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## A REVERED CONSTITUTION

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# A REVERED CONSTITUTION

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*The following is adapted from one of Professor Ceaser's seminar sessions at a 2016 Jack Miller Center Summer Institute in Philadelphia.*

**T**he Constitution of the United States of America is first and foremost a legal document. It serves as the supreme law of the land, establishing the basic structure of the federal government, determining the powers of the federal government and certain powers of the states, and delineating a set of basic rights.

Yet the Constitution has played another important, far less remarked upon role: the body of thought that went into developing the Constitution comprises a notable contribution to political theory. Prior to the “founding” of our nation, the notion of “founding” and “founders” was not in vogue. Indeed, to this day it remains largely absent from the political life of most other democratic nations. “Founding” is thus one of the principal features of American exceptionalism, and it was the work of our “founders” that brought these themes into currency in constitutional thought.

One of the main questions in constitutional thought grew directly out of the practical business of making a new government: namely, what is the best way to go about forming a government? This question is

taken up at the outset of *The Federalist*. In attempting an answer to this question, two basic possibilities are provided. Government can come into being either by *reflection and choice*—that is, by some individuals consciously making a plan to which the people consent—or it can come into being by *accident and force*—that is, by chance and without consent. When the authors of *The Federalist* raised this question, they left no doubt about which of these alternatives they hoped to see confirmed. Their task, after all, was to ratify and implement a new constitution, making a good government by “reflection and choice.”

And, I confess, for many years I read that passage in the first *Federalist* paper without ever entertaining the superiority of the alternative position. The option favoring reflection seemed to me so obvious as not to require further consideration. But it turns out that I missed something crucial. I will avoid here the discussion of whether *choice* is better than *force*, and focus instead on the dimension of whether *reflection* is to be preferred to *accident* in the formation of governments.

## TWO THEORIES ON FOUNDING

The best-known spokesperson of government forming by “accident” is Edmund Burke. He celebrates the fact that the English system was not “formed upon a regular plan or with any unity of design,” but instead “in a great length of time and by a great variety of accidents.” Consider three arguments in favor of this model.

First, the idea of completely remodeling government contains something fearful about it. It presupposes a central authority with power to make and remake a government, and it thereby endorses, at least conceptually, the existence of a power without limits. Once acknowledged and accepted, what is there to prevent such a power from being invoked again?

Second, human reason is unequal to the task of successfully erecting a plan of this magnitude. It is too big and complex a job. If, as some say

today, you cannot remake one-sixth of the economy, what makes you think that you can remake nine-tenths of a political system?

Third, a public that favors creating a new model of government is destabilizing. New-modeling government sets a dangerous precedent. If a government is new-modeled once, why not new-model it again, just as those of a progressive temperament are inclined to tear down a house deemed old or obsolete and replace it with something new and modern?

The almost natural process of growth and accommodation that Burke described for the formation of government is referred to as the organic model. In the “organic” formation of governments, a political system is said to evolve slowly by accidents and incremental adjustments, with customs and habits developing to support it. The people come to appreciate the resulting heritage or tradition, which adds another prop to preserve the system.

This organic model stands in stark opposition to the idea of rational making. Rational making, or making by choice, has no similarly accepted name, but we can label it the “synthetic” or the “rationalist” model. Proponents of this model also appeal to nature, but in a very different way than that posited in the organic conception. Nature under the synthetic model refers to necessary relationships—abstract laws of nature—that are grasped by reason. This is not your garden variety of nature.

The philosopher René Descartes, who can be credited with inaugurating the Enlightenment project, offered a version of the rationalist model. In his *Discourse on Method*, he writes, “I imagined to myself that people who were semi-savages in earlier times and who became civilized only little by little and created their laws only as they were compelled to by the extent to which crimes and quarrels bothered them would not be so well regulated as those who, from the moment they first assembled, followed the constitution of some prudent legislator.”

Descartes' idea of the founder here is one who begins *de novo*, unconstrained by customs or ancient structures. The founder would ideally level the ground and bring to bear objective scientific knowledge in building a political order. This model is in the vein of an Enlightenment version of city planning and rational control.

It is undeniable that, by underscoring the claim that good government is made by reflection, constitutional thought in America has promoted a rationalist mode of thought within the American mind. Consider Madison's stirring question in *Federalist* 14: "is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity [or] custom?"

But while *The Federalist* comes down on the side of remaking government, its authors were nevertheless deeply sensible of some of the practical concerns raised by the organic model. Beyond merely noticing objections, they seek to qualify their rationalist view. American constitutional thought aims in a certain way to combine rationalism and traditionalism. It does so by reaching beyond the modern expressions of these positions and drawing on classical expressions of both positions.

## THE AMERICAN FOUNDERS

As I mentioned earlier, though the themes of "founding" and "founders" are common in American discourse, these notions are largely absent in other nations. What, then, accounts for the prominence that is accorded in America to the founders? Perhaps the best explanation is that Americans pay so much attention to the founders because this theme is developed in constitutional thought and in *The Federalist*.

*The Federalist* treats the theme of founding, discussing the different possibilities in establishing government and surveys some of the great lawgivers of antiquity. Though they are reluctant to sing their own praises, there is no doubt that the authors of *The Federalist* sought to

place in the reader's mind the possibility that America's founders should be considered the rivals of, if not the replacements for, the founders of antiquity as the most esteemed models.

It is important, moreover, to ask why American constitutional thought embraced this view of founding and what effect it was intended to have. Founders are among the greatest of actors in political life, and *The Federalist's* account of founding and founders was above all meant to lend support to the idea of political greatness. It was meant to keep this idea alive in modern political life.

In celebrating greatness, *The Federalist* denies that politics can ever be controlled by a science or doctrine. While it is true that the American system of government was constructed to reduce the reliance on individual talent and "enlightened statesmen," this does not obviate the fact that politics needed and will always need the contribution of great persons. *The Federalist* emphasizes the fact that political talents and virtues are unequal, and that political greatness is essential to a thriving nation.

Looking back, it is interesting to consider how well America's founders achieved the renown that *The Federalist* sought for them. The American founding is widely considered today as the seminal event of modern constitutionalism. America's founders, including the leaders of the Revolution, are among the few in the world honored as great successes, sharing the stage with perhaps only Gandhi and Mandela.

## WHY A WRITTEN CONSTITUTION?

The founders drew in important ways on a classical understanding of founding, but they departed in two important ways. The first difference between the ancient and American mode of establishing government involves the issue of consent.

Acceptance by consent means that a lawgiver must settle for some-

thing less than perfect. Wisdom must bend to consent. *The Federalist* here cites Solon, the lawgiver of democracy in Athens, who “confessed that he had not given his countrymen the government best suited to their happiness, but most tolerable to their prejudices.” The American founding in this respect appears to be closer to the methods of Solon than to another ancient founder, Lycurgus, who used force.

Founding by force was out of the question, but it was not the necessity of the case that guided their decision. They chose consent because it was the supreme test of the viability of republican government. The ratification of the Constitution by consent arguably stands as the most important event in the establishment of modern republican government. In all human affairs, the initial act tends to be the most important one, setting the precedent for all that comes after.

The second difference between the ancient mode of founding and the American method turned on the use of a written constitution. The Americans set out in one document the basic structure of government and its basic powers and limitations. The ancients, apparently, did not.

The instrument of a written constitution is now so much taken for granted that few even recognize it as a *chosen* instrument. It is known, of course, that a nation, for example Great Britain, can have an unwritten constitution in the sense of a known set of stable laws, customs, and understanding that structure and limit government. But this is widely regarded as a relic or a curiosity. It has been all but forgotten that there were once no written constitutions and that theoretical objections were once advanced in opposition to the whole idea.

In looking back on the original period of American constitution making, which includes the writing of the state constitutions immediately after the break from Britain in 1776, it is surprising to learn that some American leaders counted the idea of a written constitution as one of their great theoretical innovations. Thomas Jefferson contended that Virginia was “the first of the nations of the earth, which assembled its wise

men peaceably together to form a fundamental constitution, to commit it to writing and place it among their archives, where every one should be free to appeal to its text.” Jefferson may have been in error in placing Virginia before South Carolina, but on the main point about the novelty of written constitutions, I do not know that his claim has ever been definitively controverted.

Given the commitment to the idea of popular consent, which had already become accepted in some of the states, a written document in 1787 was necessary. The ratifying bodies had to consent to something, and it was only by referring to a common text that people assembled in different places at different times could conduct the exercise. The history of the ratification process bears this out. The main features of the proposed constitution were discussed and debated not only in the ratifying conventions but also in pamphlets and in the popular press, as was the case with most of the essays in *The Federalist*.

Yet the significance of a written text went beyond the goal of public consent. Conceived as supreme law, the Constitution marked an innovation in the form of government. It placed a written law above the ordinary government. This means that no statute passed and no act taken by any official can rightfully claim to stand if it is inconsistent with the Constitution. To fortify this legal hierarchy, the Constitution derives its legitimacy from “the people.”

*The Federalist* explains what is so unique here: “The important distinction so well understood in America, between a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government, seems to have been so little understood and less observed in any other country.” The point is that the will of government officials is subordinate to a written law that the government itself cannot alter.



## REVERENCING THE CONSTITUTION

The idea of a written constitution is coupled in *The Federalist* with another important contribution about how the people should regard the document. What kind of thing is a written constitution? From a legal standpoint, a written constitution is higher law. But is it merely law, or does it perform a further function and have a different status? Is the Constitution something to be venerated—something that endows government with respect and contributes to its stability and endurance—and that provides a bond that connects the people to the nation?

As with the idea of a written constitution, many today can easily overlook the originality of this doctrine. But there is no logical connection between what are just words on a page and the veneration we apply to them. The idea of reverence for the Constitution was a creation of *The Federalist*. But why did *The Federalist* create this doctrine of constitutional reverence?

First of all, the experience of the leading figures in writing and promoting the Constitution led them to appreciate just how difficult it was to secure a happy outcome for this kind of venture. The odds of success, they concluded, would always be slim, and there were always grave risks in trying. Every attempt at remaking government creates instability and threatens to divide the nation.

These leaders were also aware of how favorable, relatively speaking, were the circumstances in their day for accomplishing their objective. The proposed constitution was being considered at a time when people still had unusual confidence in their leaders, most notably George Washington, and when there was a lingering unity of purpose stemming from the Revolution.

Even more importantly—though the authors could not openly state this about themselves—was that the main figures involved were persons of exceptional talents, with rare devotion to the public good, and,

in the case of a few, extensive knowledge of the science of politics. As I hinted above, accident (or chance) played a critical and perhaps decisive role in ratifying the Constitution.

Given these facts, the founders concluded that it would be best to lock in the gain. Veneration of the Constitution was a means to assure its durability and avoid temptations to engage in experiments of new-modeling the government. Durability would not exclude changes, which the Constitution allows for by the process of amendment. But amendment is not made easy, as this would defeat the objective of durability.

It is important to note, finally, that while *The Federalist* allows for piety as a support for the Constitution, it also presents the rational arguments in its favor. Depending on one's inclination, either basis of maintaining the frame of government might work. This combination of rationalism and traditionalism is not easy to realize, as these two commitments pull the public mind in different directions. But suspended between these two poles is arguably the most realistic position for the public mind.

To support this combination, I chose upon solemn consideration to place "Fed 49" on my Virginia license plate. By this means I hope to impress on all who venture on our roads, and especially on the willful who tailgate, the need for restraint and the importance of fidelity to the Constitution.

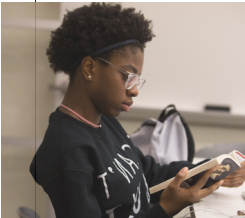


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