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## THE CONSTITUTION AND CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES: IT'S PAST, PRESENT, AND FUTURE

Lecture by **Mortimer J. Adler**  
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### *PREFATORY REMARKS*

In the brief time we have together, I am going to try to do three things: *First*, I will briefly summarize the 18th-century achievement that was celebrated during 1987-1989; *Second*, I will pose for you the questions we must answer about the last 200 years (especially the post-Civil War years) and consider the significance of the answers we give to those questions. *And finally*, I will ask about the changes to come in the transition from the present to the future—in the next 200 years.

*WHAT WAS OUR 18TH-CENTURY ACHIEVEMENT?*

First of all, it was the establishment of constitutional government by a written constitution, emanating from a people as its constituents, a people in a new country, and one without a feudal background. Let us compare this with the English achievement. England has a much older constitutional government, but in a country with a feudal background, and without a constitution—with its constitutional laws coming from Parliament, not from the people directly. Few of those who had been subjects of the King, had they remained in 18th-century England, would have had the political status and the liberty of those who were then enfranchised.

Second, ours was the first republic in the modern world, with a written constitution in which a larger proportion of the total population became enfranchised citizens—more than 10 percent, but still a minority of it. It was also the first federal republic in the world—a republic constituted by federated states—with dual citizenship and dual jurisdiction. But it was not the first constitutional government or republic in the world; and it *did not have the first written constitution*. That began in Greek antiquity—in the 6<sup>th</sup> century BC.

What was *not innovative* about our 18th-century achievement? Like all republics or constitutional governments up to that time, ours was an oligarchy with extremely restricted suffrage (with a propertied elite). Compare that to the most extreme form of what Greeks called democracy. For Pericles, it was “rule by the many” but they were, in fact, the very few (less than 30,000 citizens out of 120,000). In this country it was government by white, male, property owners: not women, not blacks, not indentured servants, not apprentices in the shops, not peasants or hired hands on the farms, etc.

Before we go on, let us spend a moment more on the idea of constitutional government itself. An extraordinary invention: a turning point in human history: the great divide between despotism and *constitutional government*.

Aristotle’s definition: a society of freemen and equals who were rulers and ruled in turn. Government could be by might alone *or* by authority with authorized force: *de facto* and *de jure*. Government could be by men of power *or* by laws adopted by the consent of the governed.

There are four significances to Lincoln's "of the people" (even though in Lincoln's day "the people" fell short of the population). First it is the people's government with the people as its possessors. Second it distinguished between Citizens (permanent and principal rulers) and office-holders (transient and instrumental rulers) Third it did not include the current misconception of the locus of government. It is not in Washington, with the people only as subjects of government, *not* themselves rulers, Fourth, national elections are not changes of government, but changes in its *administration*.

The Declaration's commitment to constitutional government which derives its just power (its authorized force) from the consent of the governed (the citizens) and includes the power to alter and abolish a government that fails to secure the unalienable rights that a government should be instituted to secure.

Let me now call your attention to the three things in the Constitution that point toward the future.

*First* it explicitly 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. *Second* Article Five makes the Constitution amendable: not engraved in stone; and hence it has a malleable future. *Third* the Ninth Amendment provides the people with not only the rights enumerated in the first eight amendments, but other rights not there mentioned, rights retained by the people. What are these other rights? They are either civil rights conferred by the several states or the unalienable, natural, and human rights mentioned in the declaration.

*THE QUESTIONS WE MUST ANSWER ABOUT THE LAST 200  
YEARS, AND THE SIGNIFICANCE OF THE ANSWERS WE  
GIVE TO THEM.*

You all know the basic, historical facts: Those disfranchised by the 18th-century Constitution: women, slaves, proletariat (propertyless workers).

Next came the succession of amendments that rectified the injustice of the 18th-century Constitution. The Post-Civil War (1865-70) amendments: 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> amendments, 1919: the 19<sup>th</sup> amendment, and 1964: the 24<sup>th</sup> amendment. This shows that true democracy in this country is extremely recent.

What are the three questions that this succession of amendments requires us to answer. Progress? Regress? Neither? Let us consider the three answers.

First *Progress*: from oligarchy to democracy as measured by successive rectifications of injustice in the 18th-century, pre-Civil War Constitution.

*Regress*: from better to worse government. Again, a principle of justice appears to be involved: unequals should be treated unequally: some given, some denied political liberty and political powers. The advantages of rule by an elite portion of the population, who deserve to be *the people* who are Jefferson's ideal of a natural *aristoi* of virtue and talent and of those with the advantages of birth, property, and education.

The third answer: *neither* progress nor regress because no principles of natural justice, no natural rights, by which the goodness of constitutions and all other man-made laws can be appraised or assessed. The historic changes are not from worse to better or from better to worse, but only from what was *more expedient* under the circumstances of the 18<sup>th</sup> century to what *became more expedient later*—under circumstances that prevailed in the 19<sup>th</sup> century after the Civil War and in the 20<sup>th</sup> century.

These changes resulted in shifts of power—changes in where the power resided, each equally good for its time—relative to the circumstances then prevalent. What was expedient in the 18<sup>th</sup> century became inexpedient in the second half of the 19<sup>th</sup> century and in the 20<sup>th</sup> century. Whereas justice and rights are always the same, the expediency varies with the circumstances. Thus, if slavery is unjust, it is always unjust, but it may be expedient at one time and not at another.

We need a clarification of the basic issue here: the gulf between the first two answers (both of which appeal to principles of natural justice) and the third (which denies such principles).

This is the deepest, long-standing issue in jurisprudence or the philosophy of law—the issue between naturalists, on the one hand, and positivists or legalists, on the other. The Naturalists include Socrates, Aristotle, Aquinas, Locke (Cardozo, Brandeis, Brennan, Blackmun). The Positivists include Thrasymachus, Ulpian, Hobbes, Bentham, Austin (Holmes, Frankfurter, Learned Hand, Bork)

Let us spend a moment on the shape of the issue. *On the positivist side* it is “Might is Right”: in our day, for example, where the power lies—the majority—determines what is right; and so there can be no unjustly oppressed minorities. Man-made laws determine what is just and unjust at a given time and place: justice is variable and relative. There are no standards for appraising the justice and injustice of laws or constitutions. No *mala per se*; only *mala prohibita*.

*On the naturalist side* constitutions give governments authority as well as authorized force (authorization by the consent of the governed). Principles of natural justice and natural rights determine which man-made laws or constitutional provisions are just and unjust. Unjust laws are laws in name only: they have only force behind them (no authority); and might does not make right. There are *mala per se* as well as *mala prohibita*.

*If*—I repeat—*IF* we dismiss the positivists’ interpretation of how the amendments came about and if the positivists cannot come up with a better explanation of their adoption; an explanation of how these amendments became expedient; *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 natural rights. The naturalists win the argument if unchanging justice, not merely changing expediency, is the standard by which the Constitution can be criticized and improved.

That leaves us with the issue between the first and second answers—progress vs. regress—both answers in terms of justice, not simply expediency.

We have the error of the aristocrats or oligarchs: their denial of a basic human equality; their affirmation only of genuine human inequalities.


When both are considered, the consequences are: *Human equality*: equality of status and of liberty—citizenship with suffrage and *Human inequalities*: the inequality of power as between citizens and office-holders (assuming that those who hold public office genuinely deserve to exercise more power).

Hence, the one right choice among the three alternatives is *progress*, even though we have not yet succeeded in making all who are enfranchised genuinely citizens nor have we yet succeeded in always getting the best individuals into public office.

*FROM THE PRESENT TO THE FUTURE:  
THE NEXT 200 YEARS.*

What remains to be done to complete the achievement of constitutional democracy: fulfillment of the central economic right, as central as the right to political liberty? Both are indispensable to the basic right, the right to the pursuit of happiness—the right to a decent livelihood, without which no one can perform his or her other duties as a citizen or succeed in living well.

*There is still another way of looking toward the future.* We have the recency of democracy and capitalism (capital intensive economies) and the great divide in the 20<sup>th</sup> century: from oppressed majorities to oppressed minorities. The next step is to have no oppressed minorities. To the future belongs the fullest realization of democracy and the universalization of capitalism (all citizens, all capitalists).

**But the last word about the future is that it rests with the improved education of the people.** 

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