GOVERNMENT AND THE GOVERNED

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Law reveals itself as something self-contradictory. On the one hand, it claims to be something essentially good or noble: it is the law that saves the cities and everything else. On the other hand, the law presents itself as the common opinion or decision of the city, i.e., of the multitude of citizens. As such it is by no means essentially good or noble. It may very well be the work of folly and baseness. There is certainly no reason to assume that the makers of laws are as a rule wiser than "you and I"; why, then, should "you and I" submit to their decisions? The mere fact that the same laws which were solemnly enacted by the city are repealed by the same city with equal solemnity would seem to show the doubtful character of the wisdom that went into their making. The question, then, is whether the claim of the law to be something good or noble can be simply dismissed as altogether unfounded or whether it contains an element of truth. (Leo Strauss, *Natural Right and History*, p. 101.)

There is a group of men and women on the political scene today who are generally characterized as a group which believes in a more or less absolute adherence to human rights and (perhaps therefore) to liberty. Our purpose here will not be to spell out the meaning of "rights" or "liberty" but merely to begin by assuming that whatever such terms mean these two concepts constitute the basic *political* ends for this group of political thinkers.[1] Those who adhere to this position and who believe in the necessity of government (some do not) found their political science in the concept of a "limited government". It is with this political science that we shall presently be concerned.

In the following consideration we shall seek to indicate reasons for the following two positions:

I. That a position which dictates absolute adherence to human rights, liberty, and limited government is not inherently committed to any particular form of limited government. A commitment to a "limited government" means a commitment to a government whose powers are enumerated and in which such enumeration is consistent with or seeks to secure human rights and which does not violate these rights. This meaning of government, however, does not dictate any particualr form of government.

II. That it is not inconsistent with a position seeking to secure complete social liberty by the maintenance of human rights to argue that men need, in some sense, to be governed where being governed means something distinct from having an institution which merely establishes rights, judges violations of rights, and in which the citizens enjoy rights.

To my knowledge, this new group of political thinkers (some of whom call themselves "libertarians") have never taken up a principled discussion of questions dictated by the nature of the discipline of political science.[2] This is a serious defect in their position, but it is probably a defect which stems from a general confusion about the nature of government and of political science.[3] Thus, part of our purpose here is to offer some indication as to what some of the issues are which might have been ignored with respect to the purpose, nature and functioning of government.

In indicating reasons for the validity of the two positions above, we shall be utilizing a somewhat unorthodox methodology. Instead of directly arguing for the two positions we shall provide a summary of a debate by a certain group of men who argued about government. We shall conclude by indicating what in the summarized debate of these men points to the validity of our two positions. The debate we shall be summarizing (on some issues only) was the debate carried on by our Founding Fathers in the constitutional convention and with the Anti-federalists.[4] Even though the debate took place in the past, the interpretation of that debate to be offered here is abstracted to such a level that one might view the issues discussed in the debate in an a-historical way. In other words, the purpose of summarizing the debate at all is to at least implicitly claim that the kinds of questions the Founding Fathers raised are the kinds of questions we must also raise when thinking about government. I believe the consitutional debate indicates the kind of dialectic which ought to be

engaged in when considering questions of the form of government. In our discussion below we shall assume (as is largely conceded) that, like the libertarians of today, the prime purpose or end of those libertarians of the past (the Founding Fathers) was to secure rights and promote liberty.[5]

I

During the constitutional debates the dialogue among the Founding Fathers centered around the three branches of the government they were designing. We shall thus begin by discussing some relevant issues which were raised in connection with each branch.

The first branch with which we shall be concerned is the legislative branch. There were basically two key questions which concerned the founders in this area: 1.) how democratic should the legislature be, and 2.) as a corollary, what should the mode of representation be like.

Numerous views were expressed on both of these points. James Wilson, for example, takes a general position which is indicative of the kind of view a large state representative might have and which is also indicative of a more democratic bias as opposed to a more aristocratic position. Wilson makes these three points: 1.) at least part of the legislature should be immediately grounded in the people, 2.) government ought to rise to a fairly high peak, and 3.) popular election is the best way to reduce the influence of the states.[6] The small states, of course, were for having the states determine who the representatives were and in such a manner that the large states would not have an advantage over them. Thus the Virginia Plan, which opted for proportional representation, was being combatted by small states who recognized that this form of representation would give the large states a majority in Congress.

Yet the issue which concerns us here is not the large state/small state controversy as such but rather the meaning behind the various forms of representation. The Virginia Plan, for example, proposed two houses the first of which was to be elected by the people and the second to be elected by the first. Those who wanted the first house elected by the people felt it was necessary in order to give the government durability.

Without concurrence in and respect for government by the people, durability could not be maintained.[7] On the other hand, there were those like Gerry who feared the excesses of democracy and thought the people easily duped by "pretended patriots".[8] More aristocratic measures were thus needed. There were still others who felt that at least the lower house should be very close and representative of the whole people. Despite these differences, most eventually did agree that the first house should be popularly elected. The house of representatives, the, became a largely democratic body, 1.) for reasons of durability, and 2.) because it was felt that the government's purpose was to serve the people. The Founding Fathers felt that the people must certainly have some assurance that their rights and liberty will not be abused by those in power which could only be secured by a democratic branch of the legislature.

Yet, the debate over how democratic the house should be continued when the question of tenure of the office holder was taken up. Some felt that the term should be only one year and reasoned that if this were not the case then the representatives would be too far removed from the people. Others wanted longer terms because they feared that if the representatives were too close to the poeple they would be subject to the passions of the people and lose their ability for detached and objective judgement.[9] Without detachment of some sort the mere will of the people could be exerted to the detriment of the country and ultimately to liberty itself. A two year term was finally settled upon as a mean between these two views and in order to incorporate the validity of both views.

The debate over the extent to which democratic principle should be employed became particularly acute with respect to the senate. Randolph felt that the senate must be exempt from the "passionate proceedings to which numerous assemblies are liable". He sums up his position by saying:

> ...The general object was to provide a cure for the evils under which the U.S. labored; that in tracing these evils to their origins every man had found it in the turbulence and follies of democracy: that some check therefore was to be sought against this tendency of our Governments; and that a good Senate seemed most likely to answer the purpose.[10]

But Randolph's plan (the Virginia Plan) called for having the senate elected by the house. As such it was recognized by

Mason and Sherman that this second branch would be dependent on the first and thus no real check at all.[11] It is clear from reading the debates that while there were disagreements as to how to secure the senate's independence, most did agree that the senate should be a body which would check the excesses of democracy.

Checking the excesses of democracy was not merely a matter of making the senate an independent body but also the Founding Fathers were concerned with the kind of men that were to compose the senate. There were roughly two views on this matter which might be termed the Madisonian view and the Aristocratic view. The latter view hald that in order to check the excesses of democracy (specifically with regard to a violation of property rights by the poor) what was needed in the senate were men of merit and property because such men would have an inherent interest in checking the popular passion of envy. The way to secure this would be by long terms and election of senators by other than popular means, i.e., means likely to assure that such men would get in office. The Madisonian view is somewhat different.[12] Madison argues that as the country grows there will be competition for limited resources and thereby factions. The problem of republican government is that the poor can rather easily gain political power and with a majority use it to thwart rights (again primarily property rights). Madison's solution was basically to utilize large districts rather than small, all of which would be interrelated by a universally applicable system of law. This was Madison's notion of an "extended republic" which generally was in contrast to the more or less localistic attitudes of the time. In the case of the House, large districts would insure that representatives would be elected who are not the pawns of special interests or causes. This would be so because a large district is unlikely to contain a special interest or view and that such a district will contain a cross-section of status and belief. In the case of the senate, an extended republic would insure that whether the senators were elected by the national or state legislatures the outcome is likely to be that men of merit, property, and reputation would be chosen. Only such men have the means and ability to distinguish themselves to a point where they are likely to be considered for senatorial positions.[13] It should be noted, however, that Madison also recognizes the validity of some aspects of the Aristocratic

position but asserts that we cannot *depend* upon a search for virtuous men per se.

In this very brief discussion we have seen that the debates over the legislative branch concerned finding a way in which the best elements of democracy could be instituted while at the same time checking the defects of democracy. As Wilson's second point indicates, it was felt that by raising government to "peaks" the best checks against the excesses of democracy could be established.

Generally the Founding Fathers saw the need for an executive to be threefold: 1.)to have some focal point of responsibility in executing the laws, 2.) to have a leader of the people, and 3.) to have a symbol of the nation particularly with respect to foreign powers.[14] It was also felt by many of the founders that the executive must be a strong one for two reasons, 1.) in a large republic execution of the laws means that the executive's influence and ability to command respect requires a good deal of power, and 2.) no foreign nation will respect the word or office of a nation which does not have a clearly recognizable and authorative leader (Hamilton emphasized this position the most).

The first concern of the Founding Fathers was to consider whether an executive was consistent with the "genius of the people", but this question did not detain them long. The basic issue of the debate consisted in answering the question of how close or far away should the executive be from monarchy. Some, such as Sherman, felt that the executive should do no more than carry out the will of the people as expressed by the legislature. Others, like Hamilton, wanted a very strong and independent executive. Most of the Founding Fathers fell somewhere in between the Hamilton and Sherman position though leaned more to the Hamilton side. Yet all feared to some extent the possibility that the office of the executive might be a vehicle to tyrany. Thus Randolph, for example, proposed having a three man executive. However, it was also felt that unity in the executive was necessary for efficiency and responsibility. A three man executive would be subject to disputes and disharmony[15] and was therefore rejected. Most of the discussion on the executive, though, did not center around these questions. Instead, the debates centered around the mode of election of the executive.

In order to secure the right kind of executive, i.e., a man of

merit capable of gaining the confidence of the people, it was felt that the mode of election was important. Some argued that state legislatures should choose the executive while other felt that the national legistlature (either house or senate) should do so. Eventually these views were rejected on the grounds that the executive must be a separate branch and not dependent on any other or the states. Another alternative, proposed by Wilson, was to have the executive elected by the people. Yet some argued with Gerry that, "the people are uninformed, and would be misled by a few designing men".[16] The kind of man needed as a leader of the country was a man of the best quality. The people are likely to elect a man who appeals to their passions or are likely to pick the wrong man because of their inability to secure adequate or complete information. Moreover, it was felt that the executive must be free from all political obligations in order that his integrity be assured. None of the methods thus far could really assure this last point.

The above account points to two essential problems the founders were faced with: 1.) since the executive was to be a leader of the people and needed their confidence, his election must in some way be tied to the people, and 2.) but in order to assure integrity in the office of the executive that office must be free from the promotion of demagoguery and the dispensing of political favors stemming from political obligations. The final solution to these problems was the electoral college.[17] We cannot go into all the complexities of the electoral college here. We can, however, point out the following: since each state was independently in charge of selecting the electors to the college, the Founding Fathers brought the executive close to the people without sacrificing the integrity of the office. Moreover, by having the electoral college convene *only* for the purpose of electing the president and by not allowing the electors to be political office holders, the presidency was virtually free of political obligations. And furthermore, by relying on electors rather than the people themselves, it was more likely that men of character would be put in office. In short, the Founding Fathers wanted the institutional symbol of America to be as unsoiled as possible.

There was one other major matter the founders considered in their debate over the executive -- the matter of in some sense combining the executive and judiciary.[18] Balance of pow-

er was a key concern here as was competent law making. Madison felt that the executive was naturally weak in a republic. Indeed, it is almost impossible to make another branch or combination of non-legislative branches as powerful (and therefore a full check to) the legislature. Moreover, Madison thought that by using the judiciary as a kind of council the wisdom of the judges would insure good laws and add weight and respectibility to the executive. Separation would be maintained, according to Madison, by enumerating exactly how the executive and judiciary would come together. The opponents of this proposal, such as Gerry and Martin, argued that, 1.) to expand the executive with the judiciary would only weaken judicial strength and reputation, 2.) it seemed to Gerry and Martin that what Madison wanted (i.e., competent law making) could be best accomplished by separation, and 3.) there is no necessary reason to believe that the judge's wisdom is any greater than the legislature's. Martin sums this up well when he states:

> A knowledge of mankind...cannot be presumed to belong in a higher degree to the Judges than to the Legislature. As to the Constitutionality of laws, that point will come before Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative. It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating against popular measures of the Legislature.[19]

As it turned out, the basic Martin/Gerry view was upheld, and it seems to me fortunate that it was. The impartiality and objectivity of the judges would have been much harder to secure if Madison's position had been established. Gerry was right, it seems to me, to fear the making of 'Judges into statesmen'. Furthermore, as Strong puts it, "the power of making ought to be kept distinct from that of expounding, the laws. No maxim was better established. The Judges in exercising the function of expositors might be influenced by the part they had taken, in framing the laws."[20]

Other than the preceeding questions concerning the judges, the Founding Fathers spent little time on the Supreme Court relative to the time spent on the other branches.[21] Yet the Supreme Court remains on of the most fascinating and important branches of the United States government. As such, some account of it must be given. In this connection I espec-

ially like Eidelberg's interpretation[22] and that which follows will be an exposition of some of Eidelberg's suggestions.[23]

As we learned in part from the above, the Founding Fathers finally established that there must be a distinction between those who make the laws and those who judge them, i.e., those who make laws ought not to be the final judge of their constitutionality. Another distinction also arises in this context and that is the distinction between rejection of laws because of their constitutionality and rejection because the laws are unwise. Since the first distinction above was maintained, the former part of this last distinction was generally sought. Despite this, it is unlikely, according to Eidelberg, that a plainly unjust law would be instituted because the Court would interpret the constitution in a way which would reject the unjust law.

If the judiciary is not combined with the executive, it will be more difficult for judges to stop the operation of improper laws. Moreover, separation from the executive meant that the court would be relatively the weakest branch of government. This meant that the court would not exercise judicial review without self-restraint, for a constant exercise of judicial review would initiate the wrath of the other branches and/or make each decision the court rendered that much less forceful and significant. Thus, by making the court a fully separate branch of government, the orientation of the court shifted from an emphasis on the exercixe of its *will* to the exercise of its *judgement*. In other words, the court was meant to be a body concerned with proper judgement more than anything else.

The Constitution was to be considered the supreme law of the land, i.e., the fundamental law or the law of last resort. Each time the Court expounds the Constitution it confirms the permanent nature of this law and invites us to consider the founder's intentions.[24] Yet how can any group of men be entrusted with the job of reviewing the laws? The basic answer is that the Court has no material power and thus no immediate interests. A decision one way or another on a case is not likely to increase their personal fortune nor give the judges any more actual power than has been enumerated to them. To preserve the Constitution as a permanent body of law is the only theoretical justification for investing the judges with permanent tenure. Moreover, the permanency of the

law, 1.) is not likely to promote judges who want radical changes, and 2.) is likely to promote an attitude in the judges which is concerned for the public interest, i.e., that which fully reflects the truth about the nature of the good for society (as fundamentally dictated by the Constitution) and a discerned judgement as to whether a law maintains that good.

If it seems to some (as myself) that the present Court (or recent history of it) has not lived up to these ideals then this may be attributed to the fact that the Court is often involved in what Eidelberg calls "creative interpretation". This interpretive power is that which most fully influences our lives for better or worse. Yet if one's position toward the Court is that the Court has presently used its interpretive power to the detriment of society, then I would suggest that one look to more cultural influences (e.g., philosophy, or the tenor of dominant ideologies, etc.) than to the removal of the Court's interpretive ability as the corrective measure. Even if it were possible to completely stamp out "creative interpretation", which it is not, it would not be desirable to do so. The Court must be permitted to have enough flexibility to deal effectively with changing implications of rights and social circumstances.[25] Without this interpretive ability the Court would soon degenerate into an archaic body.

In short, my vision of the judicial branch is one which views this branch as the main protectorate of objectivity. It is true that this objectivity is more of a legal than a philosophic nature, but in a world without the philospher king legal objectivity is normally that which is most desirable and necessary to maintain.

Our summary of the debates of the convention is now complete. In the next section we shall turn to a brief exposition of the debate over the general nature of society and government as expressed in the debate over the ratification of the Constitution between the Anti-federalists and the Federalists.

II

We now turn to one of the most fascinating and important debates in American history -- the debate between the Federalists and the Anti-federalists. Despite the importance of this debate few people seem to be aware of the general features of

the debate. Yet as Herbert Storing suggests, the Anti-federalists should also be considered as founders for two reasons: 1.) the Federalisits won the debate but did not simply win, and 2.) the Constitution is the basis for a continuing debate in American politics and the Anti-federalists were the first participants in the debate. Indeed, as Storing also suggests, much of the later debates in American politics were anticipated by the Anti-federalists. Moreover, one will recognize in what follows that some of the present day attitudes on the nature of government and society were in large part enumerated by the Anti-federalists as were some of our present problems.

Before presenting our summary of the debate a word of caution is in order. The Anti-federalists agreed on absolutely nothing, i.e., there was no one position on which all the Anti-federalists agreed.[26] In fact, some Anti-federalists even voted for the Constitution! However this may be, the Anti-federalists are generally those men of this period who had strong reservations about the Constitution. Furthermore, there are certain points on which many or most agreed. In our discussion below we shall try to focus on these main features.

It is generally conceded that James Madison is the father of the American Constitution. As such, it is often Madison whom the Anti-federalists are attacking. Because of this we shall spend a brief moment on Madison's general philosophy of government (recognizing, of course, that many Federalists were less modern, more aristocratic, or more democratic than Madison).

A basic maxim can be applied to Madison's philosophy of government: 'republican solutions for republican problems'. Generally Madison sought to construct a government which was cognizant of the problems of republicanism but which solved such problems by largely republican measures.

Like most of the Founding Fathers, Madison stressed a balanced government. Yet, unlike most, Madison's vision was more modern. He argued that balanced government, as it was employed in Britain, could not be employed here because there were no well established and traditional classes in America, as in Britain, to balance off. Some men, such as Dickenson, agreed but felt that the major elements of the balance should be the states. Others, like Hamilton and Adams, thought that the balance should center around dichotomies which are inherent in the nature of any society, such as

the rich vs. the poor or merchants vs. landed interests. Madison's position was neither of these; he argued that the balance should be a constitutional one, i.e., that the branches of government set up by the constitution will be balanced off against one another with less emphasis being paid to the balancing of cultural differences or interests.[27]

Governments which have relied on merit or on a balancing of "natural" cultural differences have not worked well in the past. They have a tendency to either "freeze" the classes balanced (i.e., almost institutionalize the views of the particular classes involved such that the government becomes hopelessly divided between the classes) or to degenerate into oligarchy or the rule of the few or into democracy (the rule of the many). In both cases, human rights and liberty tend to fall by the side.

Madison's great and ingenious solution to the problem of fixed and warring classes or the problem of relying simply on men of merit is his notion of the "extended republic". Madison believed that a number of basic republican problems could be solved by an extended republic. In the first place, the danger to rights and liberty comes not so much from the rich as from the poor. As such, the passions of the poor or many must not be allowed to surface to the extent of having rights (especially property rights) abrogated. There are two basic solutions to this problem. The first is to have a fluid, expanding, and commercial society (possible only in an extended republic) whereby the poorer members do not actually suffer from need. On a more general level the question was whether democracy could maintain or secure property at all. This was a question because it was felt that as society grew and resources became scarce those without much property would come to demand that the minority (the rich) not be permitted the absolute right to keep what they have. There were three basic ways to insure a maintenance of property rights: 1.) leave suffrage only to freeholders[28] (which Madison rejected basically on the grounds that freeholders would considerably dwindle as society expanded), 2.) have one branch with property and the other without, and 3.) have one branch represent property and the other everyone. These last two seem most appealing (escpecially to such men as Hamilton) but Madison remained highly sceptical of the ability of working out such solutions in practice. His proposal was to deal in large districts. In respect

to this problem, large districts would promote men of means because it is most likely that in large districts only men of means will be enough in the public eye to be in a position for office. Since men of means have an interest in remaining men of means it is likely that they will not consent to an erosion of property rights.[29]

More generally, the extended republic was designed to stem the problems which develop from minority vs. majority faction. In an extended republic the will of the minority is not likely to emerge. If it does and the minority does gain control of the government then the minority will have to either proceed in secrecy or by deceiving the people, for if the minority ruled in the open against the majority the majority would eventually rush in and rectify the situation. Yet to rule in secrecy or by deception in a large republic is not likely to be successful in the long run basically because it would be quite difficult to close off all channels of exposure.

The problem of the will of the majority is much more severe. If the will of the majority does take hold of the government it is almost impossible to remove. The extended republic notion is an attempt to combat the problem at its root. In an extended republic, composed of an almost infinite variety of interests and attitudes, it will be quite difficult to get a majority to agree on much of anything that might threaten minority rights. In other words, an extended republic is not likely to give rise to a majority which conceives of itself as a majority. Thus an extended republic is not likely to foster a majority of men and women who are self-conscious about a "majority interest" per se.

Basically, an extended republic is designed to de-class the classes. No class, whether rich or poor, will come into government with a class consciousness, i.e., no governmental office holder will conceive of his duty as being the promotion of his class interests. An extended republic is an attempt to defuse rigidly dichotomous interests which seem to develop in most societies. The idea is still to promote men of merit and property (or whatever characteristic is needed) but, in an extended republic, the promotion is designed to assure that (for example) the only meaning men of property will attach to the notion of property rights is the meaning spelled out in the Constitution.

The Anti-federalists were generally for the notion that the

major part of government ought to be carried on by the states. The reason which they offered is simple: only in small territories can republican government be successful. An extended republic will not promote freedom or respect for the laws but will destroy it. Samuel Bryan in "The Letters of 'Centinel' " sums up the view this way:

> If one general government could be instituted and maintained on the principles of freedom, it would not be so competent to attend to the various local concerns and wants, of every participant district, as well as the peculiar governments, who are nearer the scene, and possessed of superior means of information; besides, if the business of the *whole* union is to be managed by one government, there would be no time. Do we not already see, that the inhabitants in a number of larger States... are loudly complaining of the inconveniences and disadvantages they are subjected to on this account, and that, to enjoy the comforts of local government they are separating into smaller divisions?[30]

Since a large or extended republic is not close to the people, the Anti-federalists argued that confidence in and voluntary obedience to the laws could not be maintained. And since a large republic cannot secure voluntary obedience to the law because people are not close to it, freedom will be destroyed because a great deal of compulsion will be needed to enforce the laws. The Anti-federalists saw that the Constitution would develop a huge bureaucratic machine in order to enforce these laws. Moreover, the Anti-federalists felt that the only way to secure law enforcement was by utilizing a large military force (which is one reason they feared a standing army). As Richard Henry Lee put it:

> There is more reason to believe, that the general government, far removed from the people... will be forgot and neglected, and its laws in many cases disregarded, unless a multitude of officers and military force be continuously kept in view, and employed to enforce the execution of the laws, and to make government feared and respected.[31]

The Anti-federalists thought that almost any form of representation was aristocratic and should be avoided. Their position was that the legislative body should merely reflect the people. On the other hand, the Anti-fedealists never had a satisfactory response to the question of why there should be representatives at all since no representative body looks exactly like the people. The reply to this was that the representative body instituted by the Constitution was much too aristocratic even granting that some representation was needed.

Their solution was to make sure that the representative body contained enough middling type or mediocraties in order to mitigate aristocracy. They also felt that a frequent and continual rotation of office holders was necessary in order to insure that the representatives returned frequently to their localities so that they did not become too far removed from the people.

Basically the Anti-federalists thought that the law and the will of the people should be pretty close to the same thing. If the people and the law do not get along then there will be an end to free government. The Anti-federalists saw the people as public spirited, homogeneous, and self-restraining. Any attempt to enlarge the republic would undermine these basic political virtues. But the Federalists had two rejoinders to this, 1.) we cannot rely on the virtues and good morals of the people or the officials (supposing there are these virtues) to make government work, and 2.) the kind of continuous popular consent the Anti-federalists wanted was dangerous. Popular conset is a great exertion and should be relied upon only infrequently -- an inflamed public was not a tranquil one. Moreover, the passage of time would insure the veneration of the laws, though the Anti-federalists doubted this would happen. The Federalists also argued that what the people really wanted was an effective protection of their rights and not necessarily a government which is close to the people. The Anti-federalists might respond to this view by saying (as implied before) that even if it were granted that the Constitution "more effectively" protects rights, what is required for this protection is far from the best mode of securing a free society. A free society is one where men obey the law more or less voluntarily. Thus even if the Federalists could protect all rights effectively, the police force needed to do this would be so large that, 1.) the danger to freedom would be great, and 2.) people would actually be unfree, even though their rights were protected, because they would only be obeying the law out of fear and not consent.

The Federalist position was that there must be enough power in government to insure that the ends government was set up to secure were actually secured. Thus it is somewhat mistaken to say that the Federalists were for a limited government in the sense of limited powers. Actually the Federalists (at least Madison) were not for limiting the powers of government at all; they were only for limiting the ends of govern-

ment. According to the Federalists, to limit powers in a constitution is, in effect, to put a limit on the ability to secure proper ends which in practice means that such ends will not be secured at all. The Anti-federalists claim, however, that one should always grant power (or the possibility of power) cautiously, that the Constitution grants too much power, and that it is better to grant more power if needed than to set up initially a system whereby power can be easily increased. If the Anti-federalists had a maxim it would be something like, "keep government as poor as possible". In their eyes, the big problem with the Constitution was that it falls between simple and complex government (like Britain) and thus is neither. Since the Constitution has no genuine or natural balancing (only constitutional balancing) and since it is not a simple government, the Constitution utilizes the worst of both the simple and complex worlds--there was no genuine responsibility and no genuine mixture. It is always easier to grant government more powers if need be than to take powers away.

The Anti-federalists had two other basic worries. The first was that they felt the Constitution was founded solely on the pursuit of self-interest. Such a principle could not serve as the foundation for a government, for it would lead or degenerate into luxury, licentiousness, and thereby a lack of concern for virtue by the citizens. This ties into their second worry, i.e., the worry that the Constitution provides no means for civic education or character formation. At least in a small republic the community could oversee what its members were doing and thereby keep them in line with what is right and good. An extended republic cannot do this.

Our examination of this debate has been all too brief, but we must move on. It is hoped that the reader will catch at least a glimpse as to the importance of the above debate and how it in many ways still applies to today. While we have not covered all the issues here (e.g., taxation),[32] suffice it to say that in many important ways the debate still rages. Only by attempting to come to grips with the debate will we be able to come to grips with many of our own present problems.

III

We have spent a good deal of time in the last two sections on

summarizing some important features of the two related debates. Now we come to the questions of, "why was all that important?" As stated in the beginning of this paper, we shall try to briefly answer this question by indicating how the foregoing discussion applies to the two points with which we began.

The first of the two points stated "that a position which dictates absolute adherence to human rights, liberty, and limited government is not inherently committed to any particular form of limited government". If this view is correct, then one could properly opt for limited monarchy as the best means by which to form a government. However, the position stated above (i.e., the rights and liberty position) normally associates itself with a democratic or republican regime. The argument against limited monarchy by such people is basically of the type that a monarchy, 1.) is very likely to secure for itself too much power, and 2.) that the very nature of a monarchy is counter to the notion stated in the Declaration of Independence that 'all men are created equal'. I am not certain that monarchy is *necessarily* opposed to the principle stated in the Declaration of Independence. However this may be, our concern here is not with the second more theoretical point but rather with the first.

To argue that limited monarchy is most likely to abuse power is to emerge from questions on what the ends of government are to how these ends should be secured. In other words, to argue against monarchy on more less practical grounds is to engage in the type of debate that the Founding Fathers engaged in. Yet to engage in this debate is to be somewhat non-committed as to the particular form of government. If our ends are the same as those of the Founding Fathers (rights and liberty) then there is nothing in particular in the nature of those ends which precludes our entering into the same sorts of considerations as they did. In short, in rejecting monarchy we have said that this means monarchy will not or is not likely to secure the ends desired.

The importance of our foregoing summary of the constitutional debates centers around the truth of the point above. The Founding Fathers were debating about what institutional structure would best secure rights and liberty and why. There are two areas of importance which must be recognized: 1.) much of the debate concerned negative matters, i.e., matters

devoted to a recognition of forms of degeneracy and the solutions for degeneration. For example, the Founding Fathers felt that democracy could degenerate to a level whereby the rights of more well off members of society would be threatened. On the other hand, many were concerned with the degeneracy of the rich whereby government would be used to further the position and status of the rich. These kinds of concerns can, and I believe always will, pose problems for those who seek the maintenance of rights and liberty. To put it more explicitly, to accept a rights and liberty doctrine does not commit one to any position with regard to, for example, the question of whether the executive and judiciary ought to be combined (or whether an executive is needed at all). The beauty of the constitutional debates is that they offer us a first-class example of high level political discourse and thus a means to judge whether those of us who hold similar ends as they, have taken into account all the complexities associated with such ends.

Our second (2) point is that it is not simply enough to suppose that all that is needed for the good society is to have proper laws on the books. The debates over the Constitution show that not only were the Founding Fathers concerned with the establishment of good laws but that they were also concerned with the question as to what institutional structure was likely to secure these good laws over time. Since these men had various attitudes and opinions as to what the best institutional form should be there is at *least* a prima facie case to be made that there are a variety of plausible claims to consider when thinking of the best institutional form. This, then, is what I mean when I say that a position which accepts the ends of rights and liberty is not committed to any particular form of government. The Founding Fathers have indicated not only what kinds of questions might be discussed but also how the debates on such questions might proceed.

This leads us to the second, and less obvious, position with which we began, namely that it is not inconsistent with the rights and liberty position to argue that men need to be governed (where being governed means something distinct from having an institution which merely establishes rights, judges violations of them, and has citizens who enjoy those rights). The Founding Fathers have indicated, and we have stated above, one reason for the plausibility of this claim, i.e., that it

is not enough merely to concern ourselves with putting good laws on the books--we must also be concerned with securing such laws over time. In this context, being governed means having an institutional apparatus which attempts to ward off the passions, or in more modern terms, the attitudes of men which might destroy or severely threaten human rights and liberty. Thus "being governed" does not always have to carry with it the meaning that someone is "telling someone else what to do". What it means is that, like the individual man who resists temptation or stops to think before he acts, some means for filtering the valid from the invalid objections to the present state of things has to be established. The term "government" or "being governed" is a proper term in this context because not all men's expressions or beliefs are permitted to have a political manifestation.

Those contemporary men and women who argue for the rights and liberty position seem to have made two mistakes -- one naive and the other from ignorance. The naive mistake we have already mentioned, i.e., the mistake of supposing that the mere recording of good laws and the maintenance of a police force is enough (simply) to insure that rights and liberty will be secured over time. This mistake stems largely from the second one. There seems to be a general ignorance about or lack of concern for the abrogation of rights and liberty. What *is* recognized is how government threatens our rights or how intellectual doctrines do. Yet throughout man's political history such basic human vices as envy, greed, honor (a mere concern for praise), and the desire for power have had important political manifestations against rights and liberty. Some of these vices seem to be continuously associated with certain political forms. For example, envy and greed seem to be the vices of democracy while honor and power are the vices of the upper classes. A political philosophy which does not at some point concern itself with such issues will not be a convincing and complete doctrine.

On the positive side I am saying that the vices of any political regime must be checked. If we are convinced, as the Founding Fathers were, that republicanism is the best form of government we must construct some means whereby the defects of this form are checked. As we have seen in our summary of the debates, the Founding Fathers differed as to how to go about solving this problem, but at least they recognized

the problem as a problem. Contemporary market anarchists who want law seem to have little recognition of this problem. Since these people believe in no government whatsoever they have no real means by which to filter the various political pressures which will be placed on the law. Since the pressures to change the law for the worse will always be present either the anarchists must adopt some means whereby these pressures are modified and channeled (which means establish a government, i.e., an overriding institution which is more than a mere police force) or they must see their law collapse under continual revolutions. This latter point is likely to be the case because the people and the law will confront one another directly. Without a mediating body (e.g., a government) the changes in the laws are likely to be radical and therefore revolutionary since there would be no way of separating legitimate revisions from illigitimate ones. If, however, some reasonable option for change could be provided in an anarchistic society, those changes would be founded on a merely democratic principle. We have not only seen from our summary of the debates that this principle was questioned and checked by the Founding Fathers but also that such a principle is still open to debate. In other words, it is quite an open question as to whether a society founded solely on the democratic principle can maintain rights and liberty over a long period of time.

The criticisms of the preceding paragraph implicitly house at least two basic questions. The first question is that did the decline of the free-market come as a result of the increased application of the democratic principle to government (e.g., popular election of senators and the president) or by calculating individuals in positions of power acting as individuals? In other words, were changes in the law antithetical to the free-market the result of efforts by populist leaders and sympathizers or mainly the result of power seeking businessmen and/or government officials? Kolko notwithstanding, the assertion that the present day violation of rights and liberty stems largely from the democratization of law is not an implausible claim. If the decline did come this way then the following kind of general problem is raised. Since the market place is a completely democratic phenomenon, the anarachist must show that since the content of law would be determined by the market the market would respond *first* to the maintenance of the law rather than to demands to change it. If this is not the

case and the law was initially good and the changes demanded were bad then how would the market sustain the good law? Would not any completely market institution which could be pointed to as a possible filtering mechanism for the preceding difficulty itself fundamentally depend on the democracy of the market? If so, then at least as a matter of principle, the question as to the relationship between democracy and the law remains. It may just be that the peoples' relationship to the law and to a commodity require rather different sorts of institutions. It would seem that this kind of possibility is not open to the anarchists.

There are two ways out of the preceding problem. One is to argue that the market place is not as democratic as we have supposed. However, this is an unlikely alternative since free-market advocates have long argued that the market as a social mechanism is as completely responsive to demand (whatever those demands are) as is humanly possible. The second alternative might be the general result of the second side of our previous question (i.e., the side which claimed that the decline of the market was mainly the result of power seeking individuals acting *qua* individuals). Here the claim would have to be that democracy does nothing to threaten rights and liberty in terms of altering the law in this rights and liberty threatening way. This must be the claim since any admission that democracy might be detrimental to rights would in principle involve the problem of the preceding paragraph. In other words, a non-democratic means would have to be employed to check the democratic, which means that not every demand or combination of demands would be allowed to directly influence the law. I shall not argue that this second alternative is mistaken but shall only say that our summary of the debates of the Founding Fathers gives reason to question it.

The second basic question is simpler but more fundamental. This question is the following: is the market a generic or derivative feature of social interaction. In other words, does the operation of the market depend on the establishment of certain kinds of legal precepts or is the market more or less intrinsically endowed with its own self-enforcing laws such that once government is removed a free-market mode of social interaction *necessarily* develops (the generic claim)? I believe that the market anarchists consider (and probably must consider) the market to be generic. However, this question is

much too complex in all its implications to go into here. While the Founding Fathers had no fully conceptual understanding of the free-market, I think it is safe to say that they would have held that the market structure is derivative, i.e., that the law and the market are rather different kinds of things and that the market would necessarily depend upon the law as a foundation in order for it (the market) to operate. To say that the founders might have felt that the market was in some sense derivative is not to say that they would be right. Nonetheless, whoever is right the question remains as one to be answered by both sides.

The present day limited governmentalists are similar to the anarchists. They have accepted the anarchists' claim that the only proper function of "government" is to be a defense agency. Thus they have ignored one important aspect of government that the Founding Fathers were trying to teach us, namely, that it is not enough merely to enforce rights and arrest violators. Included in a government must be some means for filtering or halting various claims. Our summary of the debates has shown the various means by which such filtering might be done. Fortunately, I do not believe that those who have argued for the limited government equals defense agency view have necessarily precluded this piece of wisdom of the other aspect of government which the Founding Fathers gave us. In other words, at least the limited governmentalists have an apparatus whereby the other aspect of government can be incorporated. This is not the case with the anarchists. In more explicit terms, since there must always be some means for amending the present body of law there must also be a means for trying to assure that the amendments are in accord with the nature of the most fundamental law (rights). The elaborate governmental structure of the Founding Fathers was designed to insure just this point.

To say that men must be governed in the sense of having an institution which weeds out various political claims is not to take a position which is inconsistent with the rights and liberty view. The reason why such a position is not inconsistent is quite simple: to establish a government whereby the house has elections every two years, or where the senate is elected by the house, or where the judiciary has no material power is not to violate anyone's rights. No one's rights are violated whether the tenure of the house be one month or fif-

teen years. Moreover, there is nothing inherent in an argument for a more democratic or aristocratic government which constitutes a rights violation. As such, the claim of the second position of this paper seems plausible.

In this paper we have tried to indicate some reasons for considering the two positions with which we began. We did so by first summarizing the debates of the constitutional convention and the Anti-federalist/Federalist debate. We also tried, in this last section, to indicate the significance of these debates. Some questions have not been touched upon, such as what legitimizes authority. Yet it is hoped that the foregoing discussion has provided a means whereby serious men may sit down, much as the Founding Fathers did, and debate the basic questions. It must be emphasized again that we have not set out in this paper to prove a particular point about what the right form of government should be or even whether we should have a government. Instead we have tried to set down some considerations regarding where the foundations of the important political questions may lie. It is not enough to begin debating about what is right and wrong in political matters; we must first have some idea of *where* to begin.

[1]There may be higher ends than liberty and rights outside the strictly political sphere.

[2]The archy/anarchy debate of recent times comes closest to this kind of discussion but is rather unhelpful. The anarchists, of course, argue for no government, but when the archists argue for government they never specify what that government should look like nor how government is supposed to go about fulfilling its functions.

[3] I am speaking of political science in the old sense, i.e., a science concerned with principled arguments about what the relationship between the government and the people should look like.

[4]We shall be ignoring completely the complex question of how to interpret the debate of the Founding Fathers. For a good discussion of the various positions, c.f., Jack P. Green, *The Reinterpretation of the American Revolution 1763-1789*, Harper and Row paper, pp. 2-45.

[5]I owe my interpretation and generally most of my knowledge about the debates to Professor Herbert Storing of the Department of Political Science at the Univeristy of Chicago. The following should not, however, be necessarily regarded as Storing's view of the proceedings.

[6]Max Farrand, *The Records of the Federal Convention of 1787*, Yale University Press, paper, 1966, Vol. I., May 31. All notes unless otherwise stated will refer to Farand's edition and will state the volume and the date and shall refer to Madison's notes.

[7]C.f., Paul Eidelberg, *The Philosophy of the American Constitution*, Free

Press 1968, p. 60.

[8]Vol. I, May 31.

[9]C. f., Eidelberg, *op. cit.*, p. 6.

[10] Vol. I, May 31.

[11]Eidelberg, *op. cit.*, p. 79.

[12]This does not mean that Madison would reject the means just mentioned but only that they are not the only means.

[13]E.g., c.f., Vol. i, June 6, Madison's position. Also note the implications of Dickenson's view of the same day.

[14]For a discusssion of many of the aspects of the debate over the executive see Vol. II, July 17-21.

[15]C.f., *Federalist Papers* #70 for a discussion of unity in the executive.

[16]Vol. II, July 19.

[17]C.f., Eidelberg, *op. cit.*, Ch. 9 for a superb discussion of the quite remarkable character of the electoral college.

[18]Cf., the debates of June 6 (Vol. I) and July 21 (Vol. II).

[19]Vol. II, July 21.

[20]Vol. II, July 21. I take the essential position of Strong, Martin and Gerry on this matter to be a telling objection against the market anarchists who want the maintenance of law and the protection of rights, but also place the legislative, executive, and judicial functions all in the courts.

[21]C.f., June 5, June 15, Vol. I; and July 26, Vol. II.

[22]Eidelberg, *op. cit.*, Ch. 10, pp. 202-246.

[23]One main purpose of Eidelberg's discussion was to argue that the founders really did intend some form of judicial review. We shall not, however, be concerned with that issue here.

[24]Eidelberg argues in this connection, I think rightly, against the Jeffersonian view that every so often the law should be more or less completely revised. Eidelberg points out that such a policy encourages disrespect for the law (a changing law can hardly be regarded as fundamental) and invites the rule of passion or whim (since each changes invokes the desire to mold the new law to one's own vision of how society should be).

[25]For example, the Court may want to apply some notion of property rights to goods normally considered free, e.g., air and water.

[26]There is also not as much coherence on the Federalist side as the *Federalist Papers* might lead one to believe.

[27]This does not mean, however, that certain kinds of men will not be attracted or promoted by certain branches of the government. This will indeed be the case, but Madison did not want to be limited to the particular interests or social outlook of any group of men at any specific time.

[28] E.g., c.f., Vol. II, Aug. 7.

[29]It was generally believed at this time that the best protection of property rights was the maintenance of freehold suffrage. However, Hamilton seems to suggest that freeholders can adequately be replaced by merchants who will be concerned with the maintenance of a healthy commercial society which will benefit all.

[30]Cecelia M. Kenyon, *The Antifederalists*, Bobbs-Merrill Co. 1966, Second printing, "The Letters of 'Centinal' ", p. 11.

[31]Kenyon, *ibid.*, Richard Henry Lee, "Letters from the Federal Farmer", p. 214.

[32]E.g., c.f., Kenyon, *ibid.*, "Debates in the Virginia Convention.