Daniel Lazare

America the Undemocratic

The United States, as every American schoolchild knows, is the oldest and still greatest political democracy on earth. Non(Un?)-Americans may disagree, but on one point there is complete unanimity: the United States is different. Just how different can be gleaned from two seemingly innocuous statements by the man who is still America's *numero uno*, Bill Clinton. The first is one of Clinton's favourite aphorisms, one he is fond of repeating at nearly every opportunity:

> There's nothing wrong with America that can't be cured by what's right with America.[1]

The second is a little homily he delivered in December 1997 at a televized 'town hall' meeting in Akron, Ohio:

> We live in a country that is the longest-lasting democracy in human history, founded on the elementary proposition that we are created equal by God. That's what the Constitution says. And we have never lived that way perfectly, but the whole history of America is in large measure the story of our attempt to give more perfect meaning to the thing we started with—the Constitution and the Bill of Rights.[2]

Both statements are worthy of close inspection. The first is of value because of the insight it offers into the solipsistic nature of US politics. If what's wrong with America can be fixed by what's right with America, then it is a very small step to concluding that all answers must come from within. Since Americans have no need to learn from anybody else, outside help is unneeded and unwanted. Foreigners have nothing to offer. They should keep their opinions to themselves.

The second statement represents the same principle applied to history. The story of the United States, it seems, is also a closed circle. No matter how far America travels in the world, it always circles back to the principles that gave it birth. Given that it is the job of Americans 'to give more meaning to the thing we started with', however, it appears that those principles were somehow ambiguous or incomplete in their original form. Filling in the Founders' blanks is not easy. Considering that Clinton, a former law professor no less, is so ignorant of what the Founders wrote that he believes that 'the elementary proposition that we are created equal by God' comes from the Constitution when fact it is a paraphrase of a famous line in the Declaration of Independence ('We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights . . .'), it is extremely difficult. But in the end it does not matter. The important thing is that they try. Americans know that even though they 'have never lived perfectly', they always wind up 'more perfect' than when they started. They know this because they are Americans. No one else even comes close.

Latent Crisis

Solipsistic reasoning like this, so common in the US that it all but goes unnoticed, is at the heart of a growing crisis of American democracy. Americans can proclaim themselves the greatest democracy on earth, one that is more perfect with every passing year, because: (a) it is an article of national faith that this is the case; (b) given that American politics are a closed circle, there is no real basis for comparison with any other country that Americans can possibly regard as valid and

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[1] Todd S. Purdum, 'Facets of Clinton,' *The New York Times Magazine*, 19 May 1996, p. 36.
[2] White House Press Release, 'Discussion Remarks in Town Hall Meeting on One America,' 3 December 1997.

therefore no basis for contradiction; and (c) relative to its own narrow legal standards, the United States is indeed freer and more liberal than at any time in the past. Although the American Civil Liberties Union (ACLU) is forever moaning about the Bill of Rights hanging in the balance, the fact is that Americans have never been freer to speak or write what they please, to express themselves politically, artistically, or sexually, to worship or not to worship as they may wish.

These are all civil liberties that more or less derive from the Bill of Rights. Hence, they are the only civil liberties that Americans, in their self-referential way, regard as valid. But if we adopt broader criteria than those traditionally used in the US, a very different picture emerges. Relative to its own past, the US civil liberties record is no better than mixed—ahead in certain respects, behind in others. Relative to the rest of the advanced industrial world, it is increasingly negative. Compared to nations of similar economic development, the US treats its citizens more harshly, jails them more frequently and for longer terms, limits their ability to defend themselves economically, and curtails them politically. With the possible exception of Japan, American politics, as a consequence, are the narrowest in the First World, its daily press is the blandest, while the political debate it serves up is the most intellectually vapid. Judging from the huge numbers who routinely stay at home on Election Day, its voters are among the most demoralized. In an age of privatization and mass unemployment, needless to say, political democracy is under growing pressure across the board. Still, using broader measurements than those usually employed in the US, there is little question that the political gap between America and the rest of the First World is growing.

To be more specific:

(i) Although drug policy is a mass of contradictions throughout the First World, nothing compares with the mass hysteria and unchecked brutality of the US war on drugs. As of 1995, the latest year for which figures are available, arrests for non-violent drug offences were running at 1.5 million a year, up 31 per cent during Clinton's first three years in office alone. More than a million of those arrests were solely for possession. Hundreds of life sentences have been handed down for possession of small amounts of cocaine—as little as 650 grams—in the state of Michigan alone, while, thanks to California's notorious 'three-strikes' law, in which a third felony conviction triggers an automatic life sentence, hundreds more life sentences have been imposed for marijuana possession as well. Whereas 15 or 20 years ago black Americans were being taken into custody for drugs at twice the rate of whites, today they are being arrested at more than three times the rate and drawing longer sentences to boot.[3]

[3] Federal Bureau of Investigation, *Uniform Crime Reports for the United States 1996,* Washington, DC 1996, pp. 280–2. Data on life imprisonment comes from Families Against Mandatory Minimums, Washington, DC.

(ii) While criminal penalties have been creeping upward throughout the First World, similarly, nowhere is mass imprisonment the growth industry that it has become in the United States. By 1995, the US incarceration rate stood at 600 per 100,000 people, just 13 per cent below that of Russia, the world leader, and six to 12 times that of Western Europe. At any given moment, nearly one-third—32.2 per cent—of black males aged 20 to 29 are under the control of America's criminal-justice panopticon, which is to say in jail or prison, on probation, or on parole.[4]

(iii) Where all other First World countries have either abolished or greatly scaled back use of the death penalty, the US has executed more than 450 people since 1976 and is currently executing them at the rate of one every five days. A recent UN study found the use of capital punishment in the US to be unfair, arbitrary, and racially and economically biased. The US is also one of only six nations that execute people for crimes committed under the age of 18, the others being Iran, Nigeria, Pakistan, Saudi Arabia, and Yemen.[5]

(iv) Although public opinion polls show overwhelming support for a third political party, the closed nature of the US electoral system makes any escape from the 142-year-old Republican-Democratic duopoly, the oldest such two-party system in the world, all but impossible. Where citizens of more modest countries are able to organize viable new parties virtually overnight, Americans are precluded from doing so seemingly forever. While Americans are thus minimally constrained when it comes to the expression of political ideas, they are maximally constrained when it comes to translating those ideas into action through electoral politics. Considering that the Republican and Democratic parties are little more than hollow shells by this point, sustained by massive infusions of government aid, America can be said to lack not only a third party but a first or second party also.

(v) Now that *Tangentopoli* is winding down, American politics stand out as the most corrupt in the advanced industrial world. Despite the fact that the American Revolution of 1775–83 was to a great extent a reaction against the system of legalized corruption then at its height in Georgian England, the American system two centuries later is little more than a supercharged version of this same 'Old Corruption'. The virtual absence of a party structure means that each and every politician is a freelance entrepreneur, cutting deals and raising funds in an effort to propel his or her political career to an ever 'more perfect' level. Congress meanwhile functions as little more than a political bourse. When questioned at a congressional hearing why he had funnelled $300,000 to various Democrats on Capitol Hill, oilman Roger E.

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[4] Marc Mauer, *Americans Behind Bars: US and International Use of Incarceration, 1995*, Washington, DC 1997.

[5] Elizabeth Olson, 'UN Report Criticizes US for "Racist" Use of Death Penalty', *The New York Times*, 7 April 1998, p. A17.

Tamraz replied that the answer was easy: 'to get access'. 'I think next time I'll give $600,000', he added.[6] While Italy has moved vigorously to rein in corruption, all such efforts in the US to date have flopped and will continue to flop until major structural changes are implemented.

(vi) The US Senate, arguably the more powerful of the two houses of Congress, is the most unrepresentative legislative body with significant political clout in the advanced industrial world. Thanks to the principle of equal state representation, a demographic giant like California—population 32 million, 50 per cent of whom are black, Hispanic, or other minority—has the same number of senators (two) as a lily-white rotten borough like Wyoming, population half a million. Inequities like these are fully comparable to the racial gerrymandering of the Deep South at the height of Jim Crow. Yet it is hard to know which is more scandalous—the fact that they continue to exist and are actually growing worse, or the fact that even the liberal media rarely mention them from one decade to the next.

(vii) The state of American labour law, is also scandalous. Entire categories of workers, often the most vulnerable and exploited, are effectively barred from unionizing: domestic servants, agricultural workers, temporaries, freelances, and so on. Six decades after the great organizing battles of the 1930s, thousands of workers are still fired each year for union organizing, supposedly a federally-protected activity. According to one recent survey, 71 per cent of employees believe that workers who dare to organize will lose their jobs.[7] Massive corporate law-breaking like this is the chief reason why unions lose more than 50 per cent of government-supervised recognition elections in the private sector while winning 85 per cent in the more law-abiding public sector. Yet federal authorities rarely give corporate law-breakers more than a slap on the wrist.

Lastly, the US Presidency, since at least the Nixon era, has been enmeshed in three different crises, each of which has illustrated, albeit in different ways, the vulnerability of the Constitution to abuse and paralysis. On the one hand, presidents are prone to abuse their power in ways that are less common in parliamentary systems. On the other, when Congress does move to check presidential power, the result is usually gridlock rather than democratic governance. And if the stars are aligned properly, and the President and Congress do happen to achieve a common democratic purpose, then it is more and more likely that an increasingly conservative Supreme Court will rule them out of order, as it did in *Buckley v. Valeo* (1976), striking down campaign finance reform, or *US v. Lopez* (1995), holding that Congress had exceeded its constitutional authority in forbidding students from carrying handguns in local public schools!

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[6] David E. Rosenbaum, 'Oilman Says He Paid for Access by Giving Democrats $300,000', *The New York Times*, 19 September 1997, p. A1.

[7] Commission on the Future of Worker-Management Relations, US Department of Labour, *Fact Finding Report*, May 1994, p. 19.

One could go on, but the point is clear: the democratic gap between the US and the rest of the First World is widening dramatically. The reasons, this article will argue, have to do with the same closed, self-contained political system discussed earlier, a system that precludes comparison and hence democratic competition with other advanced industrial nations. More specifically, it has to do with the same Constitution and Bill of Rights that Clinton finds so sacred, both with the document itself and the religious aura surrounding it. The cult of the Constitution is the basis of America's solipsistic political culture. It draws a circle of faith whose effect is to separate believers from everybody else. *Pace* the ACLU and the rest of the vast US civil-liberties establishment, this circle of faith does not shore up democracy and civil liberties, but, quite the contrary, weakens them by shielding America's pre-modern, fundamentally irrational constitutional system from criticism and analysis. The more Americans genuflect toward the supposedly omniscient Founding Fathers, the more their own political abilities atrophy. Intellectual deterioration leads to political decay, which leads to the sort of enervation that is now gripping the American system. The problem is not that Americans obey their ancient Constitution too little, as so many liberals seem to think. The problem is that they defer to it too much without considering why they should be controlled by a plan of government drawn up by a group of merchants and slaveowners at the dawn of the modern era.

This is not a common line of criticism in the United States, to say the least. Whereas the British Left has never been more conscious of the constitutional question, the American Left, such as it is, has never been more oblivious. Whilst British socialists are turning a jaundiced eye toward all their most fundamental political institutions, Americans remain deep in an age of faith. While arguing furiously over what individual bits and pieces of the Constitution mean, they rarely pause to consider the document as a whole. A fixed and sacred constitution would seem to be anomalous in a world in which all is profaned and everything is in flux. Yet the more anomalous it becomes, the more that anomaly is ignored. As US democracy runs downhill, one would think that Americans would grow increasingly sceptical of their most basic institutions and increasingly bold in their search of answers. Yet the opposite is the case. As democracy deteriorates, all pretence of a search is abandoned. This article is an attempt to throw open a window or two and admit some fresh air into the stale mausoleum of American constitutional thought.

History and Structure

There are many constitutions, but only one Constitution, that is, the famous document crafted in a closed conclave in Philadelphia in 1787, ratified in a series of popular state conventions, and then expanded over the ensuing 211 years with the approval of 27 amend-

ments by Congress and the individual states. Some 4,000 words long, the Constitution opens with a famous Preamble ('We the People of the United States, in order to form a more perfect Union . . .') and continues with a series of seven 'articles' delineating the powers of Congress, the Presidency, the federal judiciary, and so forth. Perhaps the most important article for the purposes of this discussion, but among the least studied, is Article V, a single paragraph of a little over a hundred words outlining the process by which the Constitution may be changed. Two things stand out about the Article V amending process. One is that it is fiendishly slow and difficult. Altering so much as a comma requires two-thirds approval by both houses of Congress plus majority approval in three-quarters of the states, a process that can literally take centuries as the strange case of the Twenty-Seventh Amendment illustrates.[8] The other is that it is immensely respectful of numerical minorities. Given the huge population disparity in the late eighteenth century between a transappalachian empire like Virginia and a seacoast province like Delaware, Article V meant that four states with as little as 11 per cent of the national population could block any constitutional change sought by the remaining 89 per cent. Today's even greater disparities mean that as few as thirteen states representing just five per cent of the population can block any change sought by the remaining 95 per cent. Not counting Prohibition in 1919 and Repeal in 1933, which more or less cancelled one another out, this explains why the Constitution has been amended only 15 times since adoption of the first ten amendments, known collectively as the Bill of Rights, in 1791, and for mostly minor technical reasons at that.

This ultra-conservative amending clause is what gives the Constitution its self-contained quality. As a little-known but highly astute constitutional analyst named Sidney George Fisher wrote during the Civil War, the result is a closed circle, 'a finality to be interpreted only by itself, and to be altered only in the manner appointed by itself'.[9] Given that it is essentially impossible to break free of this circle in any way short of revolution, Americans have had no choice but to live within its confines. Although the 38 men who signed the newly-drafted document at the close of the Philadelphia Convention admitted among themselves that it was flawed and likely to last for only 'a course of years'—to quote Benjamin Franklin, the gathering's *éminence grise*—once ratified it became an article of faith that it had been written for the ages. For the next two centuries, the Constitution would be as central to American political culture as the New Testament was to medieval Europe. Just as Milton believed that 'all wisdom is enfolded' within the pages of the Bible,[10] all good Ame-

[8] The Twenty-Seventh Amendment, which precludes members of Congress from raising their own salaries before the next election, was drafted by James Madison and approved by Congress, but then allowed to drift through the state legislatures for more than 200 years before finally picking up enough votes in 1992.
[9] *The Trial of the Constitution*, New York 1969, p. 57.
[10] Christopher Hill, *The English Bible and the Seventeenth-Century Revolution*, London 1994, p. 21.

ricans, from the National Rifle Association to the ACLU, would believe no less of this singular document.

For all its supposed timelessness, though, the Constitution was the very timely product of an eighteenth-century provincial society on the edge of the modern era, but not yet in it. Some parts of the document were fairly forward-looking. Despite certain ambiguities in wording, the Preamble seemed to assert an unqualified right of the people to restructure their political environment at will so as to 'establish justice, insure domestic tranquillity', and so forth, a theory of popular sovereignty that anticipated the Jacobins and the best of the utilitarians.[11] Although hardly radical by today's standards, the provision in Article I requiring a national census every ten years to reapportion seats in the House of Representatives was a repudiation of a British system in which representation in the Commons had not been adjusted to reflect population changes in centuries. The requirement in Article I that Congress publish periodic transcripts of its proceedings was a repudiation of the doctrine of parliamentary secrecy that John Wilkes had had such fun with some two decades earlier. And, of course, the creation of a popular lower house was a major advance over a British system in which power was effectively monopolized by a few thousand magnates. Although the Constitution was fudged by leaving it to the states to determine who could vote for members of the House of Representatives and who could not (Article I, Section two), it was generally assumed that it would serve as a democratic counter-weight to the more aristocratic Senate.

Puritans Versus Stuarts

Yet other aspects of the Constitution were decidedly backward-looking. The cold-war political theorist Samuel P. Huntington argued in 1968—around the time he was making a name for himself as an advocate of US-sponsored 'forced-draft urbanization' in Vietnam—that the Constitution was created by the descendants of early-seventeenth-century Puritans who were dismayed by growing Stuart absolutism and were filled with longing for the 'balanced' constitution of the Tudors. Although any notion of constitutional balance may seem jarring when used in connection with such overweening personalities as Henry VIII and Elizabeth I, Huntington, basing him-

[11] 'Le peuple souverain est l'universitalité des citoyens français', declared the French Constitution of 1793. 'For the happiness of the people', added Jeremy Bentham some 30 years later in his 'Constitutional Code', 'every security that can be given is reducible to this one—the supremacy, or say the sovereignty, of the people: the sovereignty of the people, not nominal merely, but effective and brought into action, as frequently as the exigency of the case requires, and the nature of the case renders possible.' What was true for utilitarianism's founder, it should be added, was not necessarily so for the movement as a whole. James Mill, Bentham's chief collaborator, largely side-stepped the question in his essay 'On Government', while John Stuart Mill opposed giving male workers the vote in 1867. See *The Works of Jeremy Bentham*, Edinburgh 1843, vol. 9, pp. 123, 153, and John Stuart Mill, *Autobiography*, Indianapolis 1976, p. 186.

self on Charles McIlwain and other constitutional historians, noted that the Tudor administrative structure was highly complex and that virtually every political player, from the monarch on down, paid lip service at the very least to the notion that the various ruling institutions ought to be autonomous and self-directing and keep to their own proper orbits.[12] As no less a constitutional theorist than Shakespeare put it in *Troilus and Cressida*, 'when the planets in evil mixture to disorder wander, what plagues, and what portents, what mutiny, what raging of the seas, shaking of earth rend and deracinate the unity and married calm of states'. By upsetting this delicate balance, Stuart absolutism was threatening to let loose who knows what storms and torments, which is why the Puritans were determined to flee.[13]

Thus, the common left-wing belief, to quote Mike Davis, that 'the Northern colonies were a transplanted "fragment" of the most advanced ideological superstructures of the seventeenth century' is incomplete.[14] While advanced in certain respects, the Puritans émigrés of the 1620s and 1630s were upholders of the Ancient Constitution who were alarmed by the Stuart propensity for change. In this one regard, at least initially, their stance was defensive and conservative. As one of their heroes, William Prynne, thundered, 'the Principle Liberties, Customs, Laws' of the kingdom are and ought to be 'FUNDAMENTAL, PERPETUAL, AND

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[12] Samuel P. Huntington, *Political Order in Changing Societies*, New Haven 1968, pp. 93–133.

[13] Although Huntington is certainly correct concerning early seventeenth-century Puritan perceptions, the reality of the Tudor constitution is another matter. Beginning in the mid-nineteenth century, a long line of historians have argued that 'Tudor despotism' is a myth and that Henry VIII, for instance, was not the autocratic prince of legend, but a patriotic hero who defended English independence and constitutional traditions against foreign interference. According to this view, Henry encouraged Parliament to take on more responsibility, was respectful of its prerogatives, and generally preferred to work with local authorities rather than against them. He was careful to stay within the law, even if ruthless in bending it to his will. So far had the pendulum swung toward this notion of Henry VIII as patriot-king that Perry Anderson was moved to protest in 1974 that 'a national absolutism was in the making' during his reign and that 'his actual personal power within his realm was fully the equal of that of his contemporary Francis I of France'. Yet the historian Joel Hurstfield, whom Anderson relies on for support, is ultimately reduced to a Scottish verdict of neither guilty nor innocent. Henry was certainly overbearing. But when he pressed Parliament for power to rule unilaterally in 1539 (the so-called Bill of Proclamations), he was refused. Under Elizabeth, however, there is no question as to Parliament's growing power and self-confidence, as the monopolies controversy in 1601 illustrated. See Anderson, *Lineages of the Absolutist State*, Verso/NLB, London 1974, p. 122, and Hurstfield, 'Was There a Tudor Despotism After All?' *Transactions of the Royal Historical Society*, Fifth Series, vol. 17, 1967, p. 98. The important point is that the chief source of tension in the Tudor polity was between authority and the law, between power as it was actually wielded by Henry and Elizabeth and the proper constitutional balance between various governing institutions that virtually all players believed should exist. The upshot is that the separation-of-powers doctrine wound up stronger than ever among the Puritans who emigrated to Massachusetts and the Cavaliers who followed to Virginia some twenty years later. See Franklin Le Van Baumer, *The Early Tudor Theory of Kingship*, New York 1966, p. 190, and J.W. Allen, *A History of Political Thought in the Sixteenth Century*, London 1928, p. 250.

[14] *Prisoners of the American Dream: Politics and Economy in the History of the US Working Class*, Verso, London 1986, p. 11.

UNALTERABLE.'[15] This generation was a far cry from that of the 1640s which, under the pressure of civil war, found itself forced to cut its ties with the past and engage in constitutional innovations far more sweeping than any contemplated by the royalists.

Huntington argues that the Puritans transported this deep-felt belief in an Ancient Constitution replete with checks and balances and separation of powers across the Atlantic and implanted it in the New World, where it eventually blossomed into the US Constitution of 1787. For Woodrow Wilson, who wrote a classic book on the subject as a young professor of political science in 1885, the formative period was the Glorious Revolution, when the separation-of-powers doctrine was at its height and members of the Old Whig opposition were most influential in arguing that Parliament should serve as a check on royal power, but should never succumb to the Cromwellian heresy of exercising executive power on its own.[16] More recently and perhaps more appropriately, the focus has been on the Hanoverian period, the immediate backdrop to the American Revolution, when, beginning in the 1720s, Lord Bolingbroke, a Jacobite who had briefly fled to Paris after plotting to block the accession of George I, set about rallying the old 'Country' party against the deepening union of legislative and executive powers taking place under his rival, Walpole.

Country and Court

The Country was a motley collection of surviving Tories, out-of-favour Whigs, and urban radicals united by their opposition toward growing political centralization and financial oligarchy.[17] It favoured parliamentary independence—that is, separation of powers—more frequent elections, an end to the corruption that Walpole used to control the legislative branch, and opposition to foreign military entanglements which it attributed to the Hanovers' continuing Continental interests.[18] No less importantly, the Country claimed to be loyal to the old forms of government while the Court was busy pioneering new constitutional forms such as a prime minister—originally a term of opprobrium—and cabinet. Innovations like these were anathema from the Country's fundamentally nostalgic point of view. In Bolingbroke's eyes, they were a betrayal of the Ancient Constitution of pre-Stuart days, 'that noble fabric, the pride of Britain, the envy of her neighbours, raised by the labour of so many centuries, repaired at the expense of so many millions, and cemented by such profusion of blood'. Walpole was leading Britain in new and unknown directions when true reform, Bolingbroke insisted, lay in

[15] *Political Order in Changing Societies*, p. 100, emphasis in the original.
[16] *Congressional Government: A Study in American Politics*, Boston 1925, pp. 203–14.
[17] John Brewer, 'English Radicalism in the Age of George III', in *Three British Revolutions: 1641, 1688, 1776*, edited by J.G.A. Pocock, Princeton 1980, pp. 326–7.
[18] Ibid., p. 326; see also Brewer, *The Sinews of Power: War, Money, and the English State, 1688–1783*, London 1989, p. 140.

drawing it back 'on every favourable occasion, to the first good principles on which it was founded'.[19]

The Country opposition was intellectually dominant during this period, even if its purely negative critique rendered it all but incapable of wielding political power. The historian John Brewer describes Country ideology as the *lingua franca* of the anti-Walpolean opposition, a tongue spoken 'not only by bucolic back-benchers from the shires but also by disgruntled placemen and courtiers, the holders of government stock, and the directors of the Bank of England and of the major trading companies'.[20] This explains Montesquieu's famous error in describing the British system as one of separation rather than union of powers following his visit to London in 1729. His *Spirit of the Laws* reflected the British governing system not as it was, but as it should be according to aristocratic circles in which he moved and in which Bolingbroke's influence was growing.[21] The Country, meanwhile, was even more influential in archaic-democratic British North America. 'Cato's Letters', a series of scathing denunciations of English politics written by John Trenchard, a Country stalwart, and Thomas Gordon, his young Scottish collaborator, were 'quoted in every colonial newspaper from Boston to Savannah'.[22] Montesquieu was also highly influential in the New World, as was Bolingbroke. John Adams regarded Bolingbroke as essential reading, while Jefferson thought so highly of him that he copied out more than fifty pages of his works into his own private notebooks.[23]

The American Revolution was very much in the Country mould—a revolution fought not only against British imperial power, but against power per se. Its dynamics, as a result, were in some ways the very opposite of the French Revolution. Where popular sovereignty in the latter was securely wedded to the concept of the nation-state 'one and indivisible', the dominance of Country ideology in America meant that it was married to a concept of the polity as something almost endlessly divisible. The Pennsylvania Constitution of 1776, for example, was one of the most democratic documents to come out of the revolution. But while it created a unicameral, popularly elected General Assembly as its centrepiece, it was careful to balance it not only with a separately-elected 'supreme executive council' but with a septennial 'council of censors' with full power to determine that 'the constitution has been preserved inviolate in every part', that 'the public taxes have been justly laid and collected', and that 'the laws have

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[19] *The Works of Lord Bolingbroke*, Philadelphia 1841, vol. 2, pp. 93, 397.
[20] Brewer, *The Sinews of Power*, pp. 156–7.
[21] Montesquieu's friend, Lord Chesterfield, joined forces with Bolingbroke in the 1730s. Franz Neumann, Editor's Introduction, in Baron de Montesquieu, *The Spirit of the Laws*, New York 1949, p. xii; Basil Williams, *The Whig Supremacy, 1714–1760*, Oxford 1962, pp. 203–4.
[22] Bernard Bailyn, *The Ideological Origins of the American Revolution*, Cambridge, MA 1967, p. 36.
[23] Willard Sterne Randall, *Thomas Jefferson: A Life*, New York 1993, p. 85.

been duly executed'. Since political power was inherently dangerous, countervailing institutions had to be established whose 'emulation, envy, fear, or interest', to quote Trenchard and Gordon, 'must make 'them spies or checks upon one another.'[24] (One wonders why Pennsylvanians didn't also create yet another body elected every fourteen years to oversee the council of censors, and so on.)

The Pennsylvania Constitution also asserted that 'the people of this State have the sole, exclusive and inherent right of governing and regulating the internal policies of the same'. This was in keeping with the Country's deep suspicion of centralized national authority. But it was a slap in the face of a revolutionary leadership struggling to coordinate policy among thirteen fractious states in response to the British military onslaught. The story was similar in New York where the populist governor George Clinton took the lead in attacking federal imposts in 1781, and in Rhode Island where the local 'Country' party grew ever more vehement in its attacks on federal power as it tried to drum up popular support. The more vehement the local populist forces, the greater their hostility to anything resembling an emergent nation-state. Thomas Paine was so aghast at these centrifugal tendencies that he journeyed to Rhode Island in late 1782 to try to talk sense to his fellow radicals, but to no avail. After telling John Adams in 1776 that checks and balances were superfluous in a people's republic, he reversed himself by the mid-1780s and began arguing that a strong judiciary was needed to rein in popular legislative power—a belief that would later get him in such trouble with the Jacobins in France.[25] After opposing separation of powers, Paine and other like-minded nationalists were searching for way in which the doctrine could be turned into its opposite, transformed into a force for unity instead of disunity, a mechanism for binding thirteen independent-minded states into one viable federal republic.

The Separation of Powers

The method that the Philadelphia Convention came up with was to encase separation of powers within a flexible but seemingly unbreakable body of law. The provision in Article I, Section six, forbidding executive-branch employees from serving in Congress was a classic Country measure aimed at preventing the use of 'placemen', that is, executive appointees, to subvert the independence of the legislative branch. The requirement that members of both houses reside in the states they were chosen to represent (Article I, Sections two and three) was an attempt to insure that the centre would not be able to manipulate elections in the far-flung provinces. The elaborate division of responsibility between the federal government and the states was similarly aimed at striking a delicate balance between centre and

[24] Isaac Kramnick, *Bolingbroke and his Circle: The Politics of Nostalgia in the Age of Walpole*, Cambridge, MA 1968, p. 251.
[25] John Keane, *Tom Paine: A Political Life*, London 1995, pp. 126, 261, 353–4.

periphery. Because the Country opposition had taken fright at the doctrine of parliamentary sovereignty as it had evolved under Walpole, the Constitution eschewed sovereignty altogether. While the Preamble seemed to suggest that the people were sovereign, the elaborate encumbrances that the rest of the document placed on the power of the people's government, including even the power to amend the Constitution created in the people's name, suggested the opposite. The result was a deliberately ambiguous power arrangement in which it was impossible to determine where ultimate authority lay, whether with Congress, the Presidency, or the Supreme Court, or with the people at large in their capacity either as state or federal citizens. Since neither Congress nor the people would exercise that 'supreme, irresistible, absolute, uncontrolled authority' that Blackstone had defined as the essence of sovereignty, the closest thing to a sovereign power would be the law. Rather than an instrument that 'We the People' would create and shape to further their own rule, the law would create and shape the people in order to further its own rule. Rather than of society, it would be over it.[26]

Hamilton's Bonapartist Challenge

Country ideology was not the only force at work in the Philadelphia Convention. Hamilton, far and away the most brilliant of the Founders, was blessedly free of Country cant. But his relationship to the convention was a complicated one. With Madison, he was the convention's prime organizer and instigator. But when he presented his own proposal for a proto-Bonapartist system based on a life-time Presidency and Senate and a triennial National Assembly with full sovereignty over the states, it was so at odds with the spirit of the gathering that it was all but ignored. Hamilton grew so impatient with the wrangling and compromising that he departed midway and spent several weeks in New York. Yet, when it was all over, he was not displeased with the outcome. He wanted a national government that would be safely removed from local populists—whom he regarded, not inaccurately, as forces for disintegration and disorder—so that it could shape American development as a whole, and in the Constitution he believed he had obtained it.[27] Where Madison, as a result, seemed to spend most of his time in the *Federalist Papers* trying to reassure his followers that the proposed new government would not be so powerful as to threaten liberty, Hamilton waxed enthusiastic

[26] Lest anyone believe that this immutable legal structure was foisted on the people by upper-class Federalists, it should be noted that anti-Federalists during this period were even more vociferous in their demands for a strong constitution as a permanent brake on politics. Hamilton, for his part, scoffed at the idea of permanent constitutional protections. See Philip P. Hamburger, 'The Constitution's Accommodation of Social Change', *Michigan Law Review* 88, 1989, pp. 241–2, 271.

[27] Hamilton was particularly pleased with the language in Article I, Section eight, allowing Congress to do everything 'necessary and proper for carrying into execution the foregoing powers', words that in combination with the Preamble's sweeping call for a government to establish justice, insure domestic tranquillity, etc. provided the basis, he believed, for a sovereign national government of unlimited reach.

about all the exciting things the powerful new federal machinery could accomplish—the commercial treaties it could negotiate, the navy it could float, the taxes it could raise, and the like. It must not be forgotten, he wrote in *Federalist* No. 1, 'that the vigor of government is essential to the security of liberty'.[28] This was as far removed from Country ideology as one could get. Indeed, it was too far removed for the reigning political culture to permit, which is why the Hamiltonian project would collapse in the wake of Jefferson's sweeping electoral victory in the 'Revolution of 1800'.

Two things stand out about the Constitution of 1787. One is that it was no more than proto-democratic. Nowhere does the word 'democracy' or any of its variants appear in the document for the simple reason that democracy in these pre-Jacobin days was still synonymous with anarchy and disorder—the case, one might add, not only in America but in Enlightenment France as well. While democracy was a fact of life in the aftermath of the Revolutionary War, the art of government for supporters and opponents of the proposed new constitution alike consisted of finding just the right balance between democracy and authority, freedom and order. While allowing the creation of a popular lower house, the Founders were careful, therefore, to counterbalance it with a Senate chosen by the state legislatures, a President chosen by an electoral college also chosen by the states, and a lifetime judiciary chosen by the President in consultation with the semi-aristocratic Senate. 'We the People' had inspired the new government. But the notion that the historic mission of the *demos* was to create a new order that would be more rational than that which preceded it remained entirely alien. The *demos*, rather, had to be arrested and contained via the law. While aspects of the Constitution would later be democratized—senators would be popularly elected as of 1914, the Bill of Rights would be made applicable to the state governments beginning in the 1920s—this essentially pre-democratic organizing principle would remain unchanged.

A Slaveholders' Democracy

The other noteworthy aspect concerns, of course, slavery. The eighteenth-century *philosophes* who gathered in Philadelphia in 1787 regarded slavery as a relic of a barbarous past and hoped that it would go of its own accord. Yet the Constitution they created hedged it about with so many protections as to render it legally impregnable. It forbade Congress to interfere with the slave trade for twenty years, limited its power to tax slaves, and required it to put down slave rebellions wherever they might occur. It enjoined free states to respect the laws of slave states by returning runaways, and it denied slaves the right to sue in federal court. It stipulated that slaves were to be counted as three-fifths of a person for purposes of apportioning seats in

[28] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, New York 1961, p. 35.

Congress and the electoral college, thereby adding to slaveowners' clout in both the House and the executive branch. The principle of equal state representation in the Senate that the Constitution enshrined also shored up slave power as Southern states fell farther and farther behind in population. Thanks to the Senate's veto power over treaties and executive appointments, it enhanced Southern control over the federal judiciary and foreign policy. As long as slaveowners could maintain control of more than one-fourth of the state governments or more than one-third of either house of Congress, their grip on the federal government was theoretically secure. There was nothing the growing democratic majority could do to dislodge it.

Protections like these were fully in accord with eighteenth-century Country ideology, which was no less suspicious of 'elective despotism', as Jefferson termed it, than of the despotism of the Court.[29] Southern planters, America's very own backwoods squirearchy, valued above all else the independence that a slave economy made possible. What they demanded of the new constitutional order was that it guarantee this independence by surrounding slavery with an impenetrable iron curtain. Northern delegates to the Constitutional Convention complied with varying degrees of reluctance. Although civil libertarians would later make much of the Constitution's protection of beleaguered minorities, this was a case in which that same tendency vastly retarded freedom by protecting a small number of slaveholders against the growing hostility of the masses both north and south of the Mason-Dixon line.[30]

Constitutional Breakdown

For English radicals like Bentham, the republic that the Constitution created was a testament to the power and creativity that popular democracy would unleash. 'There, all is democracy; all is regularity, tranquillity, prosperity, security', he exulted in 1809.[31] In reality, though, what the Constitution had wrought was a half-formed democracy locked in a deepening stalemate with a constitutionally entrenched slavocracy, a stalemate that would persist until Lincoln and his fellow Republicans cut the Gordian knot during the Civil War. It is significant that, during the 'Bleeding Kansas' episode of the 1850s, the position that pro-slavery elements had a right to hijack the territory politically, regardless of what the rest of the nation might think, was known as 'popular sovereignty'. It was yet another example of the American habit of confusing democracy with localism. It is also significant that during the final run-up to the Civil War, the only method that supporters of the Union could come up with out to hold things

[29] *Notes on the State of Virginia*, Question XIII, Chapel Hill 1982, p. 120.
[30] Less than 25 per cent of the 1.6 million white households in the South owned slaves at all on the eve of the Civil War, less than three per cent owned more than 20, while only 3,000 planters owned more than 100. See Robert C. Heilbroner and Aaron Singer, *The Economic Transformation of America: 1600 to the Present*, San Diego 1984, pp. 127–8.
[31] *Works*, vol. 3, p. 447.

together was to entrench slavery all the more deeply via the so-called Crittenden amendment, which, while barring the 'peculiar institution' in the West, would have permanently enjoined Congress from interfering with it in the South. It was a last-ditch effort to maintain the supremacy of law over politics, which, had it passed, might very have allowed slavery to continue into the twentieth century.

Fortunately, the effort collapsed. The existing constitutional order was too decrepit, too torn by internal contradiction, to be salvageable. The Civil War was a second American revolution not only because it saw the expropriation without compensation of billions of dollars' worth of ruling-class property in the form of the slaves themselves, but because it represented a rupture in the existing constitutional order. In this most legalistic of societies, Congress and the President were forced to take actions of dubious legality to deal with an exigency the Founders had never contemplated. The outbreak of war was an occasion for marvellously talmudic debates over whether the Constitution contained an implied escape clause that allowed the federal government to cast aside checks and balances and take emergency measures that ordinarily would be forbidden or whether the Constitution had simply had been suspended for the duration. The first was Lincoln's view. As he wrote in 1864, 'I felt that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the constitution, through the preservation of the nation'.[32] It was legal to violate the law, in other words, in order to save it.

The second position—that the Constitution was in abeyance for the duration of the conflict—was the view of the Republican Party's radical wing, in which rhetoric was taking on more and more of a Jacobin cast. By January 1862, George W. Julian, the Radical Republican who headed the powerful House Committee on Public Lands, was calling, in effect, for a people's dictatorship over the Constitution rather than under it:

> Should both Congress and the courts stand in the way of the nation's life, then 'the red lightning of the people's wrath' must consume the recreant men who refuse to exercise the people's will. Our country, united and free, must be saved at whatever hazard or cost; and nothing, not even the Constitution, must be allowed to hold back the uplifted arm of the government in blasting the power of the rebels forever.[33]

A Jacobin Turn

When the New Jersey state legislature passed a resolution calling for a negotiated settlement in early 1863, members of the Eleventh New

[32] Herman Belz, *Lincoln and the Constitution: The Dictatorship Question Reconsidered*, Fort Wayne 1984, p. 21.
[33] Louis Hacker, *The Triumph of Capitalism in America*, New York 1940, p. 348.

Jersey Regiment, taking a page, no doubt, from the New Model Army's revolt against Parliament, denounced the legislature as 'wicked, weak, and cowardly' and vowed that 'every armed rebel shall be conquered, and traitors at home shall quake with fear, as the proud emblem of our national independence shall assert its power from North to South, and crush beneath its powerful folds all who dared to assail its honor'.[34] No longer was the Constitution 'the supreme law of the land'; now the people were supreme—not the people of the individual states, moreover, but the people of the nation-state, one and indivisible, a point the French had reached some 70 years earlier.

It is significant that the 'four score and seven years ago' in Lincoln's 1863 Gettysburg Address refers not to the Constitution but to the Declaration of Independence, with its clarion call in favour of undiluted popular sovereignty ('whenever any Form of Government becomes destructive it is the Right of the People to alter or to abolish it'). Although Lincoln argued that the Northern cause represented the continuation of the Madisonian constitutional tradition, the phrase 'government of the people, by the people, for the people' implied something different: a rejection of the Madisonian principle of a people's government endlessly checked and balanced against itself. It was an embrace, instead, of a system in which all instruments of power are concentrated under the rule of a single, unified *demos*.

Much as in the English Civil War, moderate constitutionalists found themselves propelled in an increasingly radical direction as the conflict intensified. The high point in revolutionary fervour came not during the war but after it as a Republican-dominated rump Congress from which the South was still excluded found itself increasingly at odds with Andrew Johnson, Lincoln's successor, a Tennessee Democrat whose goal was to short-circuit Reconstruction and normalize the legal status of the defeated Confederacy as quickly as possible. The Republicans' definitive victory in the 1866 congressional elections led to a showdown in the form of presidential impeachment and trial. But rather than lopping off the head of the monarch *à la* 1649, the Senate fell one vote short of the two-thirds majority required by the Constitution to convict. With Johnson free to finish out his term, the revolutionary momentum was broken. Popular sovereignty receded, and Reconstruction was undermined.

Had the Senate gone the other way, the revolutionary gains of 1861–65 would have been much more likely to be consolidated. While hostile, the conservative *Harper's Weekly* was hardly inaccurate in noting that the overthrow of Johnson would make it 'plain that impeachment of the Executive will become an ordinary party measure [so that] the balance of the whole system comes to an end'.[35] The legislative branch

[34] Henry Steele Commager, ed., *Documents of American History*, New York 1968, vol. 1, p. 428.
[35] Hans L. Trefousse, *Impeachment of a President: Andrew Johnson, the Blacks, and Reconstruction*, Knoxville 1975, p. 178.

would have become superior to the executive, while the House, which had initiated impeachment proceedings and was the more competent and vigorous of the two, would have become dominant over the Senate. The US would have been on its way to becoming a modern democratic state under the control of a sovereign national assembly.[36] The fact that convicting Johnson would have been contrary to both the letter and spirit of a constitution that allowed for impeachment only in cases of 'high crimes and misdemeanors' rather than mere policy differences would have rendered Congress's break with the past all the more decisive. By violating the Constitution, the people's representatives would have been in a position of taming the ancient law and subordinating it to the democratic will. Instead of the past dominating the present, to quote the *Communist Manifesto*, the present would have dominated the past. Instead of having to work through a hostile executive, the Republican majority in Congress would have found itself with far more manoeuvring room in which to bring genuine reform to the South.

A Bitter Harvest

'The phase of the Civil War over, only now have the United States really entered the revolutionary phase, and the European wiseacres who believed in the omnipotence of Mr. Johnson will soon be disappointed'. So Marx wrote to Engels in 1866.[37] But, for a variety of reasons, 'the documentary superstition', as Walter Bagehot described it from his vantagepoint as editor of *The Economist*, proved too strong. Without the slavery issue to bind it together, the Republican Party was already beginning to splinter as Western radicals parted ways with conservative industrialists eager to return to business as usual. Endemic racism in both the North and South helped isolate the Radical Republicans as well. The upshot is that political conditions for both blacks and poor Southern whites deteriorated as the all-important Fourteenth Amendment, rammed through literally at gunpoint in the war's aftermath, became a dead letter. Although the Thirteenth Amendment had formally abolished slavery throughout the Union in 1865, Southern blacks were forced back into a system of peonage that in some respects was even worse. Although the Fifteenth Amendment, adopted in 1870, promised that '[t]he right to vote shall

[36] If such a happy situation had come to pass, the results would have been much closer to the plan of government that Hamilton advanced at the Philadelphia Convention than to the Virginia plan that more or less prevailed. One of the chief problems in American historiography is to explain how the war to abolish slavery, one of history's great moral crusades, evolved largely out of the Hamiltonian-Federalist-Whig tradition and not out of the Jeffersonian-Jacksonian tradition, which liberal historians for years painted as more democratic. Another problem is to explain how the Republican-led crusade led so quickly after the war to the naked rule of big capital. For an example of Jacksonian hagiography at its most extreme, see Arthur M. Schlesinger Jr., *The Age of Jackson*, Boston 1945. For an important corrective, see Charles Sellers's *The Market Revolution: Jacksonian America 1815–1846*, New York 1991. For an excellent Marxist analysis of the American Revolution, the Federalist period, and the Jacksonians, see Harry Frankel's essays written in the 1940s and reprinted in *America's Revolutionary Heritage*, edited by George Novack, New York 1976.

[37] *Collected Works*, New York 1987, vol. 42, p. 269.

not be denied or abridged on account of race, color, or previous condition of servitude', by the 1880s and 1890s Southern Democrats were disenfranchising blacks *en masse*. Ironically, where the Southern white élite had once benefited from a system that counted slaves as three-fifths of a person for purposes of apportioning seats in Congress and the electoral college, it now benefited even more from a system of apportionment that counted ex-slaves and their descendants as five-fifths of a person while still depriving them of the vote.

If we can somehow imagine a system of proportional representation taking hold in post-civil war America, then it is likely that ex-slaves, their Northern white supporters, and perhaps poor Southern whites as well would have been able to gain at least a toe-hold in the national assembly, where it is likely that they would have been joined by emerging socialist forces in the North and West. This might well have provided the opening wedge for a genuinely interracial socialism—not just a socialist *movement*, one might add, but a disciplined, unified socialist *party*. Such a party would have faced immense difficulties in uniting educated Northern workers, immigrants, and barely literate Southern blacks. But then Russian social democrats faced even greater hurdles in the context of a polyglot Czarist empire beginning in the 1890s. America's failure to democratize—or, rather, the failure of American socialists to grasp all that democratization entailed—led to a truncated Left, a movement that was intellectually backward, slow to organize, and in thrall to hoary old Jeffersonian myths about the heroic days of the early republic. It also led to a Left that, needless to say, would be slow to embrace anti-racism until the advent of the Communist Party.

The Bourgeois Republic *in extremis*

The post-civil war constitution was a refurbished version of the old. To be sure, any ambiguity as to whether the United States was a voluntary federation or a permanent union had been eliminated. But states' rights were once more in the ascendant, the Southern white ruling class was once more free to deal with 'its' blacks as it would, while political corruption fairly exploded. The Supreme Court was once again a bulwark of legal conservatism.

Where formerly the Constitution's minority protections had served the interests of Southern slaveowners, they now protected the robber barons up north. As understood by both the Left and Right, the Constitution once again existed to protect the few against the many, in this instance a minority of capitalists against a growing number of hard-pressed farmers and non-property-owning proletarians. 'The Constitution had yoked two legal principles of freedom, of the person and of his property, and sacramented them in an *entrenched* document', noted Michael Mann.[38] Even the mildest industrial reform became

[38] *The Sources of Social Power*, Cambridge 1993, vol. 2, p. 647; emphasis in the original.

impossible. The Sherman Anti-Trust Act of 1890 was used to break strikes on the grounds that they constituted illegal restraints on trade, while judges regularly issued injunctions banning picketing, boycotts, and even free speech on the part of union supporters. Labour's legal status remained precarious right up to the New Deal reforms of the mid-1930s, while anti-labour violence exploded. Between 1872 and 1914, according to one count, seven workers were killed in labour disputes in Britain, 16 were killed in Germany, and 35 were killed in France. Yet at least 500 to 800 were killed in the United States. The only country to exceed this record of violence was Czarist Russia, which saw some 2,000 to 5,000 labour deaths during the same period.[39] While no country claimed to value individual rights more highly than the US, few suppressed the collective rights of labour more vigorously.

This, too, was 'constitutional' in the sense that it accorded with a document that sought to strengthen individual liberty by restraining the power of the *demos* as a whole. Despite the US Socialist Party's overall theoretical weakness, it was, of necessity, as militant vis-à-vis the Constitution as it was toward capitalism in general. In 1912, the year of its electoral peak, the party's platform fairly bulged with proposals for a constitutional overhaul—for 'absolute freedom of the press, speech and assemblage', for example, for proportional representation, for abolition of the Senate and the presidential veto, for an end to judicial review, and for constitutional amendment via a simple democratic majority. Not all of the party's constitutional ideas were fully thought out and some were contradictory, but the overall thrust was clear. The problem was not just one of reactionary employers or bigoted politicians. Rather, the *structure* of American politics was at odds with the needs of society and therefore in need of radical democratic overhaul.

1937: The Great Inversion

This was the dominant sense on the American Left through the early years of the Depression. 1937, however, saw a remarkable about-face. The occasion was Franklin D. Roosevelt's great showdown with the Supreme Court, which had struck down as unconstitutional no less than a dozen pieces of New Deal legislation over the preceding four years. FDR's proposal for dealing with the court was characteristically Machiavellian, a complicated scheme enabling him to appoint additional Supreme Court justices to offset the existing five-to-four conservative majority. Although Roosevelt compared it in private to the Liberals' assault on the House of Lords in 1911, in public he insisted that he was merely trying to help the court by providing it with additional manpower. No one was fooled, and the public outcry was immense. The crisis was not defused, though, until a few weeks later when the court approved a New Deal measure indistinguishable from

[39] Ibid., p. 635.

one it had earlier rejected. 'Switch in time saves nine', was how Abe Fortas, a young member of the Roosevelt brain trust, described it. The change marked the start of the high court's long march to the left, an ideological journey that would culminate in 1954–73 in a series of near-revolutionary rulings striking down everything from racial segregation and the ban on abortion to restrictions on birth control and prayer in the public schools.

This was constitutional modernization of the sort that leftists and liberals had long been fighting for. Yet it came from a most unexpected source. Previously, the Supreme Court had been regarded as an American college of cardinals, a reactionary-obscurantist body of old men in black robes who picked through the entrails of a dead document to divine reasons why the *demos* could not do what it wanted to. Now the court was transformed. No longer 'nine old men', as Roosevelt had so famously described it, it was now a group of lonely and courageous judges who, in the face of legislative and executive paralysis, were fighting in behalf of the most deeply oppressed minorities. They were Gary Cooper in *High Noon* (1952) facing down the bandits while the townsfolk scurried for cover. Where leftists had formerly railed against the court's isolated, undemocratic nature, it was precisely that same isolation, that same position over society rather than of it, that was now seen as the source of its moral strength.

This great inversion was ironic in any number of respects. Supreme Court justices are unelected appointees who 'hold their offices during good behavior' (Article III, Section one), which, practically speaking, means for life. Once appointed, they are essentially unaccountable. Yet the least democratic branch of government was now responsible for democratizing American society while so-called democratic politicians stood idle. For the ACLU, the legal professoriat, or various op-ed civil libertarians, it was proof once again that freedom lay in the rule of law over the *demos* rather than under it. The immutable constitution was once more a bastion of liberty just as it had been in the eighteenth century.

Yet rallying behind the Supreme Court meant rallying behind the Constitution *in toto*, which meant ignoring the constitutional system's many unsavoury aspects. Following the Supreme Court's *Baker v. Carr* decision (1962) striking down violations of one person-one vote at the state and local level, one might have expected calls to ring out to finish the job by extending the same elementary democratic principle to the US Senate. Instead, there was silence. Congress was (and is) as balkanized, corrupt, and unresponsive to the needs of society after the Warren Court as before. Debate is mostly for show, while the real action takes place in literally hundreds of committees and subcommittees offstage where deals are cut and favours exchanged. Bills sometimes disappear behind closed doors for weeks, only to reappear with crucial language added or subtracted, yet no one, not even the participants, can

say how it happened or who was responsible. Public accountability is the exception rather than the rule. But despite occasional tinkering around the edges, liberal constitutionalism required that no one confront this problem at its source in the Constitution's staggeringly inefficient system of checks and balances and separation of powers.

Bureaucratic Feudalism

State and local government in the US similarly remained a nightmare of baroque inefficiency. Not only does America have 50 state governments, each with its own legislative, executive, and judicial branches, but it also has some 83,000 local governments, everything from city councils and school boards to such exotica as library boards, mosquito control commissions, and flood control districts. All are elected, all are largely autonomous, and all are intensely jealous of their ancient constitutional liberties. Given the opportunity, all behave with the impunity of feudal barons as they raid their neighbours to lure away businesses, upscale residential developments, or other profitable assets. Nearly all strive to keep out poor people, blacks, or anyone or anything else they think will adversely affect the municipal bottom line. While greedy for every last dollar that they can get their hands on in state or federal aid, they are quick to protest when a higher level of government attempts to rein them in. Not only is there no comprehensive policy to determine what this swarm of self-serving local governments is supposed to do to promote the greatest good of the greatest number, there is no comprehension that any such policy is possible, no understanding that fundamental arrangements that have existed time out of mind are even subject to fundamental change. The attitude is essentially a medieval one in which

> the conception in some way persisted that the law belongs essentially to a people or a folk. This idea did not connote, however, that law was the creature of a people, dependent upon their will, and capable of being changed by their volition. The order of ideas was rather reversed: the folk as a communal body was perhaps more truly conceived to be made by their law, much as a living body might be identified with its principle of organization.[40]

Or, as one of America's most prominent legal scholars explained in 1986,

> We live in and by the law. It makes us what we are: citizens and employers and doctors and spouses and people who own things. It is sword [and] shield, our abstract and ethereal sovereign. We are subjects of law's empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do.[41]

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[40] George H. Sabine, *A History of Political Theory*, London 1963, p. 202.
[41] Ronald Dworkin, *Law's Empire*, Cambridge, MA 1986, p. vii.

The law rules, the people obey. Ironically, the great constitutional reforms of the 1950s, 1960s, and 1970s strengthened this neo-medieval belief system instead of weakening it. At a time when Southern racists were vowing resistance to the Supreme Court, popular sovereignty came to be more and more associated with mob rule, while the rule of law came to be associated with racial equality and freedom of assembly. 'If we are wrong,' Martin Luther King Jr. told his followers in 1955, 'then the Supreme Court of this nation is wrong. If we are wrong, the Constitution of the United States is wrong. If we are wrong, God Almighty is wrong.'[42] If he was right, by the same token, then God was in his heaven and all was right with the US constitutional order. A similar process took place two decades later when Watergate, America's version of the Glorious Revolution of 1688, reinvigorated tired old notions about checks and balances, separation of powers, and judicial review. Legal pietists like *The New York Times*'s Anthony Lewis had a field day bashing Richard Nixon for daring to challenge the age-old rule of law. The Constitution loomed higher over American society than ever.

James Madison as Pre-Postmodernist

Perhaps the most important gloss ever written on the Constitution is *Federalist* No. 10, one of a series of polemics known as the *Federalist Papers* that James Madison turned out in collaboration with Alexander Hamilton and John Jay during the crucial New York State constitutional ratification battle of 1787–88. In it, Madison turned his attention to that great eighteenth-century bugaboo, the 'faction'. A faction, he wrote, is any group or party 'adverse to the rights of other citizens, or to the permanent interests of the community'. When a faction is in the minority, there is no problem thanks to 'the republican principle, which enables the majority to defeat its sinister views by regular vote'. But when a faction is in the majority, the republican principle is useless. A mechanism was needed, he wrote, to prevent any such 'interested and overbearing majority' from trampling the rights of others.[43] The mechanism had to be effective, but not so effective as to wind up destroying liberty in the process.

Madison's solution was to divide up the polity with a system of political firewalls so as to inhibit the spread of dangerous ideas from one section to another. The idea was not to hermetically seal off the various portions, but merely to break the momentum of unsettling ideas and movements as they crossed from one part of the country to the other:

> The influence of factious leaders may kindle a flame within their

[42] Anthony Chase, *Law and History: How American Legal Rules Change Over Time*, New York 1997, p. 68.
[43] *The Federalist Papers*, pp. 77–80.

> particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it.[44]

Safety lay in diversity. Where royal absolutism held to the principle of one nation–one religion, Madisonian pluralism held that greater stability was to be found in a multitude of religious sects. Where the trend in Britain was toward centralization, Madison argued that a decentralized federation based on a system of scattered authority might make for greater security by absorbing rather than confronting rebellious forces.

But there was a contradiction here, which, if not apparent to eighteenth-century republicans, is fairly glaring from the perspective of a modern socialist. 'Permanent interests of the community' are as meaningless as permanent notions of good and evil. Rather, interests and communities are ever shifting, ever evolving, which means that they must be continually wrestled with and redefined. They must be redefined democratically, moreover, yet the profusion of firewalls that Madison had played a leading role in reinforcing in 1787 made it supremely difficult for the *demos* to do so in a coherent way. The impediments that Madison applied to bad majorities, in other words those he did not like, applied equally to good ones. To prevent rule by an oppressive majority, he was willing to close the door on coherent majority rule entirely.

From Factions to Special Interests

This has turned out to be the distinguishing characteristic of American politics. Obviously, the US is not the only country to experience the tension between broad principles and particular interests. The difference is that under the US constitutional system all advantage flows to the latter and none to the former. In the absence of coherent majority rule, parties are chronically weak and principles scarce to non-existent. Theory, something 'practical' politicians in the US view with scorn, is reserved for academics and park-bench philosophers. The elaborate compromises needed to shepherd even the most modest measures through Congress mean that legislators must kow-tow to every last special interest. Rather than eliminating factionalism, the Madisonian system has thus encouraged a proliferation of factions, each more parochial and narrow-minded than the last. As Jeb Stuart Magruder, a high-ranking aide in the Nixon administration, once explained: 'We didn't spend time on the disadvantaged for the simple reason that there were no votes there. We

[44] Ibid., p. 84.

don't have a democracy of the people. We have a special-interest democracy'.[45] If 'all politics are local', to quote the late Speaker of the House Tip O'Neill, long regarded as the last word in political wisdom on Capitol Hill, then all politics are fragmented, egotistical, and de-historicized. '*Divide et impera*, the reprobate axiom of tyranny, is under certain conditions, the only policy by which a republic can be administered on just principles', Madison wrote to Jefferson a few days after the close of the Constitutional Convention.[46] While this strategy has certainly inhibited movements 'for an equal division of property', as Madison trusted it would, it begs the question of who in a people's republic was to be dividing and conquering whom. Can a people divide and conquer itself? Is stable self-government really to be achieved through self-fragmentation?

By checking and balancing the people's government against itself so as to prevent the development of coherent majority rule, Madison was blocking development of the one force capable of moving society forward. Popular sovereignty was stillborn as a result, and the US was prevented from modernizing itself constitutionally or politically. Or, to put it more precisely, it was encouraged to seek out economic and geographical expansion as a substitute for political modernization. This explains why, two centuries later, amid all the subdivisions and shopping malls, America is home to so many Christian fundamentalists, heavily-armed militia members, creationists, and other rebels against modernity. It explains why its politics are so parochial and anti-intellectual, why its parties are little more than empty shells, and why the presidency carries with it so many royal trappings. Today, the US is still a society divided between Court and Country, between a hypertrophied Washington overflowing with office-seekers and deal-makers and suburban Jeffersonians convinced that the politicians are, as ever, pulling a fast one on the people. It is a society that still thinks of reform in terms of constitutional restoration, of driving out the moneychangers and purifying the sacred temple, of forever drawing back to 'first good principles'.

Atavistic Ambiguity

This notion of self-government through self-fragmentation is very eighteenth-century, yet at the same time curiously postmodern. It is absurd on its face, yet the enormous success of the American enterprise suggests that somehow absurdity works. A constitutional order that is deliberately ambiguous as to whether final authority rests with Congress, the President, or the Supreme Court, or whether it even exists at all, is disorienting, which has a certain postmodern appeal also. A system that is always in motion yet constitutionally always at

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[45] Harrell R. Rodgers Jr. and Michael Harrington, *Unfinished Democracy: The American Political System*, Glenview 1981, p. 42.
[46] Isaac Kramnick, *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth-Century England and America*, Ithaca 1990, p. 263.

rest, that strives to return to first principles the more obsolete or obscure those principles become, appeals both to traditionalists who never want to go anywhere in the first place and to postmodernists who believe that progress is a myth. Perhaps this explains why, amid deepening political stagnation, the American academy has proved so receptive to cultural theorists who argue that reality, meaning, and progress are so many artificial political constructs.

Of course, this could be used to 'prove' another thesis—that what rationalists see as 'absurdity' is the manifestation of a higher intelligence beyond the comprehension of mere mortals. If 'God takes care of drunkards, of little children, and of the United States', as the Russian political scientist Moisei Ostrogorski remarked in 1902,[47] then the republic's success despite its illogical political structure can be taken as proof that God is personally guiding the American enterprise. Rather than popular sovereignty, the Constitution reflects the sovereignty of the Supreme Being. Postmodernists, religious traditionalists, born-again Jeffersonians who believe God is on their side—the Constitution has something for everyone except secular modernizers who believe that the role of the people is to new-model society from top to bottom so as to render it more equitable, rational, and democratic.

Popular Sovereignty and Civil Liberties

The constitutional theory of civil liberties as it is understood in the late twentieth-century US is yet another variation on the theme of the few versus the many. Rather than slaveholders versus the Northern masses or robber barons versus a growing industrial proletariat, it is a matter of an endless number of beleaguered minorities—blacks, atheists, Nazis wishing to march through Jewish neighbourhoods, KKKers wishing to march through black neighbourhoods, and so on—versus an intolerant majority supposedly eager to steamroll over the rights of anyone it dislikes. The only thing holding it back, the theory holds, is the Bill of Rights in combination with the larger Constitution. This reflects the standard Jeffersonian-ACLU view that the original Constitution of 1787, which described all the things the new federal government could do, was incomplete until ratification of the Bill of Rights four years later inscribed into law all the things Congress could not do, such as establish religion or abridge freedom of speech. Passage of the Bill of Rights did not mean that the 'majoritarian' danger had evaporated. On the contrary, it assumed that the potential for abuse would continue to loom large. The only thing it did, rather, was to provide vulnerable minorities with a legal instrument for correcting such abuses once they occurred.

But there was a catch, as American legal scholars of the late nineteenth century—but not, alas, of the late twentieth—were aware. By assign-

[47] M. Ostrogorski, *Democracy and the Organization of Political Parties*, Garden City 1964, vol. 2, p. 143.

ing primary responsibility for civil liberties to the judiciary, the Constitution relieved the elected branches, particularly Congress, of that same responsibility. By relieving them of responsibility, it rendered them institutionally *irresponsible*, which fairly guaranteed that they would behave as the Constitution expected them to behave, that is, abusively. Civil liberties were de-politicized, while politics were de-liberalized. Thus was born the peculiar rhythm of American politics in which politicians or the people at large go on periodic rampages in which they lynch, terrorize, and generally trample democratic rights until they are finally brought up short by the courts. Then everyone involved congratulates themselves that the system has worked, that the abuse has been corrected, that the majority has been reined in—until some new eruption sets the cycle going again. This was the case with Jim Crow and McCarthyism and may eventually prove to be the case with some of the grosser inequities of the drugs war of the 1980s and 1990s. As a Harvard law professor named James Bradley Thayer observed at the tail end of the nineteenth century:

> No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the Constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if they are wrong, they say, the courts will correct it.[48]

Similarly, as ACLU Executive Director Ira Glasser put it at the tail end of the twentieth century when the Supreme Court overturned a particularly demagogic piece of anti-smut legislation known as the 1996 Communications Decency Act (CDA):

> This is why independent courts are required to protect liberty. Everyone knew the CDA was unconstitutional, but Congress passed the law and the President signed it. Today's historic decision affirms what we knew all along: cyberspace must be free.[49]

Both view the elected branches as institutionally irresponsible. The difference is that where Thayer laments the failure of America's elected politicians to uphold civil liberties, Glasser seems positively gleeful that they have fallen short yet again.

Democracy and Freedom

By externalizing civil liberties in the form of an untouchable Bill of Rights, US constitutionalism has prevented their internalization as part of the democratic political process. By defining civil liberties in terms of an eternally beleaguered minority, it has failed to recognize

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[48] 'The Origin and Scope of the American Doctrine of Constitutional Law', *Harvard Law Review* 7, 1893, pp. 155–6.
[49] American Civil Liberties Union, *The Year in Civil Liberties: 1997*, New York 1997.

that civil liberties are no less important to the *demos* as a whole since it is free speech, a free press, and free debate that enable the majority to find and organize itself, to determine what it is and what it believes. In the absence of such freedoms, a democratic majority eventually degenerates into an undemocratic faction determined to impose its views on society regardless of what the people might think. While there are revolutionary periods in which the *demos* is forced to use repression against its enemies—Lincoln once remarked that he was concerned posterity would blame him 'for having made too few arrests [of Confederate sympathizers] rather than too many'—revolutionaries from the Jacobins through to Trotsky have recognized that victory ultimately depends on a return to democratic norms in which debate can once again be open and unconstrained.

At the same time, Marxism teaches that freedom is not static, as an unchangeable legal code like the Bill of Rights would suggest, but that its definition is always in flux. Indeed, there is no better proof of this than the Bill of Rights itself, which contains a number of provisions that, after the elapse of more than two hundred years, are either embarrassing (such as the apparently unqualified right to bear arms set forth in the Second Amendment), irrelevant (the Third Amendment ban on quartering soldiers in civilian homes during peacetime), or hopelessly obscure (the rarely-cited Ninth and Tenth amendments reserving various unspecified rights to the states or the people at large). It also contains a blanket protection of private property in the Fifth Amendment's 'just compensation clause that all good leftists should be straining at the bit to remove, plus some nice-sounding phrases barring 'cruel and unusual punishments' and 'unreasonable searches and seizures' that have been rendered inoperative by the war on drugs.

Clearly, there is much to argue about here, much to repair, rethink, and modernize. Yet nothing is more terrifying to American civil libertarians than the prospect of opening the Bill of Rights to political review, an idea that, for them, conjures up images of slack-jawed rednecks asking themselves if the US really needs protection after all these years against compulsory self-incrimination or double jeopardy. Not only does this reflect the prejudices of what is in fact a self-serving civil-liberties élite, it assumes that the Bill of Rights is the final word on the subject and that there is nothing Americans in the late twentieth century can add that will not make matters worse. Two centuries of economic and political development have apparently added not one iota to the accumulated general wisdom, which, if true, would be a terrible testament to the stultifying effects of the US constitutional system.

The de-politicization of civil liberties, finally, renders not only the elected branches institutionally irresponsible, but renders the people irresponsible as well. By placing civil liberties on a plane high above their reach, it tells them, in effect, that they do not have to struggle

day in and day out for their modernization and expansion. If it tends 'to drive out questions of justice and right' from the minds of legislators, it does the same for those who elect them to office. Daily life is de-politicized as the people are reduced to the role of passive onlookers. In *Prisoners of the American Dream*, Davis notes that even at the height of labour militancy in the 1930s, political activism for American workers was for the most part intermittent and short-lived:

> Even the most anaemic labour or social democratic party in Western Europe harvests the working class's deep cultural self-identification with its institutions. But the overall character of [US] trade-union militancy in the 1930s and 1940s was defined by the limited, episodic participation of most industrial workers.[50]

It is not something in the air that causes American workers to behave this way, but something in the political structure. Because the system works—which is to say, endures—those who live under its aegis are free to attend to other matters. If the US constitutional system is 'a machine that would go of itself', as James Russell Lowell said in the 1880s,[51] then the people's role is essentially negative: to guard the system against subversion or attack, but otherwise to stand aside and let it do its work. Limited government means limited democracy and hence limited mass participation. By taking the most vital questions having to do with the structure of the state and its relation to society and placing them in a realm high above society's reach, it devitalizes politics. As politics grow enervated, democracy is trivialized, and civil liberties cannot but deteriorate as well—precisely the sort of vicious cycle we now see at work in the United States.

Popular Sovereignty and Socialism

Not only is America falling behind democratically relative to the rest of the advanced industrial world, but it remains the one First World society, indeed one of the few societies on the globe, without a viable working-class political party of even the most anaemic, reformist sort. Is there a connection?

The answer, obviously, is yes. Historically, the task of the workers' movement has been to carry forward the democratic revolution that the bourgeoisie initiated in the eighteenth century but increasingly turned against from the mid-nineteenth on. In the US, the turning point was not 1848, but 1868–77 when the revolutionary momentum of the civil war era was broken, the Ancient Constitution was refurbished and put back in the saddle, and Reconstruction was thrown by the wayside. The subsequent failure of socialism insured that democracy would fail with it. Although many Americans still clung to a

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[50] p. 98.
[51] Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture*, New York 1986, p. 18.

concept of popular sovereignty within a Jeffersonian-republican framework, those ideals were bound to weaken as robber-baron capitalism accelerated. A mass socialist movement was needed to reanimate the old doctrine, not by *replacing* government of the people with rule by the working class, as certain vulgar Marxists would have it, but through a revolutionary *expansion* of the sovereignty of the overwhelming majority, that is the toilers, over not only politics, but industry and the economy also. Rather than a static view of democracy under the law, socialism needed to advance a dynamic view of a democracy that would transform the whole of society and the law with it.

A major body of literature, Marxist and non-Marxist, has grown up over the years around the question of why social democracy in the United States failed to take root. Everything from class and geography to immigration and race has been investigated, yet the Constitution, which should be central to any analysis, has been comparatively neglected. This is especially the case in the post-war period. Michael Harrington, America's most prominent social democrat of the 1970s and 1980s, acted as if the question did not exist, while more radical writers such as Mike Davis and Michael Goldfield have displayed remarkable reticence with regard to it.[52] Yet the crucial role played by the Constitution should be obvious.

The Fifth Amendment's entrenchment of bourgeois property rights, for instance, renders socialism 'unrealistic' for anyone who accepts the permanence of America's constitutional structure. The enormous barriers that the constitutional system places in the way of new political parties all but guarantee that socialism will be effectively marginalized. Douglas J. Amy's impassioned brief in favour of proportional representation is a commendable effort to update and modernize America's sclerotic electoral system.[53] But while his concerns are entirely justified—PR is as important to any

[52] Goldfield's *The Color of Politics: Race and the Mainsprings of American Politics*, New York 1997, which analyzes the role of white racism in the failure of the working-class movement, discusses the defeat of Reconstruction, for example, without so much as mentioning the impeachment question—or virtually any other aspect of the Constitution, for that matter—even though the failure to convict did so much to undermine the power of the Republican Party's radical, anti-racist wing (pp. 118–36). It discusses the abortive movement for a labour party in the 1930s without mentioning the constitutional system's awesome electoral impediments to the organization of a third party (pp. 218–20). It discusses racial gerrymandering in Southern state legislatures under Jim Crow, yet refers only in passing to the racial inequities of the US Senate some 40 to 50 years later, even though they are hardly less extreme (pp. 342–3). *Prisoners of the American Dream* meanwhile begins with the Jacksonian era, which allows Davis to completely avoid the founding period. While he dissects such issues as the unrepresentative nature of Congress or the peculiarities of the US electoral system, he neglects any discussion of the document responsible for such inequities in the first place. Indeed, Davis makes a serious error when he asserts that 'popular sovereignty (for white males) was the pre-existent ideological and institutional framework for the industrial revolution and the rise of the proletariat' in the nineteenth century (p. 11) when, as we have seen, popular sovereignty in America was never more than half-formed.

[53] *Real Choices—New Voices: The Case for Proportional Representation Elections in the United States*, New York 1993.

democratic reinvigoration in the US as it is in the UK—he makes the serious error of trying to institute reform within the existing constitutional system, when in fact the system's multi-chambered eighteenth-century architecture is itself an obstacle to change. Where an insurgent party in a parliamentary system has to take on only a single chamber, in the US it must advance on several fronts simultaneously. It must conquer the House of Representatives and the Senate. Given the presidential veto over both houses of Congress, it must conquer the executive branch, while, considering the Supreme Court's veto power over the other two branches, it must subdue the judiciary as well. Thanks to America's arcane voting laws, any third-party movement must maintain a small army of lawyers and campaign workers to gather signatures on nominating petitions in all fifty states just to get on the ballot.[54] The sheer number of elections in the US for everything from the local school board to President—as of 1992, America had more than half a million elected officials[55]—is overwhelming, which makes it all the harder for an insurgent party to get the public's attention. The primary system, one of the many wrong-headed reforms of the Progressive Era, compounds the problem by opening up the two bourgeois parties to public participation, making it almost impossible for leftists voters to avoid being drawn into their internal affairs. Ideologically, the difference between the Republicans and Democrats is slight. Although one is centre-right while the other is generally harder right, both are devoted to God, country, and the free market above all else, and each is more constitutionally reverent than the other. Yet all attempts to break free of this dictatorship are effectively for nought.

Workers' Consciousness and Totality

Thus, the US electoral system all but slams the door shut on meaningful socialist participation, while opening it wide to political participation under the joint 'Repocratic' umbrella. But the ideological world-view imposed by the Constitution is an even more potent deterrent. Marxism, needless to say, advances a view of class conflict not as something separate and distinct within each nation-state, but as a political-economic phenomenon that not only transcends political boundaries but subverts them. The US constitutional system does the opposite. By fostering a view of itself as unique, it creates a separate and distinct political cosmos. Instead of encouraging workers to see society as a totality, which Lukács, among others, defined as the

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[54] Some petition requirements are truly sadistic. In California and Nevada, for instance, third-party candidates have been required to gather the signatures of fully 10 per cent of the electorate, while in Florida they have been required to gather at least 25 signatures in each of the state's 54 counties. Invariably, such efforts lead to lengthy court battles as the validity of every last signature is challenged. See Daniel A. Mazmanian, *Third Parties in Presidential Elections*, Washington, DC 1974, pp. 91–3.

[55] Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword*, New York 1996, p. 43.

sine qua non of political class consciousness,[56] it fairly mandates that the working class see itself as acting within a pre-existing, essentially unchangeable constitutional framework. It encourages workers to view the world from within the fishbowl rather than from without. The extraordinarily variegated nature of the American political system around the turn of the century, when the socialist movement was attempting to get off the ground, compounded this tendency. Observes Michael Mann:

> In any one year some northern states might be passing progressive legislation and seeking ways around reactionary court rulings, western states might be shooting Wobblies, south-western states harassing Populists, and southern states intensifying racism. A notion of extensive class *totality* across the nation was hard to come by, even for those being shot at.[57]

This was more than a mere product of geography—after all, the even greater distances of Czarist Russia did not inhibit the development of political class consciousness during the same period—but the result of Madisonian self-fragmentation that made *political* distances seem greater than they need have been.

The absence of a working-class opposition of even the mildest sort is the chief reason why the judicial revolution of the 1950s, 1960s, and 1970s has been so contradictory. The lack of any socialist alternative meant that there was no way workers could mobilize to democratize the political structure in their own interests. In their absence, the field was left to well-heeled civil-liberties professionals employing the logic of eighteenth-century republicanism. Once the Supreme Court overturned racial segregation on purely legal grounds, America's antiquated political system did not provide the tools to rein in subsequent white flight to the suburbs even if bourgeois politicians had wanted to—which, with few exceptions, they most certainly did not. *De jure* segregation was eliminated while *de facto* segregation accelerated. While the courts overturned some of the more egregious police abuses of the 1950s and 1960s, the growing isolation of minorities and the poor in economically depressed inner cities meant that there would be no one left—no one who *counted*, that is, according to the prevailing political standards—to make sure the police obeyed the rules. As the law-and-order movement advanced, it became more and more apparent that they would not. 'They give me a stick, they give me a gun, they pay me 50 G's to have some fun', sang one policeman during the 1992 LA riots—'they' being America's constituted authorities.[58] There was also nothing the courts could do, or would do, to prevent an unfolding horror like the

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[56] Georg Lukács, *History and Class Consciousness: Studies in Marxist Dialectics*, Cambridge, MA 1971, p. 69.
[57] *The Sources of Social Power*, vol. 2, p. 653, emphasis in the original.
[58] Paul Chevigny, *Edge of the Knife: Police Violence in the Americas*, New York 1995, p. 35.

war on drugs. Indeed, William O. Douglas, the Supreme Court justice who pushed judicial liberalism to its greatest extremes, engaged in anti-drug rhetoric in *Robinson v. California* (1962) that was no less hysterical and incendiary than anything uttered by the Right.[59] Only a working-class movement, animated by socialist principles of rationalism, equality, and democracy, would have been in a position to act as these policies fell more and more heavily on workers and the poor.

The upshot, decades later, is an economically polarized society marked by freedom for an increasingly narrow elite and growing unfreedom for those below. In a raw capitalist society like today's US, the size of one's bank account determines whether one goes to prison for possession of cocaine or to an expensive, privately-run drug-rehabilitation centre; whether a congressman brushes past on his way to a fund-raiser or sets aside half an hour to listen to one's concerns about an upcoming piece of legislation; whether a child attends a lavishly-appointed public school in the suburbs or a prison-like structure in the inner city; or whether one visits a posh medical office on Manhattan's Upper East Side or spends hours waiting in a crowded emergency room in an under-funded municipal hospital. To be sure, disparities like these are not unique to the US, but nowhere in the advanced capitalist world are they more extreme or widespread.

A Counter-Democratic Régime of Infinite Duration?

A constitutional system without a locus of sovereignty is like a car without a steering wheel. While the people may possess a certain limited control over individual components, they have no control over the mechanism as a whole as it careens downhill. The result is a 'multiple, acephalous federation'—Michael Mann's term for the political structure of feudal Europe, but one which applies equally well to the latter-day US[60]—the democratization of which requires the creation of a sovereign power ex nihilo. There is no other First World society for which the same thing can be said. In nearly all other cases, the people have established their sovereignty by reconstituting their political environment and vice versa—in the 1870s in the case of the Swiss, since 1945 in the case of nearly all members of the European Union.[61] Britain is an obvious exception in that it constitutionally enshrines the sovereignty of the crown-in-parliament rather than that of the people. But at least it recognizes a form of sovereignty whereas the US recognizes none.

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[59] To be a confirmed drug addict is to be one of the walking dead . . . The teeth are rotted out, the appetite is lost, and stomach and intestines don't function properly. The gall bladder becomes inflamed; eyes and skin turn a bilious yellow; in some cases membranes of the nose turn a flaming red; the partition separating the nostrils is eaten away—breathing is difficult. Oxygen in the blood decreases; bronchitis and tuberculosis develop. Good traits of character disappear and bad ones emerge. Sex organs become affected. Veins collapse.' Quoted in Edward M. Brecher, *Licit and Illicit Drugs*, Boston 1972, p. 21.

[60] *The Sources of Social Power*, vol. 1, p. 416.

[61] This is not to say, of course, that the marriage of popular sovereignty and the nation-state is any less contradictory in the modern period than the marriage of popular sovereignty and states' rights was in the antebellum United States.

All points on the US liberal-conservative spectrum are at one with the Founders in believing that unlimited popular sovereignty—the only kind of sovereignty there can be, since sovereignty, by definition, is unlimited—is inherently tyrannical. The struggle to democratize the Constitution therefore means a struggle to forge a sovereign people, a *demos*, out of a population that has allowed its power to be divided and subdivided so as to prevent it from taking charge of society as a whole. Rather than merely fighting for this or that reform, it means challenging American political beliefs at their most basic.

But speaking the language of democracy as it has developed since 1787–88 means speaking a language that is by now largely alien to American ears. Rather than separation of powers, it means arguing that a union of powers under the control of a single *demos* is the only coherent basis for modern democracy. Rather than fetishizing checks and balances, it means arguing that the goal of democracy must be to overcome the contradiction between government and the governed. Instead of limited government, it means arguing the people's unlimited right to move heaven, earth, and the Constitution to preserve, defend, and extend their rule. In a society predicated on the principle that freedom depends on the people holding their sovereign power in abeyance, the notion cannot help but sound strange, counter-intuitive, utopian.

But the situation is not as hopeless as it may at first glance appear. Nor, for that matter, is the system as closed. We know from Sidney George Fisher that the US constitutional system aims to be 'a finality' unto itself, 'to be interpreted only by itself, and to be altered only in the manner appointed by itself'. It strives for 'completeness,' to use the language of the Austrian mathematician Kurt Gödel. But we also know from Gödel that no system of logic is perfectly self-contained, but that all systems are incomplete in some way or another. All have a dangling thread, so to speak, which, if pulled hard enough, will cause the entire arrangement to unravel.

There are many ways the US constitutional system could be said to be incomplete, but perhaps the most obvious concerns the aforementioned Article V. After delineating the elaborate process by which the Constitution may be amended, Article V concludes with an extraordinary clause adopted without debate on the penultimate day of the Philadelphia Convention. The clause declares in its entirety that 'no State, without its consent, shall be deprived of its equal suffrage in the Senate'. This is the only part of the entire document exempt from the normal two-thirds/three-quarters amending process, the item that comes closest to being absolutely immutable. It is rarely discussed, no doubt because its implications are so explosive. What it means, simply, is that since no state can be deprived of its 'equal suffrage' in the upper house without its consent, every state must agree if the arrangement of two votes each is to be altered in any way. Since every last state must agree, we can assume that latter-day Old Sarums

such as Wyoming, Montana, or Vermont, all of which benefit enormously under the current system, would not agree and would use their constitutional power to veto any modification indefinitely. *No matter how unfair the current system of equal state representation, consequently, reform is impossible.* Where the ratio between the most populous and least populous state was a mere 12 to one in 1790, today it is 67 to one, while in the year 2020, according to census projections, it will be 73 to one. Yet, according to America's Ancient Constitution, there is nothing the vast majority can do to change it. Where California will be nearly two-thirds black, Hispanic, or other 'minority' by the year 2020, Wyoming according to the same census projections will be just 14.6 per cent, North Dakota will be just 10.6 per cent, and Vermont will be just 4.4 per cent. Yet, once again, the people would be powerless to rectify such gross imbalances.[62]

Is this the most ironclad portion of the Constitution or merely the most brittle? How long can an ostensibly democratic republic continue with such an undemocratic system? If one of America's leading historians is to be believed, the answer is endlessly:

> The Constitution closed the door to simple majoritarian rule in the United States. Popular majorities animated by what people wanted to do at a particular moment would be *forever* constrained. Despite the celebration of popular sovereignty in America, the sovereign people were restrained once the Constitution was ratified.[63]

If so, then, America has succeeded where every other empire in history has failed. It has created a counter-democratic regime of infinite duration.

On the Brink

But it has not. The more inequitable the American system grows, the greater the likelihood that someday it will snap. Any other society would in the grips of a similar contradiction, and there is no reason to think that the United States is any different. Indeed, the US constitutional system has already snapped once before—in 1861–65—when democracy and an immutable constitution were similarly at loggerheads. Slavery was legally impregnable, the Constitution contained no adequate provision for its removal, and yet somehow the immovable moved.

If—or, rather, when—something similar happens in regard to the rotten-borough Senate, the implications are intriguing. Mathematically, the most elegant solution would be for the people, led no

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[62] US Bureau of the Census, *Population Projections for States, by Age, Race, and Sex: 1993–2000*, Washington, DC 1994.
[63] Joyce Appleby, 'The American Heritage: The Heirs and the Disinherited,' *The Journal of American History* 74, 1987, p. 804, emphasis added.

doubt by the urban working class, to confront the Senate *en masse* and demand reform where the law says reform is impossible. Even if they were to confine their demands to the removal of a single troublesome clause, they would be doing so in violation of the existing law of the land. They would be acting illegally, yet the idea of an entire people acting in violation of a constitution made in its name would be patently absurd. While some latter-day Tories might look to the law to dissolve the people and elect another, the people would dissolve the law instead. Presuming that no one tried to interfere with the democratic will, a revised Article V shorn of its final fifteen words, would become the new law of the land. The people would have demonstrated once again the old principle that, as the source of law rather than its subject, a sovereign power is incapable of violating the law, but rather creates new law with every step. It is its own law, its own justification. Although the rest of the Constitution would remain intact, the superiority of the *demos* to the whole of the document would have been established. The door would be open to thorough-going constitutional review, not through the obsolete eighteenth-century method set forth in Article V, whose inadequacy would have been demonstrated for all to see, but by the people as a whole ranging freely over the entire document. Checks and balances, separation of powers, and the rest would have to defend themselves in the court of democratic opinion, something they have never had to do since ratification. All would be considered guilty until proven innocent. How much of the old constitutional baggage would survive is purest speculation, of course. But it is worth bearing in mind the rule of thumb that societies most hostile to change are the ones for whom change is most sweeping when it finally occurs. The most constitutionally conservative of societies thus might become the most radical.

The urban masses, short-changed and ill-governed under a system that gives undue weight to under-populated agrarian states, might discover that they enjoy governing directly and embark on further changes to strengthen their rule. Workers, who have never had a real opportunity to speak with their own voice in America's impoverished political system, might seize the opportunity to organize a separate political party. This is something that other societies take for granted, yet the formation of a mass socialist party in the headquarters of global capitalism would shake not only US society to its depths but the world as well. Constitutional democratization might be America's February Revolution leading to—what? America has never known a top-to-bottom makeover along the lines of the French Revolution, the Meiji Restoration, Bolshevism, or the post-1945 transformation of Continental Europe. Even the Constitution itself was less a makeover than a codification of constitutional relationships going back to the earliest days of the colonies. True democratization, on the other hand, would require a fundamental break with the past. As the people awake to the absurdity of trying to force a modern society to conform to a pre-modern plan of government, they would have

no choice but to toss ancient shibboleths overboard and replace them with something more modern and democratic.

A February Revolution or a Neo-Venetian Reaction?

On the other hand, limited modernization within the existing constitutional framework is not altogether impossible. There are various ways such modernization could take place. Rather than reforming the Senate in accord with the principle of one person–one vote, for instance, Congress could abolish it outright, slash its powers, or eliminate them entirely—all of which could be accomplished via the two-thirds/three-quarters process outlined in Article V. Or Congress could try to make the Senate more equitable by breaking up the most populous states or consolidating the least populous—something that the affected states, according to the Constitution, would have to agree to themselves, however. Reforms like these are highly unlikely thanks to the daunting constitutional obstacles that would have to be overcome, but they are not absolutely out of the question. Their chief virtue from a liberal perspective is that they would allow true believers to trumpet that the system had 'worked' once again. Finally, Congress could opt for a Clintonian policy of muddling through under more or less the constitutional status quo. This is what might be called a 'neo-Venetian' solution, named after the republic with which the US briefly overlapped, whose constitution was once the envy of Europe. Government in Venice was an immensely complex arrangement of checks and balances and countervailing institutions. Yet for centuries it 'worked' in the sense that it allowed the republic to grow rich off the Levantine trade while sparing it the civil wars that were tearing apart the rest of Italy. But, beginning around the seventeenth century, the situation began to change. Other nations advanced, while the Venetian constitution remained frozen in its late-medieval splendour. Stability gave way to stultification and decay to the point that when the modern world in the figure of Napoleon Bonaparte pounded on the doors in 1797, the republic was too paralyzed even to offer a proper surrender. Instead, the Venetian ruling class simply scattered.

It is difficult to imagine the US following a similar path to ruin. After all, America's problem would not seem to be stasis, but over-excitement to the point of hysteria. But all this hyper-activity masks—or perhaps compensates for—stagnation at the core. In love with change at one level, it refuses to acknowledge even the possibility of change at another. While admitting in its bleaker moments that the long-term outlook for US is negative, that decay is deepening, that what is right with America may in the end be insufficient to overcome the growing list of what is wrong with it, it is incapable of marshalling its resources to put a halt to the downward spiral. Indeed, its greatest constitutional sages tell it that even to attempt such a thing would mean breaking faith with the Founders and letting loose all those torments and disorders that sent the Puritans fleeing into the wilderness in the 1620s. Instead, the populace is urged to stand by and watch as

constitutional high priests rummage through the ancient law to come up with answers to modern problems. If this trend is allowed to continue, the outcome will almost undoubtedly be deepening political stagnation, growing corruption and oligarchy, increasing brutality toward the working class and the poor, and a rising obsession with legal forms as opposed to democratic substance. The Constitution and Bill of Rights will no doubt remain in their bullet-proof, helium-filled glass cases in the National Archives in Washington, lowered each night into a reinforced underground vault as a precaution against nuclear attack. But the essence of democracy will have been lost. The more revered the Constitution grows, the more society beneath it will decay. The more society needs to analyze where it went wrong, the less will it be able to concentrate its thoughts. Thomas Hobbes, who argued that society needs a clearly defined sovereign power to guard against the war of all against all, would not be entirely displeased by the outcome.

In an interesting article a few years ago, Akhil Reed Amar argued that the US Constitution has not just one amending clause, but two: the one everyone knows about in Article V plus a super-amending clause implicit in the Preamble.[64] It is by a now commonplace in American legal history that the Constitution of 1787 was an illegal usurpation under the terms of America's first constitution, the Articles of Confederation, which were still the law of the land at the time of the Philadelphia Convention. Where the Articles stipulated that unanimous approval of all thirteen states was required to approve any constitutional change, the Constitution of 1787 declared itself ratified with the approval of just nine. Hence, the assertion that 'We the People do ordain and establish this Constitution for the United States of America' implies a right not only to create new frames of government but to abrogate old ones when they are no longer serving their purposes. The people may do so over and above, or even contrary to the existing law. Given that the current constitution is no longer establishing justice, insuring domestic tranquillity, and promoting the general welfare but is in fact undermining them, the people have a historically established right of revolution to jettison it as well. Having done it once, 'We the People' can do it again. The US Constitution's great gift to the cause of international democracy is contained in its first three words. The rest of it can go.

[64] 'Philadelphia Revisited: Amending the Constitution Outside Article V', *University of Chicago Law Review* 55, Fall 1988, pp. 1043–1104.