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THE AMERICAN TESTAMENT

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Part 7 of 12

We turn now to each of the six objectives considered by itself.

. . . in order to form a more perfect union, . . .

In the context of the Convention of 1787, there is no question about what this clause meant historically, and no question as to why it had to come first. The Convention was called because of the pervasive judgment that the Articles of Confederation had failed to bring sufficient unity to the United States, had indeed brought impotence and confusion at home, and dishonor and distrust abroad. Hence the primary motive for the calling of the convention lay in the hope that means could be found to bring about a more perfect union than the Articles had achieved.

The debates, in the public forum and in the ratifying conventions, centered upon the style and vigor of the union that would be served by the new Constitution. The design of a federal republic was itself a novelty. The intent—to have "an indissoluble union of indestructible, hitherto 'sovereign' states"—outran all political experience.

In the years ahead, the evocation of "the Union" was to become a kind of talisman. The major theme of Washington's noble Farewell Address was "the Union." He spoke of it reverently, but with grave apprehensions about its present state and its future. He spoke of it not just in juridical terms, but as something delicately affected—helped or harmed—by actions in every dimension of the effort at a truly national life.

The campaign leading to the election of the third President of the United States was marked by virulent hostility between the "parties" of Hamilton and Jefferson. Jefferson's First Inaugural was tense with his hope and his effort to initiate a reconciliation—to move toward the concord so necessary and so desirable. Only a few decades later, the controversy about nullification occurred. By the time of Lincoln's First Inaugural it was possible—and necessary—to assert that "a disruption of the federal Union, heretofore only menaced, is now formidably attempted."

Before leaving these brief intimations about the theme of "the Union" in our national history, some words from Lincoln's First Inaugural Address, in that ominous context, should be set down:

> I hold that, in contemplation of universal law and of the Constitution, the Union of these states is perpetual. . . . The Union is much older than the

> Constitution. It was formed, in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured, and the faith of all the then thirteen states expressly plighted and engaged, that it should be perpetual by the Articles of Confederation of 1778. And finally, in 1787, one of the declared objects for ordaining and establishing the Constitution, was "to form a more perfect Union."
>
> But if destruction of the Union by one or by a part only of the states be lawfully possible, the Union is *less* perfect than before the Constitution, having lost the vital element of perpetuity.
>
> It follows from these views that no state, upon its own mere motion, can lawfully get out of the Union—that resolves and ordinances to that effect are legally void; and that acts of violence within any state or states against the authority of the United States are insurrectionary or revolutionary, according to circumstances.
>
> I therefore consider that, in view of the Constitution and the laws, the Union is unbroken; and to the extent of my ability, I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the states. Doing this I deem to be only a simple duty on my part; and I shall perform it, so far as practicable, *unless my rightful masters, the American people,* shall withhold the requisite means or in some authoritative manner direct the contrary.

The continual, heightened concern about "the Union" in our life as a nation derives from the fact that as a matter of historical development the union originally conceived as of the States has become, and has come to be regarded as, a union also of the people. However, there are good philosophical reasons why "to form a more perfect union" should be the first item in an articulation of the common good and of the purposes of government—the first item in the preamble to *any* constitution, not just ours.

A society—a multitude of human beings associated for a common purpose and a common life—does not exist in nature as biological organisms do. It comes into existence by the voluntary actions of the human beings who decide to associate. Precisely because it originates in this way, it is said to be conventional (a thing

of voluntary institution), not natural (a product of nature) . But it is not purely and simply conventional.

The reason why human beings form societies (doing voluntarily what other gregarious animals do instinctively) is that men are social by nature; that is, they need to associate with their fellow men in communities in order to lead characteristically human lives. Their common purpose is the cooperative pursuit of happiness, or the mutual supplementation of their several capacities for pursuing it. Human societies, especially the family and the state or political community, are thus both natural and conventional, natural in the sense that they arise in response to a natural need, and conventional in the sense that the way in which they do arise is by rational and voluntary action rather than through the blind impulse of instinct.

In any society, especially in that most complex of all societies which is the state, government is necessary to effectuate the union of wills that brought the society into being in the first place. A government is well designed and good in performance if the way in which it directs and coordinates the life of the society instructs the associated human beings in the implications of the social ties which bind them together as one people. It should also confirm and strengthen their dedication to the objectives which they sought to achieve by willing to associate.

To whatever extent, then, the activities of an instituted government enlighten and strengthen the basic unity that gives a people its historical existence, to that extent the government is good. On the other hand, a government could have the opposite effect if, in the name of forming a more perfect union, it were to impose a rigidly uniform test of loyalty; or if, panicking about the security of the union, it were to .violate liberties that were intended to be immunities from government.

. . . in order to . . . establish justice . . .

As there was a pressing need for a more perfect union, so there was an equally pressing need for the administration of justice. The authors of the *Federalist Papers,* after dealing with the question of union and with the incompetence of the Articles of Confederation in that respect, turned next to the inadequacy of the Confederation in the sphere of justice.

Alexander Hamilton, in *Federalist* #22, wrote: “A circumstance which crowns the defects of the Confederation remains yet to be mentioned—the want of a judiciary power.” The Articles of Confederation contained no provisions for national courts. In Hamilton’s view, the consequent domestic conflicts, confusions, and lack of uniformity in the administration of justice were intolerable. “Is it possible,” he asked, “that foreign nations can

either respect or confide in such a government?" The second clause in the Preamble was obviously in response to a defect in the existing state of affairs that must have been widely felt.

On the plane of more general and philosophical considerations, the second clause can be seen as following hard upon the first. Almost as important as concern for the precarious kind of unity that gives a society its very *being* is concern for the quality of the interactions among persons that give a society its *life*. It is for this reason that a constitutional government should aim at establishing justice.

Starting with Plato's *Republic* and Aristotle's *Ethics* (Book V) , the consideration of the idea of justice runs through the whole tradition of Western political thought. At certain moments in that tradition, justice is broadly conceived as encompassing three different sets of relationships: the duties or obligations that the individual has with respect to society itself; the rights and duties that individuals have in relation to one another; and the obligations that organized society has with respect to the rights possessed by the human beings who are its members. These three sets of relationships, or dimensions of justice, can be denominated *contributive* justice, *commutative* justice, and *distributive* justice.

When it is thus broadly conceived, justice can be viewed as the overriding objective of government, one that subsumes, if it does not include, the other objectives mentioned in the Preamble. In *Federalist #51,* Madison, for example, said: "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost [1] in the pursuit."

The Declaration of Independence had spoken of a just government as one that secures to each man his inalienable rights. When organized society, through the laws and actions of its government, renders to its members what is rightly due them, distributive justice is being done. Questions of justice raised about the fundamental law of the land—the Constitution—are questions of distributive justice. But when, in the framing of the constitution itself, the Preamble calls for the establishment of justice, the framers have in mind how the government being instituted must be set up to ensure that commutative justice is done—justice in the transactions between one member of society and another. It is in this narrower conception of justice that the establishment of justice appears to be coordinate with the other five objectives of government stated in the Preamble.

Commutative justice involves correlative rights and duties—rights that one individual claims for himself and demands that others respect, and duties on the part of others to respect those rights—for example, an individual's right to security of life and limb; his right

against the invasion of his privacy or arbitrary intrusion in his home; his right against defamation of character; his rights with regard to the acquirement, accumulation, exchange, and conveyance of property. When such rights are legally acknowledged, the laws impose upon all the obligation to respect them. Whereas distributive justice consists in those measures by which the state or organized society renders to each person what is rightfully due him, commutative justice consists in one individual's rendering to another what is due him or is his by right.

In order for men to live peaceably together in society and have peaceful commerce or dealings with one another, the rights and duties which are involved in commutative justice have to be given authoritative and definitive recognition, either in immemorial customs that have the force of law or by the enactment of positive laws which prescribe or prohibit certain acts on the part of one individual in relation to another. In addition, a system of courts has to be set up to render judgments in particular cases that fall under these laws; and sanctions have to be applied for the enforcement of the decisions rendered by the courts in the resolution of litigations. To establish justice, then, a constitution must provide for legislative and judicial bodies and for agencies able to enforce the laws and the decisions of the courts.

When we turn from commutative to contributive justice, we turn from the field of private to the field of public law. Contributive justice involves other rights and wrongs than those covered by the laws of property, contract, torts; it also covers more than the wrongs prohibited by the criminal law. On the positive side, it requires that a man, in his relation to all others with whom he is associated in organized society, should render to them what he owes them in virtue of their common social nature and purpose. He owes them the contribution he can make toward the common good—toward their cooperative realization of a good human life for all. The conscientious direction of his talents to the service of society is an obligation that the virtuous man discharges. It is in this sense that Aristotle spoke of the man whose moral virtue directed him to serve the common good as exhibiting "general justice," reserving the term "special justice" to cover commutative and distributive justice.

In the period of this nation's formation, Americans had other words in their lexicon for contributive justice. "The word republic, *res publica,"* Thomas Paine said, "means the public good, or the good of the whole." From his very rich knowledge of the literature of this period, Gordon S. Wood tells us that "no phrase except `liberty' was invoked more often by the revolutionaries than 'the public good.¯ The men of that time had learned from Montesquieu how the principle of republican government differs from that of a monarchical or despotic regime. "There is no great share of probity

necessary to support a monarchical or despotic government," Montesquieu had written. "The force of laws in one, and the prince's arm in the other, are sufficient to direct and maintain the whole. But in a popular state, one spring more is necessary, namely, *virtue"* —the virtue of men as citizens, public virtue.

The men of the revolutionary-constitutional period understood that their experiment in self-government depended for its success on the people's capacity for public virtue. The concept of public virtue is identical with Aristotle's concept of contributive justice. We would today call it "public-spiritedness," and we would find it manifest in voluntary action for the common good on the part of individuals in dealing with such things as an energy shortage or widespread pollution. Our ancestors would have recognized that the task of establishing justice did not extend to this dimension of justice. They would have realized that contributive justice in the conduct of citizens must be largely left to the promptings of moral virtue on their part—largely, but not entirely, for the law does prescribe some actions for the common good, and prohibits some that are injurious to it.

The thrust of distributive justice is in the opposite direction to that of contributive justice. Contributive justice concerns the obligation of the individual to act for the good of society as a whole, an obligation that the individual is sometimes legally required to discharge, but more often discharges from moral conscience in the absence of any specific legal requirement. Distributive justice concerns what is due the individual from organized society as a whole. It aims to see that each individual shall have his fair share of the goods that only organized society can make available to all. With regard to such goods in which the members of society can share, distributive justice is done when the distribution of these goods is fairly apportioned. The doing of distributive justice is mainly covered in the Preamble under a later clause—the one that calls for the promotion of the general welfare.

. . . in order to . . . insure domestic tranquility . . .

Widely read in Western history, particularly the history of the Greek city-states and of the Roman Republic, the writers of the Preamble were thoroughly aware of the distresses to which the body politic is prone—crime and civil turmoil. They were equally cognizant of the traditional affirmation of peace—civil peace—as a component of the common good and as one of the advantages that men seek to derive from living in civil society. Their phrasing of this third objective of government echoed the language of Augustine, who had defined peace as "the tranquility of order." They probably also knew that civil peace had been spoken of as "the work of justice," at least to the extent that justice removes the obstacles to

peace by removing incentives to crime and to violence in the effort to remedy grievances.

Although they are closely related, peace and justice are nevertheless distinguishable aspects of the common good. The undertaking to establish justice presumes the prevalence in the people of the personal virtue of justice, for which it seeks to provide stable arrangements through which virtuous inclinations can find orderly and effective realization. The undertaking to insure domestic tranquility attempts to ward off the prevalence of acts springing from the vice of injustice. Helping prevalent justice to find steady realization and preventing vice from becoming prevalent are, clearly enough, distinguishable even as, in public medicine, measures that promote health are distinguishable from measures to prevent disease.

Civil peace is also closely related to social union. Without the bonds of union and the tranquility of orderly life, a society would hardly exist as such and would be unable to pursue any purpose in a sustained fashion. The maintenance of peace, like the strengthening of union, is therefore to be regarded as having a certain priority to the establishment of justice, even though it is also true that the establishment of justice contributes to the maintenance of civil peace and social unity.

The leaders and people of the revolutionary generation were not so enamored of peace that they would be willing to acquiesce in any measures that might be proposed for maintaining it. They had not been willing to forgo, for the sake of peace, their rights to take whatever steps they thought necessary to redress their grievances, even steps that involved violent disturbances of the peace. In resisting British edicts and protesting against encroachments, they had often deliberately fomented domestic turbulence when their petitions for the redress of grievances went unheeded. Hence, in instituting a new government, they would perforce be sensitive to the possibility that certain measures directed to ensure domestic tran quility might result in the reduction of liberty. "A new nation, conceived in liberty," would not wish, for the sake of unbroken civil peace, to debar legitimate efforts of free men to protest against injustices suffered or to probe toward the expansion or fuller realization of justice.

To insure domestic tranquility without encroaching upon liberties is a delicate assignment for the constitutional government of a free society. America's most penetrating nineteenth-century visitor, Tocqueville, wrote a warning on the point:

> The dread of disturbance and the love of well-being insensibly lead democratic nations to increase the functions of central government as the only power which appears to be intrinsically sufficiently strong,

> enlightened, and secure to protect them from anarchy. . . . All the particular circumstances which tend to make the state of a democratic community agitated and precarious enhance the general propensity and lead private persons more and more to sacrifice their rights to their tranquility. . . . The love of *public tranquility* becomes . . . an indiscriminate passion, and the, members of the community are apt to conceive a most inordinate devotion to order.

The point of the warning cannot be lost on the American people in our own day—a time of convulsive conflicts about social and racial injustice, about undeclared war, about the increasing incidence of crime and of random violence, about the bewildering speed of social change. We still have a fresh memory of actions taken in violation of laws to test their constitutionality. Only a short time ago mass protest meetings and parades took place, suggesting by their size and intensity the latent presence of violent disorder. New questions have been asked about the adequacy of existing means for effective civil dissent by lawful means, and about the proper understanding and role of civil disobedience. Something like a constitutional crisis arose from a line of decisions handed down, over bitter dissenting opinions, by the Warren Court in fourth, fifth, and sixth amendment cases—decisions that limited the power of police by affirming such procedural safeguards as enlarging prisoners' right to counsel and setting stricter standards for gathering evidence and conducting interrogations. A new administration and an altered Court have proceeded to a series of significant alterations in laws and in legal doctrine.

One thing remains constant. A constitutional government, charged "to insure domestic tranquility," must see to it that law enforcement is itself lawful, its processes articulated in law, its conduct subject to steady, critical, and politically accountable examination by the people.

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