

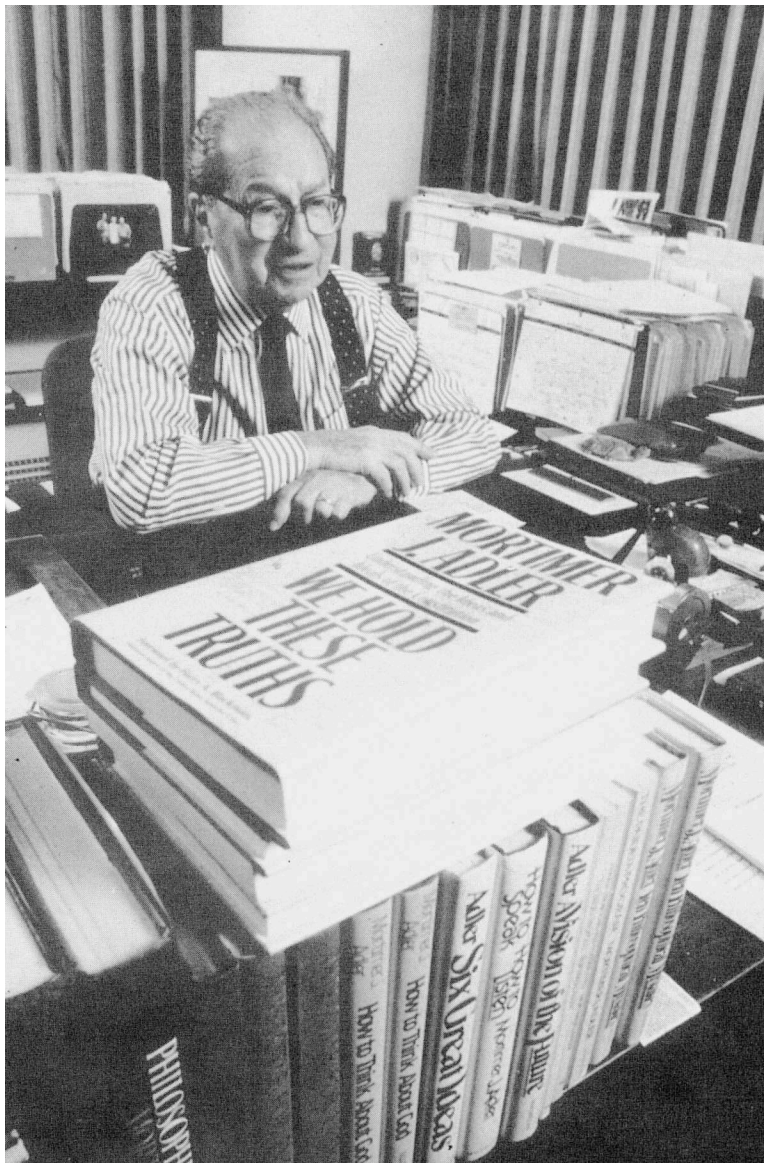
THE GREAT IDEAS ONLINE

May '04

Nº 275

The innovation in 1789, when our government came into existence, was not creation of a constitution but that it was the first federal republic in the world.

—Mortimer J. Adler



Mortimer Adler in his office [1988]

WE HOLD THESE TRUTHS

Understanding the Ideas and Ideals of the Constitution

Mortimer J. Adler

Address to the Commonwealth Club of California

Constitutional government did not originate with us. The Greek city-states were republics and had written constitutions, and the Roman Republic was a great institution indeed. The Greek invention of constitutional government created the dividing line between governments in which might is right and governments that draw their authority from moral principles. The innovation in 1789, when our government came into existence, was not creation of a constitution but that it was the first federal republic in the world.

The important aspect of constitutional government is popular sovereignty—government with both authority and force deriving its power from the consent of the governed. Constitutions are drafted and adopted by the people as the source of all legislative law. That aspect of constitutional government, that it draws its authority from its constituents, is contained in an extraordinary statement by Lincoln at the end of the Gettysburg Address: “government of, by, and for the people.” The crucial word is “of”—it means the people’s government; the citizens of this republic are its principle and permanent rulers.

We normally—incorrectly—think of the government as being in Washington, D.C. What the great public buildings of Washington contain are the officeholders. They are the transient and instrumental rulers of this country, not the governors of it.

Aristotle’s definition of a constitutional government was a government of free men and equals where the citizens rule and are ruled in turn and where each citizen has a share of the sovereignty. There is a misconception of government in this land today: We think of the people as the subjects of government. We are in fact the rulers.

Horace Mann said “The establishment of a republican government without well-appointed and efficient means for the universal education of the people is the most rash and foolhardy experiment ever

tried by man.” That was in the middle of the last century when less than half the population were enfranchised, when government was still by a minority. How much more true his statement is today when we finally have universal suffrage.

Some years before the Constitution was drafted, the Declaration of Independence expressed its dedication to constitutional government when it said that a government derives its just powers from the consent of the governed. Citizens thus have the power to alter and abolish a government that fails to secure the unalienable rights a government should secure.

Corrections and Amendments

Three things in the Constitution point toward the future. First, it announces itself as the fundamental law of the land, which makes any laws or acts contrary to it unconstitutional. This is the foundation of the Supreme Court’s power of judicial review whereby what is unconstitutional can be declared null and void. Secondly, Article V provides for amendment—the Constitution is not engraved in stone.

Finally, the Ninth Amendment says the enumeration in the first eight amendments of the Constitution of certain rights “shall not be construed to deny or disparage others retained by the people.” These can be civil rights people retained in the states from which they came. They would also include the natural, unalienable human rights mentioned in the Declaration of Independence. With the latter comes a principle of natural justice that extends judicial review from nullifying laws that are unconstitutional to nullifying laws that are unjust because they transgress natural rights.

The 18th century Constitution, like all the constitutions of antiquity, established an oligarchical republic with the protection of political liberty and freedom of action for the very few who were citizens. It was not dedicated to the proposition that all men are equal and, in justice, deserve equality of treatment and status.

Think of the large part of our population that was disfranchised by the 18th century Constitution—all women, all black slaves, and a vast proletariat of property-less workers who could not pay poll taxes. To get the sense of what our founding fathers were like you must remember John Adams who said, “The country should be run by those who own it, by those who have property.”

The succession of amendments that rectified the injustice of the

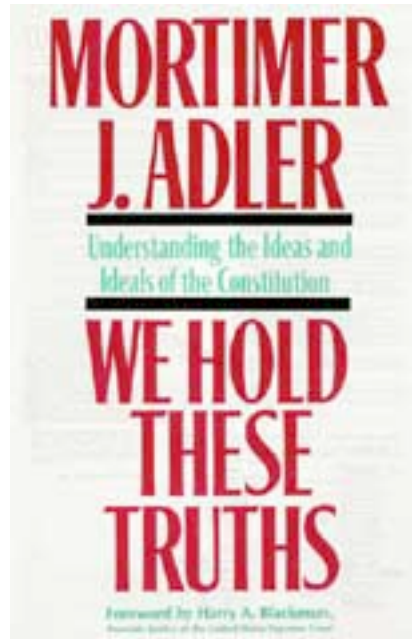
18th century Constitution came slowly. There were the post-Civil War amendments, the Thirteenth, Fourteenth, and Fifteenth; the 1919 Women's Suffrage Amendment, the Nineteenth; and finally in 1964, the Twenty-Fourth Amendment which abolished the poll tax. Democracy did not exist in this country until 1964. The existence of a poll tax disfranchising those without property was a final act of injustice in our Constitution.

Progress, Positivists, and Plato

If you regard the history of the U.S. Constitution from the 18th century to the present as progress toward more and more justice in our basic law, there is implicit acknowledgement of natural justice as the basis of the Constitution's reformation and rectification. This fact is not generally acknowledged.

There are many, among them past and present justices of the Supreme Court and law professors, who take the opposite side of the age-old issue between positivists and naturalists in the philosophy of law. That issue began in Plato's day. In the great dialogue of Plato, *The Republic*, the Socratic dialectic sets up the debate between the positivist view that justice is the interest of the strong, which simply means might is right, and Socrates' defense of the proposition that sheer power can be wrong and there are principles of natural justice.

To deal more closely and clearly with this fundamental difference of opinion, let us look briefly at this age-old issue. On the one hand the positivists, such as Justice Holmes, Judge Hand, Justice Frankfurter, and recently Judge Bork, deny the existence of natural rights, deny natural justice, and take the position that those who have the power to make laws determine what is just or expedient at any time, and what is expedient changes from time to time. If this position were correct there would be no argument of tyranny of a ruling minority over an oppressed majority—as in the 18th century—or of a ruling majority over an oppressed minority—as in the 20th century.



On the other hand we have naturalists such as Justices Cardoza, Brennan, Blackmun, and Marshall, whose position is that an unjust law is a law in name only. Natural justice and natural rights are the standards for judging laws. Minorities and majorities in power can tyrannize, and there must be protection against their tyranny. Unlike expediency, justice does not change from time to time.

I've asked myself how the positivists would explain the amendments to our Constitution. The only thing I can come up with is the positivists assert that the amendments—which the naturalists regard as stages of progress toward democratic justice—came about as a result of power politics, which means that those who stood to benefit had enough political clout to get those enactments adopted.

But is this true? Was it true of the black slaves after the Civil War or of the very small group of militant suffragettes in the second decade of the 20th century or of the disfranchised poor in this century? I hardly think so. The outcries against black slavery came long before the Civil War from abolitionists in the North. And if chattel slavery was ever thought to be unjust, it is always unjust at all times and places. Remember how persecuted and mistreated were the few women who were militant suffragettes. Did they have power politics behind them; did they have the clout to change the Constitution? I hardly think so.

If we dismiss the positivists' interpretation of how the amendments came about, and if the positivists cannot come up with a better explanation of what happened, then our constitutional history is a

story of progress toward democracy—of step after step toward greater justice according to the principles of natural justice and of natural rights. The naturalists win the argument, then, of unchanging justice not merely changing expediency as the standard by which the Constitution can be criticized and improved.

Judicial Review and Natural Justice

Let us consider next the ways in which the injustice of the original Constitution has been rectified. Obviously it has been improved by the addition of those great amendments. But more than that, it has been rectified by the Supreme Court power of judicial review of national and state legislation.

Judicial review has appealed to natural rights and principles of natural justice. Consider the Court's decision in 1896 of *Plessy vs. Ferguson*; then consider the decision in 1954 of *Brown vs. the Board of Education of Topeka, Kansas*. In both cases a minority was being mistreated. In *Plessy vs. Ferguson* blacks were not allowed to use the same restrooms in railroad stations as whites; in *Brown vs. the Board of Education* blacks and whites went to different schools.

Both decisions tried to appeal to the same clause in the Fourteenth Amendment which guarantees equal protection of all under the law. But that clause cannot support opposite decisions without appealing to an underlying principle of justice. Any significant discrimination, as between blacks and whites or females and males, is intrinsically unjust—not a matter of constitutional interpretation but of appealing to justice outside the Constitution.

Hence there are two kinds of action by the Supreme Court in its exercise of its power of judicial review. It can nullify laws that are unconstitutional—let me remind you of the Dred Scott decision before the Civil War, which was constitutionally correct but absolutely unjust—and sometimes nullify laws that are unjust, such as recent decision to nullify the Connecticut law prohibiting use of contraceptives by married couples, a decision which appeals not to any right mentioned in the Constitution but rather appeals to the natural, unalienable right to liberty. When the words were used in that decision calling the law an invasion of privacy, nothing was added in the notion of privacy because liberty itself only occurs in the private sector in those acts by which the public good is not af-

fect; thus, privacy is simply the age-old right to liberty.

Future of Democracy

Democracy in this country is not fully achieved. One more step is needed: the institution of a natural economic right, the right to a decent livelihood. Every human being, to be a decent citizen, needs a decent livelihood, without which our citizens cannot perform their duties as citizens.

But even if our Constitution is somehow amended to secure that economic right, democracy in action—not just on paper—will not be fully achieved without the educational reform that I outlined when I last addressed the Club in 1983, the Paideia Proposal.

We must have a school system with truly equal educational opportunity for all children, with exactly the same curriculum for all children in the public schools from K through 12. The two quickest ways to summarize this are John Dewey's statement in 1900, "What the best and wisest parents would wish for their own children, the community should attempt to provide for all its children," and Robert Hutchins' remark in 1937, "The best education for the best is the best education for all."

Much must be done to make constitutional democracy more effective in the U.S. How? By legislation, by judicial decision, by more amendments still? By a second constitutional convention? Heaven forbid. Only when the Paideia Proposal is nationally adopted and fully realized, sometime in the next century, will we have truly intelligent citizens and farseeing statesmen of the kind that existed—the very few that existed in this country—at the beginning of its history. We don't have citizens now, we don't have statesmen now, and a second constitutional convention would be a horror.

Answers to Written Questions From the Floor:

Q. What is the most serious weakness of the U.S. Constitution?

A. The Constitution's greatest weakness is its failure to secure basic economic equality. This doesn't mean equal amounts of wealth, but that everyone has the conditions of a decent human life that economic welfare provides.

Q. In your book you call attention to the similarity between the

UN Charter and the Articles of Confederation, and suggest that as the Constitution established a more perfect union, the management of today's world tensions requires a similar solution. Please comment.

A. States, not persons, are members of the UN Charter. Similarly the 13 states of the Articles of Confederation were its members. The Confederation had no authority; it wasn't a government. The founding fathers met in Philadelphia in 1787 to preserve peace on this continent. Under the Articles of Confederation, there could be no prevention of war between New Jersey and New York State over the fishing rights in New York harbor. Connecticut and Rhode Island were about to go to war. We had peace on this continent because we moved toward a more perfect union. The same is true of the world. We'll have world peace and security on this planet only if we have world federal government.

Q. Does something need to be done to the Constitution to deal with the growing strength of bureaucracy in the government?

A. I would abolish the White House staff. It consists of unelected officials—a private staff of the president. Woodrow Wilson had only one staff person, Theodore Roosevelt had none, FDR had a small group of private advisors. Any large corporation has a chairman of the board, a president, a CEO, a COO, and a series of senior executive vice presidents. The structure of the executive branch of our government is not properly organized. We should have a series of elected vice presidents. We should return to a cabinet government instead of government by an unelected and unconfirmed White House staff.

Q. In view of the records of those who turn out to vote, should we deal with suffrage in some other way?

A. Every normal human being deserves to be a citizen with suffrage. The only persons who should be excluded are felons, children, or the mentally incapacitated. However, we have few citizens today, despite universal suffrage. I've been reading the Declaration of Independence with high school students across the country for the last few years. Not one high school senior had read the Declaration of Independence before I assigned it. They are totally ignorant of the ideas behind the political framework of this country. We've made them citizens, but in name only. There's nothing wrong with the principle of universal suffrage; what is wrong is our educational system.

Q. Please comment on Alan Bloom's book *The Closing of the American Mind*.

A. It's a very bad book. It's dishonest; the title is misleading. Professor Bloom is totally anti-democratic; he acts as if he invented the Great Books, which he didn't.

Q. Please comment on the role of free speech, as relating to the ruling on the *Falwell vs. Flynt* case.

A. Mr. Rehnquist's decision in the Falwell case is very fine indeed. I'm sure he has the same repugnance that most of us feel toward the publisher of *Hustler*, but he nevertheless rightly defended freedom of speech, while giving Mr. Falwell damages for emotional disturbance.

Q. Should campaign expenditures be limited? Isn't any limitation effectively a violation of the right of free speech?

A. Our electoral procedures are very bad. I wish we could adopt the British style of cutting them down to six weeks and limiting the funds markedly. But we don't have parliamentary government in this country. The British can have a national election in six weeks because each candidate is running for a local office. When candidates are elected, the party in power chooses the prime minister, and the prime minister chooses the cabinet. That's a more sensible procedure than ours. The two most important changes we can make in the next 200 years are a motion toward a parliamentary form of government in the U.S. and the formation of a unitary state, with the abolition of the 50 states.

Q. Is the U.S. government a republican or a democratic government?

A. "Republic" has only one political meaning: It is a constitutional government. There's no opposition between a "republic" and a "democracy;" the division is between oligarchies and democracies, governments with restricted suffrage and those with universal suffrage.

Q. Please comment on the controversy at Stanford concerning core curriculum.

A. Some professors there think books other than the Great Books should be read during the course of core curriculum. I think all English departments should be abolished. There are three distinct

subjects: history of English literature; language skills—reading, writing, speaking, and listening; and reading and discussion of literature. English teachers think literature is only English literature rather than literature in any language; they also think literature is mainly poetry and fiction. But literature contains mathematics, scientific works, philosophy, theology, history, economics, and so forth. English departments came into existence only when the liberal arts ceased to be taught.

Q. Does freedom of the press extend to school publications written and edited by high school students?

A. High school students can sometimes go too far, and the principal should have some control over student publications. The answer would have to be made on a case-by-case basis.

Q. What can or should be done about the intrusion of television into the political process?

A. In the last 20 years we've elected "television presidents." Having appeal on television is more important than being good in office. We've made the nomination procedure a spectator sport, like football. Television has a very deleterious effect. I wish I knew the answer.

Q. Will there be an effective world court?

A. There will be a world court under world government, and we'll have world law and a world constitution. The present World Court is not that remote.

Q. Do you believe in the "convergence theory" between Eastern European cultures and ours?

A. One hundred years ago we only had bourgeois capitalism. We now have state capitalism or communism; we have mixed economies or socialized capitalism. We have in America progress toward universal capitalism through ownership of capital shares, and we have forms of bourgeois capitalism in some backwards parts of the world. The two major economies, state capitalism and our form of capitalism, are on convergent lines. They will discover some of the values in ours, we'll discover some of the values in theirs, and a capitalism that doesn't exist today will come into existence.

Q. What needs to be done to restore the balance of power between the executive, judicial, and legislative branches of our

government?

A. The main problem is between the executive and the legislature. In a parliamentary system of government, there can't be conflict between the executive and legislative branches. The party in power controls both of them. In our system, we can have a Republican president and a Democratic Congress, and they can stymie each other. That's a system of checks without balances.


Q. What did the members of the Continental Congress really mean when they said, "all men are created equal"?

A. To make this statement self-evident, I want to remove the word "created." To make the proposition that all men are equal, one must change it to "all men are by nature equal." Two things are equal when one is neither more nor less than the other. All men are equal with respect to their humanity. No human being is more or less human than another. Any of you who wince at that proposition are confusing nature with nurture. We are very unequally nurtured. One reason for a truly democratic system of education is to ensure that our equality in nature is properly nurtured.

Q. In *We Hold These Truths* you state that the Declaration of Independence, Constitution, and Gettysburg Address comprise the "American Testament." Are the Declaration and the Address taken into account by the Supreme Court, and should they be?

A. The positivists on our court do not take account of the Declaration of Independence or the Gettysburg Address. Those documents appeal to natural rights and natural justice. Positivists think any law passed by a majority in power is a correct law and do not make the appeal that all men are by nature equal and inherit inalienable rights, among them life, liberty, and the pursuit of happiness.

Q. What are the perils of a constitution based on natural law that ends at our borders?

A. There are countries nearby in which natural law and natural rights are not respected and where might is employed without justification. This is the reason for national security and self-defense. It doesn't mean we should give up the basis of our life in natural law and natural principles of justice. 

Printed in The Commonwealth March 7, 1988

THE GREAT IDEAS ONLINE

is published weekly for its members by the
Center for the Study of The Great Ideas
Founded in 1990 by Mortimer J. Adler & Max Weismann
Max Weismann, Publisher and Editor
E-mail: TGIdeas@speedsite.com
Homepage: <http://www.thegreatideas.org/>

A not-for-profit (501)(c)(3) educational organization.
Donations are tax deductible as the law allows.