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THE AMERICAN TESTAMENT

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Part 10 of 12

> . . . and secure the blessings of liberty to ourselves and our posterity, . . .

Closing his lectures on *Constitutionalism: Ancient and Modern,* Charles H. McIlwain wrote: "The two fundamental correlative elements of constitutionalism for which all lovers of liberty must yet fight are the legal limits to artbitrary power and a complete political responsibility of government to the governed."

That sentence, written in 194o, could have been uttered in an opening address to the Constitutional Convention in Philadelphia in 1787. Americans had proved themselves "lovers of liberty" in their resistance to arbitrary British power and in their war for independence. They were to consummate their revolution by "ordaining and establishing a Constitution for the. United States of America." On the Fourth of July, 1788, James Wilson delivered an oration, at the procession formed at Philadelphia, to celebrate the adoption of the Constitution of the United States. In his proem, Wilson said:

> A people free and enlightened, establishing and ratifying a system of government, which they have previously considered, examined, and approved! This is the spectacle, which we are assembled to celebrate; and it is the most dignified one that has yet appeared on our globe. . . . What is the object exhibited to our contemplation? A whole people exercising its first and greatest power—perform-ing an act of sovereignty, original and unlimited!

In an only slightly less exclamatory way, Madison was to write in 1792:

> In Europe, charters of liberty have been granted by power. America has set the example and France has followed it, of charters of power granted by liberty. This revolution in the practice of the world may, with an honest praise, be pronounced the most triumphant epoch of its history and the most consoling presage of its happiness.

A free and enlightened people performing an act of sovereignty, original and unlimited! A charter of power granted by liberty!

These exclamations were after the fact. In the actual work of ordaining a new Constitution, the Framers were anything but naïve about arbitrary power. Indeed, when they had been British subjects, the Americans were fervently proud of their British liberties. They had by no means forgotten the victories over arbitrary power by which the liberties of Englishmen had been secured. They knew and prized the documents that recorded those victories, documents comprised by what the elder Pitt called "the Bible of the English Constitution"—Magna Carta, the Petition of Right, and the Bill of Rights after the Glorious Revolution of 1688.

Indeed, it was precisely because they remembered those documents, as well as recent royal and parliamentary acts of arbitrary power, that the Framers proceeded, as "lovers of liberty," to place legal limits on the charter of power they were about to grant. In so doing, they borrowed heavily, often in direct wording, from "the Bible of the English Constitution."

In *Federalist # 51,* Madison stated the Framers' concern for the first element of constitutionalism:

> 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. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

In the context of *Federalist #51,* Madison was pondering the task of laying "a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty."

However, in addition to the broad ideas about the precautions that might be effected by the separation of powers and by checks and balances, the Constitution of 1787 contains a composite of many mutually reinforcing guarantees of individual rights, and of limitations on federal and state governments. The Constitution in its main body forbids suspension of the writ of habeas corpus except in cases of rebellion or invasion; prohibits state or federal bills of attainder and ex post facto laws; requires that all crimes against the United States be tried by jury in the state where committed; limits the definition, trial, and punishment of treason; prohibits titles of nobility and religious tests for officeholding;

guarantees a republican form of government in every state; and assures each citizen of the privileges and immunities of the citizens of the several states.

Popular dissatisfaction with the inadequacy of the guarantees in the main body of the Constitution, which was repeatedly expressed in the state ratifying conventions, led to firm demands and consequent promises, which eventuated in the first ten amendments. These amendments have always been regarded as a Bill of Rights. That term, however, should be extended to include not only the limitations in the main body of the Constitution, but also those in later amendments—those that abolish slavery; declare all persons born or naturalized in the United States and subject to its jurisdiction as citizens thereof; forbid the states to abridge the privileges or immunities of citizens of the United States, to deprive any person of life, liberty, or property without due process of law, or to deny to any person the equal protection of the laws; prohibit the denial or abridgment of voting rights because of race, sex, or failure to pay poll taxes.

By such an extended Bill of Rights, taken together with the results of the separation of powers and of checks and balances, Americans placed constitutional limits on arbitrary power. These constitutional limitations intended to provide basic security for one freedom, fundamental throughout the revolutionary era freedom *from* arbitrary power. The revolutionary Americans had freed themselves from British arbitrary power. Their posterity should not be exposed to arbitrary power exercised by the government the Founding Fathers were here ordaining.

The second of Mcllwain's "two fundamental correlative elements of constitutionalism" is "a complete political responsibility of government to the governed." Constitutional arrangements to satisfy such an ideal would make the new nation a republic—a self-ruling people.

Madison's definition of a "republic" in *Federalist #10* was succinct enough: "A republic, by which I mean a government in which the scheme of representation takes place." Another, fuller, and famous passage, in *Federalist #39,* connects the term "republic" with "self-government": "The first question that offers itself is, whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government." The people of a republic, with a government in which some system of representation is operative, is a self-governing people.

Such a high claim puts a heavy burden on what has certainly come to be considered an elusive and complicated idea—the idea of representation. Indeed, the revolutionary period had its beginning in a dispute revolving around that idea. Bernard Bailyn writes: "The question of representation was the first serious intellectual problem to come between England and the colonies, and while it was not the most important issue involved in the Anglo-American controversy (the whole, matter of taxation and representation was `a mere incident,' McIlwain has observed, in a much more basic constitutional struggle), it received the earliest and most exhaustive examination and underwent a most revealing transformation." The history of that transformation is complicated, but its direction is clear.

Edmund Burke's idea of "virtual representation" (by unelected representatives) was ridiculed by Daniel Dulany in a powerful pamphlet, *Considerations on the Propriety of Imposing Taxes in the British Colonies, for the Purpose of Raising a Revenue, by Act of Parliament.* Representation had to stem from electoral power in the citizens, and that would extend to measures for choosing the first elected chief executive the world had ever seen.

More important, the leaders in the early revolutionary period rejected Burke's theory of representation, which he had expressed in words now famous: "Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but Parliament is a deliberative assembly of one nation, with one interest, that of the whole; where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole." The contrary doctrine, to which the Americans appealed, was precisely one that declared "representatives" to be "agents and advocates," to whom "instructions" could be given. In 1774, James Wilson, America's leading jurist, wrote, "The interest of the representatives is the same with that of their constituents," and again, "representatives are reminded (by electoral acts) whose creatures they are; and to whom they are accountable for the use of that power, which is delegated unto them." Section 2 of the 1776 Virginia Declaration of Rights read: "That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants and at all times amenable [accountable] to them." The records of the Convention of 1787 show James Wilson as having said: "The Legislature ought to be the most exact transcript of the whole Society. Representation is made necessary only because it is impossible for the people to act collectively." On a later occasion, he also said that: "The Doctrine of Representation is this—first, the representative ought to speak the Language of his Constituents, and

secondly, that his language or vote should have the same influence as though the Constituents gave it." This tendency is summed up in a letter written by Thomas Jefferson in 1816, altering Madison's definition of a republic: "Were I to assign to this term a precise and definite idea, I would say that, purely and simply, [the term "republic"] means a government by its citizens in mass, acting directly and personally according to rules established by the majority; and that every other government is more or less republican, in proportion as it has in its composition more or less of this ingredient of the direct action of the citizens."

The conviction was so strong about the doctrine of instructions—the doctrine that at any time a clear expression of the will of the majority of constituents is binding on the action of their representa-tive—that some of the new state constitutions, after independence, provided for it. However, in the First Congress, a proposal to include the right to instruct representatives in the Bill of Rights was voted down by a large majority. Questions had begun to arise about what a sound theory of representation might entail.

The last word here, on representation and elections, can come from James Wilson, lecturing on law in the College of Philadelphia after his term as member of the first Supreme Court. His words steer clear of hard questions about the idea of representation and emphasize the need for more experience with elections and with the representative bodies they select:

> Of the science of just and equal government, the progress, as we have formerly seen, has been small and slow. Peculiarly small and slow has it been, in the discovery and improvement of the interesting doctrines of election and representation. If, with regard to other subjects, government may be said, as it has been said, to be still in its infancy; we may, with regard to this subject, consider it as only in its childhood. And yet this is the subject, which must form the basis of every government, that is, at once, efficient, respectable, and free.
>
> The pyramid of government—and a republican government may well receive that beautiful and solid form—should be raised to a dignified altitude: but its foundations must, of consequence, be broad, and strong, and deep. The authority, the interests, and the affections of the people at large are the only foundation, on which a superstructure, proposed to be at once durable and magnificent, can be rationally erected.

> Representation is the chain of communication between the people and those, to whom they have committed the exercise of the powers of government. If the materials, which form this chain, are sound and strong, it is unnecessary to be solicitous about the very high degree to which they are polished. But in order to impart to them the true republican luster, I know no means more effectual than to invite and admit the freemen to the right of suffrage, and to enhance, as much as possible, the value of that right. Its value cannot, in truth, be enhanced too highly. It is a right of the greatest import, and of the most improving efficacy. It is a right to choose those, who shall be intrusted with the authority and with the confidence of the people: and who may employ that authority and that confidence for the noblest interests of the commonwealth, wtihout the apprehension of disappointment or control.
>
> This surely must have a powerful tendency to open, to enlighten, to enlarge, and to exalt the mind. I cannot, with sufficient energy, express my own conceptions of the value and the dignity of this right. In real majesty, an independent and unbiased elector stands superior to princes, addressed by the proudest titles, attended by the most magnificent retinues, and decorated with the most splendid ragalia. Their sovereignty is only derivative, like the pale light of the moon: his is original, like the beaming splendor of the sun.
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> The benign influences, flowing from the possession and exercise of this right, deserve to be clearly and fully pointed out. I wish it was in my power to do complete justice to the important subject. Hitherto those benign influences have been little understood; they have been less valued; they have been still less experienced. This part of the knowledge and practice of government is yet, as has been observed, in its childhood. Let us, however, nurse and nourish it. In due time, it will repay our care and our labor; for, in due time, it will grow to the strength and stature of a full and perfect man.

One further point remains to be made—the point that the "two fundamental elements of constitutionalism" are, indeed, "correlative." A whole range of civil liberties, involving legal

limitations on the powers of government, are precisely the liberties by which the people are assured security for their development and exercise of electoral judgment, and for holding their government at all times accountable.

The point is amply clear insofar as it touches the political meaning of all the First Amendment rights. In addition to those rights are the civil liberties indispensable to safeguarding the people's position as the standing principal ruler, such as protection from arbitrary arrest and imprisonment, from bills of attainder often used in the past to silence political opposition, from unreasonable and arbitrary searches and seizures.

There can be no doubt that the main preoccupation during the Revolutionary and the Constitution-making periods was with political liberty—in its two dimensions, one involving a freedom from arbitrary power, the other involving freedoms for the task of keeping government accountable for its performance within the powers assigned to it.

The general criterion for judgments of governmental performance *intra vires* involved another liberty, which can appropriately be designated personal liberty. Indeed, personal liberty was more fundamental than the two aforementioned political liberties, since they, in effect, served to protect it. In significant measure, personal liberty was grounded in law, in the sense of being "secured" by law and government.

How would such personal liberty have been defined by the American founding leaders? In the context of the Declaration of Independence, personal liberty would consist in the capacity to exercise effectively the natural right equally possessed by all men to the pursuit of happiness. Was government necessary for conferring such liberty on citizens and safeguarding it? The answer was firmly in the affirmative. Are not laws antithetical to such liberty, so that the more law, the less liberty? The answer was firmly in the negative.

All the leaders of the founding generation were well acquainted with John Locke's *Second Treatise on Civil Government.* There is no evidence anywhere that there was any fundamental disagreement with his "resolution" of age-old questions about the relation between law and liberty.

In Chapter IV of his treatise, a chapter interestingly enough entitled "Of Slavery," Locke wrote as follows:

> The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of Nature for his rule. The liberty of man in society is to be under no other legislative power but that established by consent in the commonwealth,

> nor under the dominion of any will, or restraint of any law, but what that legislative shall enact according to the trust put in it. Freedom, then, is not what Sir Robert Filmer tells us: "A liberty for every one to do what he lists, to live as he pleases, and not to be tied by any laws"; but freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it. A liberty to follow my own will in all things where that rule prescribes not, not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man, as freedom of nature is to be under no other restraint but the law of Nature.
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> This freedom from absolute, arbitrary power is so necessary to, and closely joined with, a man's preservation, that he cannot part with it but by what forfeits his preservation and life together.

The same points are somewhat more amply stated in Locke's Chapter VI:

> For law, in its true notion, is not so much the limitation as the direction of a free and intelligent agent to his proper interest, and prescribes no farther than is for the general good of those under that law. Could they be happier without it, the law, as a useless thing, would of itself vanish; and that ill deserves the name of confinement which hedges us in only from bogs and precipices. So that however it may be mistaken, the end of law is not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings, capable of laws, where there is no law there is no freedom. For liberty is to be free from restraint and violence from others, which cannot be where there is no law; and is not, as we are told, "a liberty for every man to do what he lists." For who could be free, when every other man's humor might domineer over him? But a liberty to dispose and order freely as he lists his person, actions, possessions, and his whole property within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own.

It is important, perhaps, to look once more at that part of the first text quoted from Locke where, after speaking of freedom under law, he refers to a sphere of freedom in which every one has "a liberty to follow [his) own will in all things where that rule prescribes not." Whatever may have been Locke's views concerning the desirable scope of that sphere in which laws do not regulate human conduct and individuals are free to do as they please, it is worth recording that there is no body of texts in the founding literature which urges that the sphere of unregulated conduct should be very large, or as large as possible. That literature, in other words, does not espouse the position later to be called "minimalism" —the view that that government governs best which governs least, because it thereby enlarges the sphere of personal liberty. It was left open to future history to determine how much legal regulation is needed to secure, indeed to preserve and enlarge, personal liberty.

For final confirmation of the American consensus, on Locke's theory of the relation of law and liberty, a text from James Wilson serves best. It not only confirms Locke's doctrine, but also argues, by implication at least, that that government governs best which governs, not least or most, but most justly; and that human beings have as much personal liberty as they deserve, or can use justly, when their conduct is regulated by just laws. The passage from James Wilson reads as follows:

> In a former part of these lectures, I had occasion to describe what natural liberty is: let us recur to the description, which was then given. "Nature has implanted in man the desire of his own happiness; she has inspired him with many tender affections towards others, especially in the near relations of life; she has endowed him with intellectual and with active powers; she has furnished him with a natural impulse to exercise his powers for his own happiness, and the happiness of those for whom he entertains such tender affections. If all this be true, the undeniable consequence is, that he has a right to exert those powers for the accomplishment of those purposes, in such a manner, and upon such objects, as his inclination and judgment shall direct; provided he does no injury to others; and provided some public interests do not demand his labors. This right is natural liberty."
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> If this description of natural liberty is a just one, it will teach us, that selfishness and injury are as little countenanced by the law of nature as by the law of man. Positive penalties, indeed, may, by human

> laws, be annexed to both. But these penalties are a restraint only upon injustice and overweening self-love, not upon the exercise of natural liberty.
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> In a state of natural liberty, every one is allowed to act according to his own inclination, provided he transgress not those limits, which are assigned to him by the law of nature: in a state of civil liberty, he is allowed to act according to his inclination, provided he transgress not those limits, which are assigned to him by the municipal law. True it is, that, by the municipal law, some things may be prohibited, which are not prohibited by the law of nature: but equally true it is, that, under a government which is wise and good, every citizen will gain more liberty than he can lose by these prohibitions. He will gain more by the limitation of other men's freedom, than he can lose by the diminution of his own. He will gain more by the enlarged and undisturbed exercise of his natural liberty in innumerable instances, than he can lose by the restriction of it in a few.
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> Upon the whole, therefore, man's natural liberty, instead of being abridged, may be increased and secured in a government, which is good and wise. As it is with regard to his natural liberty, so it is with regard to his other natural rights.

The title page of the first published edition of James Wilson's *Works* contained a motto from Cicero: Lex fundamentum est libertatis, qua fruimur. Legum omnes servi sumus, ut liberi esse possimus. "Law is the foundation of the liberty we enjoy. We are all servants of the laws in order that we can be free."
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