, Plato argues, characterizes democratic society and democratic man.

Disproportionate desire for money-making indicates advanced social and political decline.

These inversions of virtue exemplify how both the society and the individual are moving away from the ethical center. The essence of Thrasymachus’ sophistry is to claim that this is not really decline at all and that the center is actually defined by the powerful. That the powerful refuse to submit their will to either inner ethical restraints or outer constitutional restraints—that the powerful become in that special sense the measure—is for Thrasymachus not a disaster, but simply the way of the real world. When the Framers of the U.S. Constitution imposed checks on power, they were paying their respects to a standard above mere partisanship, and they recognized that maintaining the constitutionalism that they envisioned required the animating presence of an unwritten constitution. Protecting against tyranny, then, is a matter not merely of reducing government power to some reasonable level, as Lord

Protecting against tyranny not merely a matter of reducing government power.

Acton's dictum might suggest, but of ensuring that the larger moral and cultural ethos, with its ethical center, resonates within the society.