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THE ANNUAL JOHN RANDOLPH TUCKER LECTURE

TAKING NEEDS SERIOUSLY: OBSERVATIONS ON THE NECESSITY FOR CONSTITUTIONAL CHANGE*

ARTHUR S. MILLER**

Justice is the end of government. It is the end of civil society. It has ever been and ever will be pursued until it is obtained, or until liberty is lost in the pursuit.

—James Madison¹

The government of the United States—however well it may have served in the past century and a half, and however sound it may still be in its fundamental structure and functions—is nevertheless in conspicuous need of an exhaustive rehabilitation.

—Clinton Rossiter²

I. INTRODUCTION: THE PROBLEM POSED

Several years ago Professor Ronald Dworkin published an important book entitled *Taking Rights Seriously*.³ The main title of this lecture is, of course, either a variation on or an extension of Dworkin's message. I shall suggest and give reasons for the proposition that the time has come for constitutionalists to *take human needs seriously*. I have little dispute with what Dworkin has to say: to me, it is, or at least it should be, beyond argument that "our constitutional system rests on a particular moral theory, namely, that men have moral rights against the state."⁴ What those rights should be is the essence

* This is an extension of remarks made at the 36th annual John Randolph Tucker Lecture, October 12, 1984, and is based upon the author's work in progress—a book on constitutional change.

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1. THE FEDERALIST No. 51 (J. Madison).

2. C. ROSSITER, CONSTITUTIONAL DICTATORSHIP 307 (1948).

3. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

4. *Id.* at 147.

of what follows. Unless the term is defined to include the dimension of human needs—something that Professor Dworkin does not do—it is seriously faulty. One can, to be sure, easily mesh needs into a concept of rights; and to some extent that will be done. Rights, however, frequently are defined otherwise, often in a “conservative” sense of “vested rights.”

In main thrust, I will propose that the Constitution should be altered to reflect that government has certain obligations to the populace. Those obligations or duties look to what governments *must* or *should* do, in a positive or affirmative manner, rather than, as the orthodox view of constitutionalism would have it, what governments *cannot* do.⁵ In Leon Duguit's words, “Any system of public law can be vital only so far as it is based on a given sanction to the following rules: First, the holders of power cannot do certain things; second, there are certain things they must do.”⁶ We are not accustomed to thinking about the “must do” aspect of governance; Cooley's *Constitutional Limitations* is still the basic text for most constitutional commentary. The Bill of Rights, for example, speaks in terms of negative naysaying; it is a series of “thou shalt nots” aimed at the national and, in recent years, the state governments. In some respects, it can be read as an affirmative command, but at best in a half-hearted manner. The changes in our fundamental law I shall recommend can come about in several ways: by a series of amendments (a sort of continuing constitutional convention that Congress submits to the states); by congressional action that is given judicial approval; or by another constitutional convention. I will favor the third alternative. What Congress gives, it can take away—and I think it necessary to embed certain matters into the Constitution and keep them beyond the reach of transient majorities in Congress. And a series of amendments would involve a long, drawn-out process sure to be abrasive and divisive. All of this will become clearer in the discussion below. My basic point is that substantial structural change in the Constitution can best come by a convention. In saying that, I am of course fully cognizant of the arguments against a convention; but choose to reject them, for reasons later delineated.

The task of dealing with constitutional change is not lightly undertaken. Recall, in this connection, Alexander Hamilton's language in *Federalist No.*

5. See, e.g., F. HAYEK, *THE CONSTITUTION OF LIBERTY* 181 (1960).

Constitutionalism means that all power rests on the understanding that it will be exercised according to commonly accepted principles, that the persons on whom power is conferred are selected because it is thought that they are most likely to do what is right, not in order that whatever they do should be right. It rests, in the last resort, on the understanding that power is ultimately not a physical fact but a state of opinion which makes people obey.

C. McILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 21 (rev. ed. 1947) (“Constitutionalism has one essential quality: it is a legal limitation on government.”). See also Friedrich, *Constitutions and Constitutionalism*, 3 INT'L ENCY. SOC. SCI. 318, 319, 325 (D. Sills ed. 1968); Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 758 (1980) (“The fundamental value that constitutionalism protects is human dignity.”).

6. L. DUGUIT, *LAW IN THE MODERN STATE* 26 (H. Laski trans. 1919).

I: He asked "whether societies . . . are really capable . . . of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force." Hamilton was arguing for ratification of the Constitution of 1787. Americans have been extremely fortunate: The government established by the Document of 1787 set us on our way; but in many respects what we have become has largely been a consequent of "accident and force." It is a sobering thought to reflect that the Framers did their difficult job and the United States has waxed strong and prosperous, so that today it is one of the superpowers of the world, but this condition was produced less because of the few thousand words drafted in 1787 than in spite of them.⁷ Only by ignoring, when deemed necessary, what appear to be the plain commands of the Constitution was the nation able to become what it is today. I will not list all of those decisions; it is sufficient to mention the Louisiana Purchase, the Mexican-American War, President Lincoln's actions at the beginning of the Civil War, and the Supreme Court's protection throughout our history of what Professor Felix Frankfurter called "finance capital."⁸ None of those was ordained by the Constitution and each is, at least theoretically, contrary to the original spirit and intent.

No need exists, however, to be overly legalistic. Surely, factors exogenous to the Constitution were more important than the provisions of the numinous document of 1787. Rufus E. Miles, Jr. said it well: "The extraordinary affluence of the United States has been produced by a set of fortuitous, nonreplicable, and nonsustainable factors."⁹ Among those are the obvious ones of an untapped continental-sized nation with fabulous natural resources, protected for many decades by two oceans and the British navy, and a political system not characterized by the shortcomings of pluralism now so evident in the arena of politics. To state the point somewhat differently: the Constitution has always been relative to circumstances. Without exception, government thus far has been as strong as conditions required.¹⁰ Even in the heyday of the so-called negative, nightwatchman state of laissez-faire economics read into public policy by the Supreme Court, Americans have been able to wage

7. Cf. Miller, *The End of a 400-Year Boom*, 24 *TECHNOLOGICAL FORECASTING & SOC. CHANGE* 255 (1983).

8. Frankfurter, *Justice Holmes Defines the Constitution*, in *LAW AND POLITICS* 61 (A. MacLeish & H. Prichard eds. 1939).

9. R. MILES, *AWAKENING FROM THE AMERICAN DREAM: THE SOCIAL AND POLITICAL LIMITS TO GROWTH* 224 (1976). See W. OPHULS, *ECOLOGY AND THE POLITICS OF SCARCITY: PROLOGUE TO A POLITICAL THEORY OF THE STEADY STATE* (1977).

10. See F. NEUMANN, *THE DEMOCRATIC AND THE AUTHORITARIAN STATE* 8 (1957). No society in recorded history has ever been able to dispense with political power. This is as true of liberalism as of absolutism, as true of laissez faire as of an interventionist state. No greater disservice has been rendered to political science than the statement that the liberal state was a "weak" state. It was precisely as strong as it needed to be in the circumstances. It acquired substantial colonial empires, waged wars, held down internal disorders, and stabilized itself over long periods of time.

See also Miller, *Reason of State and the Emergent Constitution of Control*, 64 *MINN. L. REV.* 585 (1980).

wars (many instances of violence were without congressional approval), obtain colonial empires, and suppress internal dissent. The question Americans must face today is whether a novel set of circumstances requires rethinking the basic premises of the ancient Document. I so believe, and will attempt to demonstrate why such a conclusion is valid, even necessary. Stated more bluntly, either the Constitution is rewritten to reflect modern exigencies or what we now have should be recognized as a mere piece of paper, important principally as the chief artifact of America's civil religion. *No middle ground exists.*

What follows is in many respects an exercise in utopian thought. There is value in such an inquiry. Ideas have consequences, as John Maynard Keynes in a famous passage once asserted.¹¹ And we all know the cliché that there is nothing quite so powerful as an idea whose time has come. (The caveat to that, of course, is that there is nothing quite so impotent as an idea whose time has *not* come.) The idea of constitutional revision is already being discussed by a number of people; it will increasingly be the focus of attention, in one form or another, as the nation approaches the 200th anniversary of its only constitutional convention. Utopias are proposals for ideal communities; they have been known since at least Plato's time. Utopian thought is an effort to justify the reasons why such communities are held to be ideal. Professor William A. Galston has explained:

Utopian thought performs three related functions. First, it guides our deliberation, whether in devising courses of action or in choosing among exogenously defined alternatives with which we are confronted. Second, it justifies our actions; the grounds of action are reasons that others ought to accept and—given openness and the freedom to reflect—can be led to accept. Third, it serves as the basis for the evaluation of existing institutions and practices.¹²

Proposing a constitution of human needs will, I hope, help to guide, at least partially, the content in the growing debate about the viability of the Constitution of 1787, develop reasons why others ought to accept major revisions, and help evaluate our present politico-economic institutions. It is well to remember that the men of 1787, they who are now revered as the Founding Fathers, were themselves engaging in utopian thought when they exceeded their mission of merely revising the Articles of Confederation and produced the Constitution.

11. J. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY*, 383-84 (1936). The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. . . . I am sure that the power of vested interests is vastly exaggerated compared with the gradual encroachment of ideas.

12. W. GALSTON, *JUSTICE AND THE HUMAN GOOD* 14 (1980).

In this intellectual journey that we, as students of American constitutionalism, are undertaking, I would like at the outset to bury, so far as possible, the idea that there is something wrong about having an "ideology." An ideology, Clifford Geertz tells us, provides "a symbolic framework in terms of which to formulate, think about, and react to political problems."¹³ For some reason, we have become accustomed to the notion that there is something essentially good about being pragmatic and something bad about being ideological. To be a "hard-nosed pragmatist" is about the highest accolade one can receive if he works in Washington. The notion is fallacious, even dangerous. Pragmatism, whatever the term means (many definitions exist), is a poor substitute for a set of political values and beliefs—an ideology, if you will.¹⁴ Whether realized or not, everyone has an ideology; indeed, everyone should have one, openly acknowledged as such. There is no more dangerous person than the ideologue who insists that he has no ideology. It is far better for anyone—in present context, a constitutional commentator—to "face his valuations," as Gunnar Myrdal counsels,¹⁵ than to proceed on the assumption, as apparently most legal scholars do, that there is any such thing as unbiased knowing. (My valuations are readily perceivable from what is said in this lecture.) We should as legal scholars remember that "the ideal model of an empty mind passively contemplating pure data presented to pure awareness"¹⁶ must be rejected. The same may be said for judges. If we insist on being pragmatists, let us make an ideology out of pragmatism and repair to Peirce and James to determine what the masters had to say. "The pragmatic method," William James maintained, "is to try to interpret each notion by tracing its respective practical consequences."¹⁷ I hope to persuade you that a proposal for a constitution of human needs does have "practical consequences," not only for Americans but, since the United States is so powerful, for people the planet over. In other words, those who persist in being pragmatic should be able to forecast the practical consequences of their actions or of proposed public policies. It is well, in this connection, to remember that those who got us in and kept us in the Vietnam "war," with its 58,000 American deaths, were pragmatists to a man.¹⁸ The Vietnam conflict is a classic example of pragmatism run riot, with consequences far more pernicious than practical.

13. Geertz, *Ideology as a Cultural System*, in *IDEOLOGY AND DISCONTENT* 65 (D. Apter ed. 1965). See S. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* c.2 (1974).

14. See Anderson, *Editor's Introduction: The Crisis of Liberalism* in *RETHINKING LIBERALISM* c.1 (W. Anderson ed. 1983). But see M. WHITE, *PRAGMATISM AND THE AMERICAN MIND* (1973); H. COMMAGER, *THE AMERICAN MIND* (1950); R. RORTY, *CONSEQUENCES OF PRAGMATISM* (1982).

15. See G. MYRDAL, *VALUE IN SOCIAL THEORY* (P. Streeben ed. 1958).

16. P. RHINELANDER, *IS MAN INCOMPREHENSIBLE TO MAN?* 98 (1973). See Miller, *The Myth of Objectivity in Legal Research and Writing*, 18 *CATH. U. L. REV.* 290 (1969); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 *U. CHI. L. REV.* 661 (1960).

17. W. James, *Pragmatism and Four Essays* in *THE MEANING OF TRUTH* 42 (paperback ed. 1955)(first published in 1907).

18. See D. HALBERSTAM, *THE BEST AND THE BRIGHTEST* (1972).

There is more than a fleeting resemblance to the condition in which the United States finds itself today, almost 200 years after the constitutional convention, and its status as a new and underdeveloped nation under the Articles of Confederation. The same tensions—between hierarchy and heterarchy¹⁹—were visible in 1787, just as they are today, although now they have been elevated to a different plane. Then, they were between state and nation, and the system of federalism was the consequence; today, they are between nation-state and an emergent global society, and no one really knows what form society will take. The age-old problems of governance remain the same, as indeed they have since the times of Plato and Aristotle: First, the individual versus the collectivity called society; here the problem is one of internal order within a given geographical area; second, the relationships between collectivities; here the problem is that of external security. Insistent demands on government were made in 1787 and are being made today. Then, they came principally from those who wanted their property safeguarded. The protection of property, said John Locke, the intellectual father of the Constitution, was the principal reason for the formation of governments.²⁰ Today, an increasing number of groups press ever more insistently for “entitlements,” in some respects a new form of (inchoate) property.²¹ The poor and the disadvantaged are more restive and discontented now than in the late 18th century; and because of the spread of the franchise, they are politically much more powerful. (It is well to note, however, that property *qua* property still remains as the highest of constitutionally protected values.)²² Another resemblance is that in 1787 Americans were poised on the edge of the First Industrial Revolution, a social transformation of great magnitude that had an immense impact on constitutional mechanisms, whereas today we are well into the Second Industrial Revolution, which is certain to have perhaps an even greater impact than the First. The security of the nation was precarious in the early 19th century, when the United States existed largely at the sufferance of the then superpowers, France and Great Britain; today, it is even more precarious because of nuclear weaponry and an apparently irreconcilable conflict with another superpower.²³

19. The term “heterarchy” is borrowed from J. OGLIVY, *MANY DIMENSIONAL MAN* 114-17 (1977). See Micheal, *Neither Hierarchy nor Anarchy: Notes on Norms for Governance in a Systemic World* in *RETHINKING LIBERALISM* 251 (W. Anderson ed. 1983).

20. Gramm, *Industrial Capitalism and the Breakdown of the Liberal Rule of Law*, 7 J. ECON. ISSUES 577, 599 n.17 (1973).

21. See Reich, *The New Property*, 73 YALE L. J. 733 (1964). See also Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877 (1976). Cf. Tushnet, *The Newer Property: Suggestions for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261; Van Alstyne, *Cracks in “The New Property,”* 62 CORNELL L. REV. 445 (1977).

22. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (Powell, J., concurring). See also Lissakers, *Money and Manipulation*, 44 FOREIGN POL’Y 107, 107 (1981) (presidential order freezing Iranian assets during seizure of hostages was less to punish Iran than to protect American banks and banking system).

23. See *NUCLEAR WEAPONS AND LAW* (A. Miller & M. Feinrider eds. 1984) (discussion of legal aspects of nuclear weaponry).

Differences of course exist between the two periods. Social change was relatively slow 200 years ago. Today, it is pandemic and built into the socio-political order. Science and technology are now on the loose and no one knows where they are taking us. All is movement and change. The only certainty is uncertainty. We are back to Heraclitus. Said physicist Ralph Lapp in 1965: "No one—not even the most brilliant scientist alive today—really knows where science is taking us. We are aboard a train which is gathering speed, racing down a track on which there are an unknown number of switches leading to unknown destinations. No single scientist is in the engine cab and there may be demons at the switch. Most of society is in the caboose looking backward."²⁴ Furthermore, today we are urbanized and industrialized as compared with the agricultural, small town, small shop society that was the United States two centuries ago. In 1984, we are truly a united state; in 1787, we were thirteen separate "sovereignties" straggled along the east coast. When toward the end of his life, Thomas Jefferson called for division of the nation into "wards" or "small republics" through which everyone could become "an acting member of government,"²⁵ by no means was that possible even in the early 19th century—and surely it cannot be realized today. This is the technological age—and technology works toward the centralization and consolidation of power. That harsh, unbecoming fact poses one of the fundamental challenges to those who would think seriously about a humane constitutional order, an order, that is, that has human needs as its principal goal.

What does this portend for American constitutionalism? What direction will future constitutional change take? What *should* it take? Change there will be, of that we can be certain, whether it comes by amendment, judicial decree, custom, a combination of all of them, or a constitutional convention. More precisely, will we as a nation continue to drift along, buffeted by the winds of change, without any real idea of where we are going or why; or will we make a concerted effort to canalize the future in directions suitable to all? We—Americans and others—are confronted by a mind-boggling situation: the requirement to establish a reasonably satisfactory world order that will simultaneously nourish community and self-governance while recognizing global unity. "Act locally, think globally," Rene Dubos tells us:²⁶ The tensions between hierarchy and heterarchy must be resolved on a global scale. This is a question that would challenge the greatest political minds of all time and provide the fodder for dozens of graduate seminars. I am not so temerarious as to do more than pose the question at this time, while maintaining that the problem of constitutional alteration should be high on the agendas of all who care about American governance or, indeed, the future of the human race.

Many, to be sure, would disagree with that statement. They believe that constitutional change is not necessary, possibly because we already have a

24. R. LAPP, *THE NEW PRIESTHOOD: THE SCIENTIFIC ELITE AND THE USES OF POWER* 29 (1965).

25. See H. ARENDT, *ON REVOLUTION* c.6 (1963).

26. *Quoted in Michael, supra* note 19, at 254.

“perfect constitution”²⁷ or because the Document of 1787 is malleable enough to meet any situation.²⁸ They cite Judge Learned Hand’s statement that the litigable parts of the Constitution are “empty vessels” into which a judge “can pour nearly anything he will”;²⁹ or Chief Justice Earl Warren’s valedictory to the effect that Supreme Court Justices “serve only the public interest as we see it, guided only by the Constitution and our own consciences”;³⁰ or even Thomas Jefferson who, angry at Chief Justice John Marshall, testily called the Constitution “merely a thing of wax” which the Court “may twist and shape into any form they please.”³¹ There is a partial truth in such assertions. After all, the Constitution has not long prevented anything that determined majorities wished to do. It is not a complete truth, however, not just because some of the unlitigated or nonlitigable parts of the Constitution contain some substantial roadblocks to effective governance, but also because what Don K. Price has called “America’s Unwritten Constitution”³² institutionalizes routine practices that make good government at least difficult and often impossible. Furthermore, those who maintain that the present Constitution is, in effect, almost infinitely malleable should realize that they are really saying that we have no constitution at all but merely the simulacrum or pretense of one.

I do not believe that is enough, for reasons that will be developed below. I prefer to take my cue from another statement of Jefferson’s and compare it to one by Professor Michael Kammen. First, Jefferson:

Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew this age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead.³³

27. Cf. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

28. This is often put in terms of the Constitution being a “living” instrument of governance, an idea that is controversial in itself. Compare Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976) with Miller, *Notes on the Concept of the “Living” Constitution*, 31 GEO. WASH. L. REV. 881 (1963); Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A.J. A.J. 1212 (1977); Ginsberg v. New York, 390 U.S. 629 (1968) (Black, J.); Katz v. United States, 389 U.S. 347 (1967) (Black, J. dissenting); Miranda v. Arizona, 384 U.S. 436 (1963) (White, J., dissenting). See also R. BERGER, *GOVERNMENT BY JUDICIARY* (1977).

29. L. HAND, *THE SPIRIT OF LIBERTY* 81 (I. Dilliard ed. 1953).

30. 395 U.S. x-xii (1969).

31. 15 THE WRITINGS OF THOMAS JEFFERSON 278 (A. Libscomb & A. Burgh eds. 1904-07).

32. D. PRICE, *AMERICA’S UNWRITTEN CONSTITUTION: SCIENCE, RELIGION, AND POLITICAL RESPONSIBILITY* (1983).

33. Quoted in W. DOUGLAS, *STARE DECISIS* 31 (1949).

Next, Kammen, who wrote in *People of Paradox*:

There is an awkward anomaly in American thought. Although the founders were themselves engaged in a continuous quest for modes of legitimacy appropriate to their times and needs, subsequent Americans have sought to validate their own aspirations by invoking the innovations and standards of our hallowed pantheon as unchanging verities. This nostalgic vision of the Golden Age actually conjures up an era when values were unclearly defined, when instability often seemed beyond control, when public rancor and private vituperation were rampant, and institutions frail and unformed.³⁴

Save for the fact that institutions are no longer "frail and unformed," Kammen's statement sounds remarkably like the present day.

Let me conclude this introduction by stating flatly: Each generation of Americans writes its own constitution.³⁵ In the past, this has been done in an incremental, *ad hoc* manner, through reactions to what Hamilton called "accident and force." The requirement confronting Americans today is to write one for themselves and "our posterity" *de novo*, all the while remembering what should be obvious but is not: that we today, and particularly those who have not reached the age of senior citizenship, are our own posterity. People alive today will have to grapple with constitutional problems of the first magnitude, in a social context that cannot be predicted, simply because the extremely rapid rate of social change makes them their own posterity. It is not your children or your children's children about whom you should be concerned; it is you, yourself, the would-be sovereign self standing all alone and increasingly afraid in a world you never made. Ask not, therefore, what has posterity done for me? Ask, rather, how you who hold the proud title of citizen can help in the transition of where we are to where we want to be. Citizenship, Justice Hugo Black once opined, has its responsibilities as well as its rights.³⁶ One of those, I am arguing, is to take part in the growing dialogue about the need for constitutional change.

II. HUMAN NEEDS AS HUMAN RIGHTS: THE PROBLEM EXPLAINED

I begin, then, with the proposition that the Constitution institutionalizes a politico-economic order that has not in the past and does not now achieve a reasonably adequate measure of social justice. I shall maintain that the only valid end of government is the promotion, insofar as the environment per-

34. M. KAMMEN, *PEOPLE OF PARADOX* 56 (paperback ed. 1973).

35. See A. MILLER, *TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT passim* (1982).

36. See *Korematsu v. United States*, 323 U.S. 214 (1944) (Justice Black's opinion sustaining exclusion of Japanese-American citizens from West Coast during World War II). The "responsibility" here, it seems, was to have one's clear constitutional rights arbitrarily denied him, mainly liberty and property. The decision is the absolute nadir of judicial irresponsibility; or to say it another way, it is proof positive that the Court is an arm of the executive branch of government.

mits, of social justice. The term, *social justice*, of course requires specificity. James Madison, in *Federalist No. 51*, was far from clear as to what he meant by the word "justice."³⁷ Even though the slogan "Equal Justice Under Law" is carved into the facade of the Supreme Court's building in Washington, none of the 102 people who have sat upon that Court has proffered any definitive meanings of either "equal" or "justice" or "law." Many, to be sure, will dispute the idea that the proper goal of government is achievement of social justice, however defined, but I take it as one of the givens of this discourse.

For present purposes, social justice is defined in this way: It is the idea that the sole valid goal of government is achievement of a sustainable society, which in turn means satisfaction of human needs and deserts so far as the environment permits. Social justice is a form of distributive justice, concerned in its *needs* aspect with the ways in which benefits are distributed in society through its major institutions and in its *deserts* aspect with both negative sanctions upon human behavior (roughly, punishments) and with benefits conferred (one's "just deserts"). Social justice, thus, deals, with how wealth is allocated, personal rights protected, and benefits divided among the populace. (No special insight is required to perceive that much of constitutional law is concerned with precisely those matters.) In short, social justice is "*suum cuique*, to each his due."³⁸ Or, as David Miller has written, "the just state of affairs is that in which each individual has exactly those benefits and burdens which are due him by his personal characteristics and circumstances."³⁹ Among other things, that means that equals should be treated equally.

What, however, is a person's "due"? The question is complex, and we have little time, but some sort of answer is necessary. In essaying a response, I start by distinguishing between the customary and the ideal in social affairs. The former means the accepted distribution of rights, goods, and privileges, as well as the conventional distribution of burdens and pains. These are thought, by many at least, to be both natural and just; and thus they ought to be and are maintained by law (including constitutional law). In short, "Whatever is, is right," and, accordingly, worthy of protection by the state and its apparatus. On the other hand, the ideal conception of justice looks to a system of rules and regulations of distribution that ought to exist (although they probably have never existed). Laws, nonetheless, are just to the extent that they approximate the ideal. The distinction is between "conservative" and "prosthetic" justice.⁴⁰ The former has the object of preserving "an existing order of rights and possessions, or to restore it when any breaches have been

37. THE FEDERALIST No 51 (J. Madison).

38. D. MILLER, SOCIAL JUSTICE 20 (1976).

39. *Id.* See Freund, *Social Justice and the Law*, in SOCIAL JUSTICE 93 (R. Brandt ed. 1962); Miller, *Social Justice and the Warren Court: A Preliminary Examination*, 11 PEPPERDINE L. REV. 473 (1984).

40. Raphael, *Conservative and Prosthetic Justice*, 12 POLITICAL STUDIES 149 (1964).

made," whereas the latter aims at "modifying the *status quo*."⁴¹

A person's "due," that is, may be perceived in one of two ways: either as protection of his present rights—"vested" rather than "civil"—or as furtherance of the ideal of prosthetic justice. The term *rights* is used here as does David Miller: They

generally derive from publicly acknowledged rules, established practices, or past transactions; they do not depend upon a person's current behavior or other individual qualities. For this reason, it is appropriate to describe this conception of justice as "conservative." *It is concerned with the continuity of a social order over time, and with ensuring that men's expectations of one another are not disappointed.* (emphasis added).⁴²

Social justice as rights thus requires judges (and others) to protect the "is" in society—precisely what the Supreme Court and other courts have generally done throughout American history. The basic task of the judiciary in any modern industrial society is to be an integral part of the governing coalition and help to underpin the stability of the social order and protect it by resisting serious efforts to alter it.⁴³ For that reason, the fundamental doctrine of American constitutional law has long been, and still is, that of "vested rights."⁴⁴ Much of the judicially announced constitutional law, historically and contemporaneously, revolves around that theme.

In modern times, social justice as rights increasingly conflicts with other perceived, albeit rather inchoate, rights—those that are herein labeled as human needs. Tensions thereby generated make up a substantial part of present-day public law. My position is that "the continuity of a social order over time"—I speak here of the United States—can only be realized if certain basic human needs and deserts are satisfied. A human *need*, in this conception, can be considered to be a significant, even indispensable, human *right*. The prime requirement is for accommodation to be made between needs (justice in the prosthetic sense) and rights (justice in the conservative sense). For the sake of clarity, I will speak of needs as needs rather than as rights; the latter term will be employed mainly in its conservative sense. In addition, some attention must be paid to human *deserts*—what people deserve in given circumstances. All of this must perforce be cast against the background of environmental or ecological limits, it being idle beyond measure to discuss rights and needs and deserts unless the milieu in which humans live and governments operate permit their reasonable satisfaction.

41. *Id.* at 154-55.

42. D. MILLER, *supra* note 38, at 26.

43. See J. GRIFFITH, *THE POLITICS OF THE JUDICIARY* (1977).

44. See Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914) (early discussion of "vested rights" as fundamental doctrine of American constitutional law). See also A. MILLER, *supra* note 35, *passim*.

For present purposes, it is desirable to telescope the argument. I shall be arbitrary and pay insufficient attention to deserts, on the assumption that what a person deserves is largely a part of what he needs— not entirely, to be sure, but enough for the moment. Negative deserts, or punishments, can hardly be called a human need, at least for the person being punished, except perhaps for masochists. Possibly, however, there is a psychological need in others to know that malefactors are in fact subjected to the punitive power of the state.

Personal-desert statements are seldom made by philosophers, legal or otherwise, whereas personal-needs theory enjoys a considerable and growing literature. Professor Joel Feinberg has asked: "What is it to deserve something?"⁴⁵ and goes on to assert that a complete understanding of justice is impossible unless the complexities of personal desert are resolved. That may well be so, but time and space permit no more at this time than an adumbration of some of those complexities. The concept of *personal* desert involves more than rewards and punishments. Any comprehensive discussion of social justice would have to confront what Feinberg calls the "peculiar perplexities"⁴⁶ of personal desert. That term is not pleonastic. Persons are not the only things that are said to be deserving. For example, art and sculpture may deserve approval for being particularly well done; some problems—in present context, the conception of human needs—may deserve careful examination and analysis; some species—perhaps most of them—deserve to be preserved;⁴⁷ and so on. Such statements have something to do with social justice, and even with human needs, but they are not of present concern.

Desert, moreover, requires a basis. We should not, for example, say that someone deserves a whipping "just for the hell of it"; and a claim that a student's desert is to be determined on the basis of his parents' mental health defies logic. Both assertions lack an appropriate "basal reason"⁴⁸ to justify them; the first rejects a basis for personal desert and is wholly capricious and the second simply is a logical *non sequitur*. Such statements offend common sense (that most uncommon of all the senses) and therefore cannot be justified. Take, on the other hand, the question of personal ability: is it a proper desert basis? In one way, the answer is yes; it deals with some determinate fact about a person. But is that enough? Is it either a good or sufficient reason for deciding that a person deserves some reward or accolade? Here, we tread upon ground that has become controversial in recent years, one where values (or deserts) are in conflict, as a number of recent judicial decisions attest. The reference here, of course, is to *Bakke* and *DeFunis*, *Weber* and *Fullilove*,⁴⁹ cases in

45. J. FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 55 (1974).

46. *Id.*

47. Compare P. EHRLICH & A. EHRLICH, *EXTINCTION: THE CAUSES AND CONSEQUENCES OF THE DISAPPEARANCE OF SPECIES* (1981) with H. McCLOSKEY, *ECOLOGICAL ETHICS AND POLITICS* (1983).

48. The term "basal reason" comes from Pitcher, *On Approval*, 67 PHIL. REV. 198 (1958).

49. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Steelworkers v. Weber*, 443 U.S. 193 (1979); *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978); *DeFunis v. Odegaard*, 416

which the Supreme Court had the difficult task of reconciling conflicting deserts. There should be little wonder that the Justices were badly split on their approaches to the issues in those cases, as indeed is much of American society. Should the putative superior ability of "WASPs" (and other whites) override an argument that black Americans deserve some special, albeit temporary, treatment because they are inheritors of centuries of prejudice and brutality? The question is merely posed here, although I do not hesitate to say that I fully agree with the decisions in *Weber* and *Fullilove*. *Bakke* and *Defunis* should be and, I think, are largely confined to the specific facts of those decisions.

Desert is concerned with modes of treatment that humans should receive from "society" or the "state"—what they *deserve*. Two types of desert exist. The first is concerned with treatments with respect to persons deserving good or ill, rewards or punishments, praise or blame. Should Mr. Rummel be jailed for life for three minor crimes?⁵⁰ Should Mr. Hutto be jailed for forty years for a small drug violation?⁵¹ Should Carrie Buck be involuntarily sterilized because she is considered to be mentally defective?⁵² Should Richard Nixon, the well-known criminal, have received a full pardon, plus all of the perquisites a generous Congress gives to former presidents? Does Whittaker Chambers deserve a posthumous Medal of Freedom? Should Felix Frankfurter be considered to be a "great" Justice of the Supreme Court?⁵³ Much of the criminal law, as well as considerable private law, falls into this first category.

The second type of desert divides people not in accordance with rewards and punishments but in terms of those who deserve and those who do not. Traditionally, the first type of desert has been called retributive justice, whereas the second type falls into the category of distributive justice. Competitive situations illustrate the latter: prizes in contests and grades in schools, among others. In other words, "X deserves Y because of Z," with X being a person, Y a mode of treatment, and Z some determinate fact about X. What types of treatments do persons deserve from others? The question brings us back full circle: I answer in general terms by stating that deserved treatments are closely connected with human needs. Feinberg maintains that "the bases of desert vary with the mode of deserved treatment."⁵⁴ There is, however, more to the

U.S. 313 (1974); see also M. PHILLIPS, *THE DILEMMAS OF INDIVIDUALISM: STATUS, LIBERTY, AND AMERICAN CONSTITUTIONAL LAW* (1983). Since the text of this article was written, the Supreme Court decided *Firefighters Local Union No. 1784 v. Stotts*, ___ U.S. ___, 104 S. Ct. 2576 (1984). This is another decision on conflicting constitutional deserts. I take no position on it at this time.

50. See *Rummel v. Estelle*, 445 U.S. 263 (1980).

51. See *Hutto v. Davis*, 445 U.S. 947 (1980).

52. See *Buck v. Bell*, 274 U.S. 200 (1927).

53. I should make my position clear: I consider Frankfurter to be the most overrated judge in American history. For some of the reasons leading me to this conclusion, see Miller & Bowman, "Slow Dance on the Killing Ground": *The Willie Francis Case Revisited*, 32 DE PAUL L. REV. 1 (1982).

54. J. FEINBERG, *supra* note 45, at 61.

second type of desert statement than competitive situations. Under what circumstances may a person validly be said to deserve something—positively, in the form of benefits; negatively, in the form of deprivations—is a large question the discussion of which must be deferred to another time and another place. It is enough now to maintain that the human being, simply because of his humanness, deserves to have his basic needs fulfilled insofar as is environmentally possible. In Professor Thomas Grey's formulation, there is "a right in each person to have his basic material needs met by his society to the extent that he is unable to meet them by his own efforts."⁵³ As will be seen, I add other human needs to what Grey calls "basic material needs."

The concentration here is upon human needs—what, in general, they are; and how, again in general, they might be satisfied through use of legal and other constitutional mechanisms. Before entering that intellectual thicket, it is desirable to refer to the historical and contemporaneous context in which American constitutionalism was born, burgeoned, and presently exists. Two points will be made. First, the institutions characteristic of what will be called the orthodox conception of constitutionalism arose at a particular time and in a particular place; today, those institutions appear to have run their course. Second, Americans seem to be poised on the edge of authoritarian government; if so, constitutionalism as it has been received and understood in this country surely must be examined anew to determine its viability. Of necessity, I must be brief.

*First: The end of a 400-year boom.*⁵⁶ During the past 400 years many institutions and beliefs that Americans consider to be the natural order of things were born: representative democracy, the private enterprise economic system, and the individualistic basis of law, among others. Were one to ask why they appeared at roughly the same time and in a limited geographical area, what would be the answer? Recognizing that there is no simple *and* complete explanation of any social phenomenon,⁵⁷ let alone a set of them, history does provide at least the beginnings of a clue. Those "natural" institutions and the very concept of constitutionalism itself were, I believe, in substantial part consequences of the wealth and free land that became available after the Great Discoveries that began with Columbus. Many Europeans were thereby enabled to escape an ecological trap, with its concomitant authoritarian institutions, that had imprisoned them in rigid class, even caste, systems throughout previous human history.

A static society gave way to one of permanent revolution. The ancient and medieval worlds were closed. Space, rather than being infinite, was con-

55. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 897 (1976). Cf. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

56. I draw upon a previously published article in these paragraphs. See Miller, *supra* note 7; see also 8 NOVA L. J. 1 (1983) (for slightly different version of same article).

57. See E. NAGEL, *THE STRUCTURE OF SCIENCE: PROBLEMS IN THE LOGIC OF SCIENTIFIC EXPLANATION* (1961).

sidered to be a solid sphere in which the stars were embedded. Time, too, would end in a short time. Learning was limited in amount and to a small few who had the leisure and intelligence to grasp abstract concepts. People believed that the final truths on all subjects had already been written, if not in the Bible then by Aristotle and other ancient philosophers. The Bible was Holy Writ, the ultimate truth for religion and for cosmology. Those who thought and wrote did so within a closed body of knowledge. With rare exceptions, such as Copernicus and Galileo, they were confined to refining the accepted wisdom of the day. The universe was anthropocentric: Earth was its center and man was the special creation of an all-knowing and all-wise supreme being. It was an authoritarian, even totalitarian, age—in politics and economics and religion. Most people lived lives of penury and want, quietly desperate about what seemed to be the unchanging natural order of things.

The Copernican Revolution smashed the intellectual structure of the time, as John Donne wailed: “ ‘tis all in peeces, all cohaerence gone.” The Great Discoveries opened new vistas and permitted new social institutions to blossom and grow. I wish to avoid being thought to be simplistic, but I do think that it is valid to hypothesize that the Discoveries created the conditions that allowed the birth and burgeoning of our familiar politico-economic institutions. For the first time, a high value was placed “on the rational manipulation of the environment”; in turn, this became two elements: “rationality, and . . . the Faustian sense of mastery over man and nature.”⁵⁸ Rationality, according to Professor David Landes, is “the adaptation of means to ends.”⁵⁹ Superstitions are pushed to the back of the mind (only to erupt centuries later). The ends of social effort became the production and acquisition of material wealth. That mind-set still abides, although whether it can for much longer is very much an unanswered question.

We live today at a time when revolution has been made a perpetual institution, not in the sense of the violent overthrow of government (although that is far from unknown elsewhere) but rather as a permanent feature of socio-economic and thus of political institutions. The underlying assumptions, the metaphysic, of society have been altered. Human life on earth, in the Western world at least, rather than being thought of as a prelude to heaven or hell, became an end in itself. It became possible, at least for a time, to think of the conquest of the “material world in human interest, of providing the conditions for a good life on this planet without reference to any possible hereafter.”⁶⁰ The ideas of progress, of a unilinear advance toward a better and better world and of the perfectability of man, flowered. Rather than living in the final days before Armageddon, humankind saw itself as participating in the continuing improvement of the human lot. Instead of having a somber

58. D. LANDES, *THE UNBOUND PROMETHEUS: TECHNOLOGICAL CHANGE AND INDUSTRIAL DEVELOPMENT IN WESTERN EUROPE FROM 1750 TO THE PRESENT* 21 (1969).

59. *Id.*

60. Beard, *Introduction* to J. BURY, *THE IDEA OF PROGRESS: AN INQUIRY INTO ITS ORIGIN AND GROWTH* (paperback ed. 1955).

melancholy, people became optimistic. No problem was considered to be insoluble, it being the humanistic vision that people, through applied reason, could not only know but solve all problems. Faith in an all-wise God was transferred to faith in scientists and technologists, who were and are thought to be able to create technological "fixes" that could and would ameliorate the severities of life. Economics developed from mercantilism—a statist economy—to laissez-faire, private-enterprise capitalism, although it is important to remember that the state has always been and still is important as a protector of and stimulant to business. The individual human being was perceived as the basic unit of society, a belief that crept into and dominated law and legal institutions. In sum, the modern age was born.

My point is not that a direct causal connection necessarily existed between those developments and the Great Discoveries, but, rather, that only after the Discoveries did the new institutions and beliefs come into existence in a small part of the planet (Western Europe and some of its colonies). An environment was provided in which new ideas and concepts could flourish. The cultural basis for the familiar institutions of constitutionalism came into being. The 400-year boom lasted until about the beginning of the 19th century for most of Europe and until about 1970 for the United States. Since those times, those patterns of social behavior began to become unraveled. That suggests my second point.

*Second: The dawning of a new age of authoritarianism.*⁶¹ As the impetus of the 400-year boom winds down, it has become increasingly obvious that we are witnessing the dying of constitutionalism as it has been known and understood in the Western world and particularly in the United States. "It is ironic," Professor Sanford Levinson observes, "that a culture which has experienced a centuries-long 'melancholy, long-withdrawing roar' from religious faith can believe so blithely in the continuing reality of citizens organized around a constitutional faith. The 'death of constitutionalism' may be the central event of our time just as the 'death of God' was that of the past century."⁶² A necessary brevity will, unfortunately, make the present discussion seem oversimplified, but that cannot be helped. My main point is that the coming of the National Security State, a condition that formally began some forty years ago,⁶³ has foreboding auguries for the American constitutional order. We are knee-deep into a condition that Auguste Comte once described as "popular dictatorship with freedom of expression."⁶⁴ That requires explanation.

61. This is based upon Miller, *Reason of State and the Emergent Constitution of Control*, 64 MINN. L. REV. 585 (1980); A. MILLER, *DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL* (1981).

62. Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123, 151.

63. See Raskin, *Democracy Versus the National Security State*, 40 LAW & CONTEMP. PROBS. 189 (1976). See also NATIONAL SECURITY AND AMERICAN SOCIETY: THEORY, PROCESS, AND POLICY (F. Trager & P. Kronenberg eds. 1973).

64. A. COMTE, *SYSTEM OF POSITIVE POLITY* (1851).

The United States has been, I believe, in a continual state of war since 1939, when President Franklin Roosevelt secretly aided Great Britain at the beginning of its struggle with Hitler's legions.⁶⁵ World War II saw the emergence of what Clinton Rossiter aptly called a "constitutional dictatorship."⁶⁶ Beginning in 1945, and perhaps a few months before, the United States entered into a period of "cold war" with the Soviet Union. Richard Nixon, among others, has called this the beginning of World War III.⁶⁷ I believe that Nixon was essentially correct. For forty years we have been locked in mortal combat with the USSR, not directly to be sure, except in the rhetoric, but indirectly. Two major wars have been fought, in Korea and Indo-China, at a tremendous cost in blood and treasure to the United States. The Soviets have been able to fight with surrogates and have suffered only minor material losses. Add the several subventions by the United States to stave off what was considered to be Russian expansionism, some covert (as in Guatemala and Iran), some overt (as in the Dominican Republic), and some—in the peculiar Orwellian language of the day—covert actions that are widely known (as in Nicaragua). Add, furthermore, the existence of nuclear weapons in plethoric quantity, and it may readily be seen that we and the world are teetering on the edge of nuclear holocaust. The meaning of all this is the creation of the National Security State (NSS) which has what I have elsewhere called the Constitution of Control⁶⁸ as its governing system.

With the coming of the NSS, the principal desideratum of public policy has become just that—national security. The contours of the NSS may be seen in a wide range of congressional, presidential, and judicial decisions. For Congress, the point of departure is the National Security Act of 1947, a statute that established the National Security Council in the White House, set up the Central Intelligence Agency, and reorganized the Department of Defense. For the President, the still secret executive order establishing the National Security Agency⁶⁹ is a prime example, as are the "wars" in Korea and Indo-China. As for the courts, a series of Supreme Court decisions that began not later than *Quirin* and *Hirabayashi* and *Korematsu* and runs through *Dennis* and *Barenblatt* and *O'Brien*,⁷⁰ among others, clearly evidence that the judiciary, not excluding the Supreme Court, is a part of the governing coalition of the

65. See W. STEVENSON, *A MAN CALLED INTREPID: SECRET WAR* (1976). See also J. TOLAND, *INFAMY: PEARL HARBOR AND ITS AFTERMATH* (1982).

66. C. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* (1948).

67. R. NIXON, *THE REAL WAR* (1980), quoted in Dugger, *On to World War IV?*, *THE PROGRESSIVE*, June 1982, at 20. See Kenworthy, *Reagan Rediscovered Monroe*, 2 *DEMOCRACY* No. 3, July 1982, at 80 (quoting organization calling itself The Committee of Santa Fe to effect that we already are in the "third phase of World War III").

68. See *supra* note 61 (works cited).

69. See J. BAMFORD, *THE PUZZLE PALACE* (1982) (first comprehensive discussion of NSA).

70. *United States v. O'Brien*, 391 U.S. 367 (1968); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Dennis v. United States*, 341 U.S. 494 (1951); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Ex Parte Quirin*, 317 U.S. 1 (1942).

nation and entirely in synchronization with the avowedly political branches of government. At *no* time has the state lost when any matter of importance was being litigated, important as perceived through the eyes of that ill-defined but nonetheless existent group called the Establishment. The *Pentagon Papers* and *Steel Seizure*⁷¹ cases are not to the contrary.

There is an apparent paradox here. At a time when increasing controls are being placed upon individual behavior, there seems to be the highest protection of human rights and liberties in American history. Certainly that was true during the years of the Warren Court. This poses the question of why were reasons of freedom and liberty preferred, often at least, over reasons of state. An answer, admittedly tentative, is not difficult to locate. It is two-fold. First, as already mentioned, the state *always* wins in any matter considered to be important by those who wield effective control in the polity. In large part, the protection of human rights in the modern era is more ostensible than real. Second, the rights and liberties received protection mostly in the *formal* as distinguished from the *living* or *operative* Constitution. I am suggesting that a subtle tradeoff has taken and is taking place. As privacy disappears and as the burdens of the state upon the person, through taxation and otherwise, become more pervasive, we are witnessing the enhanced protection of liberties of a relatively innocuous nature. No decision of the Warren Court can be said to be truly revolutionary in the sense that fundamental social patterns were rearranged. Thirty years after the path-breaking decision in *Brown v. Board of Education*,⁷² which might be said to have been an effort to alter social patterns in America, the change has been mainly in the formal law. Blacks in fact are not much better off than they were prior to *Brown*.⁷³ True enough, they can now eat at restaurants and stay at motels from which they had been barred and some—a relative few—have prospered in their professions. On the whole, however, America still remains a nation characterized by eleven percent of its population that, despite the formal law, still remains separate and unequal. (That is a sobering lesson for those who attempt to use law to satisfy human needs.)

The "price" paid for steadily increasing social controls over the individual, controls that emanate from both public and private governments, creates the

71. *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952).

72. 347 U.S. 483 (1954) (Brown-I); 349 U.S. 294 (1955) (Brown-II). See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

73. See A. MILLER, A "CAPACITY FOR OUTRAGE": THE JUDICIAL ODYSSEY OF J. SKELLY WRIGHT c.3 (1984); R. WOLTERS, THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION (1984); Patterson, *The Black Community: Is There a Future?*, in *THE THIRD CENTURY: AMERICA AS A POST-INDUSTRIAL SOCIETY* 243 (S. Lipset ed. 1979). The essential problem—let's face it—is white racism, which shows no signs of diminishing. See Report of the National Advisory Commission on Civil Disorders (1968) (concluding that "Our nation is moving toward two societies, one black, one white—separate and unequal").

paradox: an apparent higher protection of liberty and a concomitant enforcement, for the first time in American history, of the Bill of Rights. Hence my conclusion that Comte was correct: We are moving steadily into a condition of a type of "democratic dictatorship"⁷⁴ accompanied by freedoms of expression broadly defined. Not much more than a casual glance at the media is required to conclude that more controls over the individual self are not only possible but are in fact being imposed. Privacy is an example. The Supreme Court has read it into the Constitution.⁷⁵ But at the same time, as a lawyer friend who is the director of a large West Coast bank told me a few years ago, "privacy is dead in this country."⁷⁶ I do not think he was exaggerating. When one contemplates the capacities of the National Security Agency to intercept electronic and other messages the world over—capacities that have been used and may in fact still be used against Americans—one is given pause.⁷⁷ There is little place to hide from the all-seeing eye.

The protections given freedoms of expression—to civil rights and liberties generally—in the past thirty to forty years repose mainly in the formal Constitution rather than the Constitution in operation. No matter how strongly judges may articulate principles of human freedom, it should always be remembered that while judges, including those on the Supreme Court, can and do propose, others can and do dispose. Over those others, including but not limited to lower court judges, federal and state, the Justices have little or no control.⁷⁸ The adversary system and the case or controversy requirement of litigation demand a willing and able (financially, in the main) plaintiff to enforce the norms articulated by an activist judiciary. Seen in this way, entitlement programs, beginning with the New Deal and constitutionalized by the Supreme Court, were and are a means of buying off social discontent from among the disadvantaged. Nothing truly basic in the social order has been changed. Furthermore, enhanced formal protection of civil rights and liberties coincides almost exactly in time with what was America's true golden age—the quarter-century following the end of World War II, when the dollar was sovereign in world currency, American military might supreme, and economic growth seemingly to last permanently. The larger economic pie that resulted enabled an increasing number of people, those formerly among the "have-nots," to sup at the groaning table of opulence that was the American

74. See A. MILLER, *DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL* (1981).

75. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

76. He prefers to remain to remain anonymous. Cf. J. BAMFORD, *supra* note 69; Miller, *Privacy in the Modern Corporate State*, 25 AD. L. REV. 231 (1973); D. WISE, *THE AMERICAN POLICE STATE* (1976).

77. J. BAMFORD, *supra* note 69. See *Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982).

78. See Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017 (1959); Note, *Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941*, 67 HARV. L. REV. 1251 (1954); Note, *State Court Evasion of United States Supreme Court Mandates*, 56 YALE L. J. 574 (1947); See also *THE IMPACT OF SUPREME COURT DECISIONS: EMPIRICAL STUDIES* (T. Becker ed. 1969).

economy. Wide disparities in wealth still remained, but the golden age permitted the realization of rising expectations in the form of entitlements. The American version of the welfare state was the result. This condition ended, with seeming abruptness, about 1970. We are now entering a period when the ecological trap appears to be closing once again; we have become "the zero-sum society."⁷⁹ That means more and more controls over individual behavior.⁸⁰

If I am correct in what was said about the trend toward an authoritarian government, no one should think that the American people, taken generally, will balk at increasing controls. Quite the contrary. As Herbert McClosky and Alida Brill have documented,⁸¹ Americans on the whole have little regard for what many call our precious rights and liberties. It would, for example, be highly likely that, if put to a vote today, both the Declaration of Independence and the Bill of Rights would not command a majority at the ballot box. Say McClosky and Brill:

We conclude with an observation with which we began—that civil liberties are fragile and susceptible to the political climate of the time. Hard-won civil rights and liberties are not eternally safeguarded, but are highly vulnerable to assaults by strategically placed individuals and groups who find certain rights or liberties morally offensive, dangerous to safety and stability, and devitalizing to the political order. Such assaults become especially threatening when the civil liberties under attack do not enjoy widespread popular support. This . . . is often the case, a result in great part of large segments of the population to have effectively internalized the libertarian norms to which the American political culture, from the beginning, has been dedicated.⁸²

Freedom, far from being innate in the human soul, is a sometime thing, "a frail and tenuous reed, slow to take root, rare, and often short-lived."⁸³ That has been so since the beginnings for the United States, as Professor Leonard Levy has shown,⁸⁴ and is even more so today. As the age of scarcity—the

79. See L. THURLOW, *THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE* (1980).

80. Arnold Toynbee forecast in 1975: "In all developed countries, a new way of life—a severely regimented way—will have to be imposed by a ruthless authoritarian government." *Christian Sci. Monitor*, Feb. 10, 1975, at 10.

81. H. McCLOSKEY & A. BRILL, *DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES* (1983).

82. *Id.* at 437-38.

83. *Id.* at 13.

84. L. LEVY, ed. *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION* (1963): "The persistent image of colonial America as a society that cherished freedom of expression is a sentimental hallucination that ignores history. The evidence provides little support for the notion that the colonies hospitably received advocates of obnoxious or detestable ideas on matters that counted." *Id.* at *xxix*.

zero-sum society—emerges, authoritarianism beckons. To avert it and other deleterious features of the emergent Constitution of Control is one of the pressing constitutional problems of the day.

A venture into the area of human needs is not a foray into *terra incognita*. A large literature exists on the subject—not, however, for reasons not at all unfathomable, in the materials on law and legal systems. Lawyers think in terms of rights, with a right being defined in limited terms: something that a person can get a court to recognize and impose a duty on someone else to satisfy it. At this time, it is not necessary to do more than point out some of the relevant factors that should go into thinking about human needs and the capacity of law and constitutions to fulfill them.

First, I begin with what should be obvious but is not: Society is fundamentally constitutive of the individual.⁸⁵ A political order made up of “abstract” persons, in the Lockean or Rousseauian sense, has never existed. People have always had to deal with real people, and, indeed, other people with definite views, passions, preferences, strengths, and weaknesses. The *social self* is what is important. John Dewey recognized this;⁸⁶ and Professor Michael Phillips has recently summarized the point: “The 300-year march of the sovereign self and its detached, egoistic, manipulative posture toward man and nature seems to be reaching its limits.”⁸⁷

Once it is seen that the individual is important only as a member of a group or groups, and indeed receives his identity mainly in that way, human needs become somewhat easier to locate and define. Those needs are associative. “Society is not only necessary for the survival of man, *qua* organism, it is crucial for the emergence of man, *qua* human. To develop a mind and a self it is necessary that the infant lives in a human society and acquires its cultural heritage.”⁸⁸ If that be so, as it is, then it presents the difficult question of whether there are human needs common to all societies. The question cannot be more than posed here. Of necessity, the following discussion of human needs is directed toward those attributable to the United States (with some reference to Western Europe). Whether needs identified as basic for Americans can be extended planet-wide is a question central to any serious discussion

85. See L. HOBHOUSE, *THE ELEMENTS OF SOCIAL JUSTICE* 140-41 (1922); C. MERRIAM, *PUBLIC AND PRIVATE GOVERNMENT* 16 (1944) (“As Aristotle said centuries ago, the isolated individual does not exist except as a stone hand. The lone individual does not figure either in family relations, in neighborhood relations, in state relations, in social relations, or in the higher values of religion. Nowhere is he left without guiding social groups, personalities, and principles.”).

86. See J. DEWEY, *THE PUBLIC AND ITS PROBLEMS* 188 (1927) (“The human being whom we fasten upon as individual *par excellence* is moved and regulated by his association with others; what he does and what the consequences of his behavior are, what his experience consists of, cannot even be described, much less accounted for, in isolation.”). See also J. DEWEY, *HUMAN NATURE AND CONDUCT: AN INTRODUCTION TO SOCIAL PSYCHOLOGY* (1922) (individual achieves meaning only in his relations with others).

87. M. PHILLIPS, *supra* note 49, at 207.

88. Spiro, *Human Nature in Its Psychological Dimensions*, 56 *AM. ANTHROPOLOGIST* 19, 24 (1954).

of constitutionalism today. It must be answered at some time; but all that can be done now is to ask it.

The "society" that gives identity to and meaning for the naked ape called *Homo sapiens* is both local and planetary, tribal and universal. Constitutionists, accordingly, must "act locally" while thinking "globally"; they must be concerned with both heterarchy and hierarchy, with the identifications and loyalties one unavoidably has to his immediate surroundings and with the need for perceiving that human problems are in fact neither local nor national but universal. The universe is defined here as the planet Earth, for it seems to be fatuous beyond measure to think in terms of extraterrestrial colonization or of interactions with sentient beings from elsewhere in the cosmos. "No man is an island, entire to himself," remarked the poet. So it is with nations. That, of course, adds an entirely new dimension to constitutionalism and to the tasks with which constitutions must deal.

The goal of a constitution of human needs is the creation and maintenance of a sustainable society.⁸⁹ Recognizing the circularity, a sustainable society is one in which human needs and human deserts are satisfied within the constraints of the environment. I should like at this time to focus on the basic requirement of acknowledging that any constitution must be seen as reflective of environmental or ecological constrictions. Both Edmund Burke and Niccolo Machiavelli have made the point well. Said Burke:

I cannot stand forward, and give praise or blame to anything which relates to human actions, and human concerns, on a simple view of the object, as it stands stripped of every relation, in all the nakedness of metaphysical abstraction. Circumstances (which some gentlemen pass for nothing) give in reality to every political principle its distinguishing colour, and discriminating effect. *The circumstances are what render every civil and political scheme beneficial or noxious to mankind.* (emphasis added).⁹⁰

Surely Burke was accurate: Those who would speak of constitutions and constitutionalism must pay strict attention to "circumstances"—to, that is, the environment in which politico-legal institutions exist and operate. In this connection, we must recognize that the ecological trap, which Hobbes saw but Locke denied and which is implicit in Burke, is once more snapping shut—slowly, to be sure, but apparently inexorably.

As with Burke, so with Machiavelli, who counseled the need of adaptation to the environment: "in human affairs men should study the nature of

89. Cf. L. BROWN, BUILDING A SUSTAINABLE SOCIETY (1981); 22 TECHNOLOGICAL FORECASTING & SOC. CHANGE 93-210 (1982). (several essays in symposium on role of private sector in building sustainable society).

90. Quoted in D. SCHAEFER, JUSTICE OR TYRANNY? A CRITIQUE OF JOHN RAWLS'S *A Theory of Justice* 42 (1979).

the times and act accordingly. . . . I have often thought that the reason why men are sometimes unfortunate, sometimes fortunate, depends upon whether their behavior is in conformity with the times."⁹¹ If people are to enjoy good fortune, they and their institutions must adapt themselves to the times. (The times today call for a fundamental alteration of existing constitutional mechanisms.) Machiavelli meant that a complete contextual analysis is necessary in thinking about the art of governance. He went on to observe:

The downfall of cities also comes about because institutions in republics do not change with the times, as we have shown at length already, but change very slowly because it is more painful to change them since it is necessary to wait until the whole republic is in a state of upheaval; and for this it is not enough that one man should change his own procedure.⁹²

In this comment lies the seed of an idea that may well determine whether a new constitution for the United States can even be seriously considered, let alone drafted and promulgated. Earlier, the Florentine stated that "those [states and religious institutions] are better constituted and have a longer life whose institutions make frequent renovations possible, or which are brought to such a renovation by some event which has nothing to do with their constitution. For it is clearer than daylight that, without renovation, those bodies do not last."⁹³ The requirement, in sum, is to become at one with nature, for without such an equilibrium, civilization and perhaps the human race are surely doomed. Americans are not accustomed to such ideas, and tend to strenuously resist them, principally because of the favorable circumstances in which they have lived for almost 200 years. But that condition, as has been noted, is now over. Strict attention must be paid to "the limits to growth" and to the conservation and preservation of resources, all within the boundaries of what will later be called an "optimum" population.

As a final prefatory observation, I maintain that human needs, however defined, cannot and will not be satisfied by some as yet unknown series of technological fixes. Only the most fatuous kind of Micawberism enables many humans—for example, Herman Kahn and Julian Simon⁹⁴—to contemplate the future roseately. People everywhere are faced with a congeries of terrible vulnerabilities—possible nuclear holocaust, an exploding population, environmental degradation, and enormous disparities in material well-being—that, taken in their entirety, are a series of crises that have become the "climacteric" of humankind. Whether relatively modern politico-economic

91. N. MACHIAVELLI, *THE DISCOURSES*, III. 8.

92. *Id.* at III. 9.

93. *Id.* at III. 1.

94. See H. KAHN, *THE COMING BOOM* (1983); J. SIMON, *THE ULTIMATE RESOURCE* (1982). Micawberism refers to the character in Dickens' *David Copperfield*, who was sublimely certain that something would always turn up to solve problems.

institutions, such as liberal democracy, private enterprise capitalism, and constitutionalism as it has been known and understood, can weather the storms that lie dead ahead is a crucial question for constitutionalists. Stated sententiously, my answer, already adumbrated, is a flat negative. But try we will, as try we must, to survive the onslaught that is certain to come. This lecture is an effort in that direction.

Second, I leave the area of constitutionalism, broadly conceived, and enter the foggy domain of psychology and sociology. This is necessary simply because lawyers tend to be narrow-minded technicians little interested in the larger questions of human life or even of constitutionalism.⁹⁵ Although many others have discussed human needs, no one can analyze such needs without referring to the late Abraham Maslow. I am, accordingly, not probing into unknown territory in seeking to determine the relevance of human needs theory to constitutionalism. Many others have dealt with the question of basic needs, including Erich Fromm, Michael Harrington, Amitai Etzioni, Herbert Marcuse, William Galston, Christain Bay, and David Miller. The point is that there is a large body of literature that has, in general, been untapped by constitutional scholars. The time has come to do so, to plumb the depths of human needs theory and determine the extent to which there is a consensus on those needs and whether needs can be translated into constitutional precepts.

James C. Davies has observed that no one can expect people to participate in politics, which is what constitutions are all about, until certain basic human needs are met.⁹⁶ Needs theory is not only a means to explain political behavior but also is a basis for judging politics and political institutions. If one believes, as I do, that satisfaction of human needs (and deserts) is the ultimate purpose of politics, an entirely new justification of constitutional government emerges. Needs and deserts imply, perhaps demand, a correlative obligation on the part of the collectivity (or collectivities) in which we all live to take action designed to satisfy them. Government, that is, should no longer be perceived through Lockean eyes—as the means of protecting private property—but in the affirmative sense of so arranging society that the equality principle writ large becomes part and parcel of our constitutional lore. This, be it noted, is a modern idea. As Professor John H. Schaar has observed, both the ancients, such as Plato and Aristotle, and the medieval political theorists were profoundly inequalitarian.⁹⁷ Equality as a goal of human endeavor is in many respects derivative from the impact of the Great Discoveries upon Western social structures. For the first and only time in human history, people could seriously think about equality—of opportunity, certainly, and even of condition—

95. See J. SHKLAR, *LEGALISM* (1964).

96. J. DAVIES, *HUMAN NATURE IN POLITICS* (1963). See also Davies, *The Development of Individuals and the Development of Politics*, in *HUMAN NEEDS AND POLITICS* 74 (R. Fitzgerald ed. 1977). The several essays in this book merit close study by anyone interested in human needs and constitutionalism.

97. Schaar, *Some Ways of Thinking About Equality*, 26 *J. POL.* 867 (1964).

a possible and even achievable goal. That it may be an impossible dream has not entered into the American ethos; it still remains in the ideal, however much actual practice may vary from that ideal. My point, in sum, is that human needs by definition require collective recognition and satisfaction. And that means, as will be demonstrated, a continuing presence of the government in social affairs. Some of us may not like that; but avoid it we cannot.

The *locus classicus* of human needs theory is that of Abraham Maslow. In a seminal article published more than forty years ago he posited the following list of needs:⁹⁸

1. Physical (biological) needs, such as air, water, food, sex, etc.;
2. Safety needs, the assurance of survival and of continuing satisfaction of basic needs;
3. Affection or belongingness needs;
4. Esteem needs, by self and others; and
5. Self-actualization or self-development needs.

Maslow considered these needs to be both instinctive and universal. To him, furthermore, they were hierarchical: satisfaction of the first is necessary before the second can be addressed, and so on. In his words:

There are at least five sets of goals, which may be called basic needs These are briefly physiological, safety, love, esteem, and self-actualization. . . . These basic goals are related to each other, being arranged in a hierarchy of prepotency. This means that the most prepotent goal will monopolize consciousness and will tend of itself to organize the recruitment of the various capacities of the organism. The less prepotent needs are minimized, even forgotten or denied. But when a need is fairly well satisfied, the next prepotent ("higher") need emerges, in turn to dominate the conscious life and to serve as the center of organization of behavior, since gratified needs are not active motivators.⁹⁹

Others, of course, have proffered definitions. Professor C. B. Macpherson rejects Maslow and asserts that Karl Marx provided a better model: "Labor in the broadest sense—creative transformation of nature of oneself and one's relations with one's fellows. This, Marx held, was *the truly human need*."¹⁰⁰ (Marx, it will be recalled, stated in a famous passage: "From each according to his ability and to each according to his needs.") Professor Marvin Zetterbaum reads Hobbes and Rousseau and Marx as maintaining "the primacy of recognition as a basic human need, if not *the basic human need*";¹⁰¹ and

98. Maslow, *A Theory of Human Motivation*, 50 *PSYCHOLOGICAL REV.* 394 (1943), reprinted in A. MASLOW, *MOTIVATION AND PERSONALITY* c. 5 (1954).

99. *Id.* See Bay, *Needs, Wants, and Political Legitimacy*, 1 *CAN. J. POL. SCI.* 241 (1968).

100. Macpherson, *Needs and Wants: an Ontological or Historical Problem?*, in *HUMAN NEEDS AND POLITICS* 26, 34 (R. Fitzgerald ed. 1977).

101. Zetterbaum, *Equality and Human Need*, 71 *AM. POL. SCI. REV.* 983, 986 (1977). See L. STRAUSS, *ON TYRANNY* 205 (1968) ("Both doctrines [i.e., Hobbes's and Hegel's] construct

goes on to remark "one may indeed say with Professor Leo Strauss" that the course of political philosophy since Hobbes "is marked by the assumption that man as man is thinkable 'as a being that is guided by nothing but a desire for recognition'."¹⁰² Zetterbaum further observes: "we cannot escape the notion that the recognition and defense of self is *a* basic human need, if not *the* basic human need."¹⁰³ To Professor William A. Galston, the concept of need has a threefold classification: natural need, social need and luxury.¹⁰⁴ Natural needs are "the means required to secure, not only existence, but also the development of existence."¹⁰⁵ Developmental needs include adequate nurturance, adequate education, institutions that permits a wide range of capacities, and friendships and social relations. Dostoyevsky's Grand Inquisitor maintained that humans needed miracle, mystery and authority more than freedom.¹⁰⁶ Professor Edgar Bodenheimer, writing about philosophical anthropology and the law, listed equality, liberty, and security as the most important values "which law is designed to protect and promote."¹⁰⁷ Finally, Professor Christian Bay maintains that there are three ranges of basic needs: "physical survival and health needs, social belongingness and participation needs, and individual subjectivity needs"—in that order of importance.¹⁰⁸

What may be said about these varying definitions? Several conclusions are possible. First, human needs theory is a significant part of philosophical and psychological discourse. Second, although the definitions differ in greater or lesser part, each of the quoted authors does agree, at least implicitly, that human needs are associative in nature and can only be realized through some collectivity. This in turn implies the requirement for some sort of government; and *that* means that human needs are indeed relevant to constitutions and constitutionalism. Third, the concept of human needs as a philosophical and jurisprudential construct is complex and controversial. If accepted, as I think it must be, it calls for reorientation of orthodox thinking about law and legal institutions.

I should like to emphasize the second of those conclusions. Human needs must be viewed as the needs of individuals within a social organization. "The 'good' or 'healthy' society," Maslow has said, "would be defined as one that

human society by starting from the untrue assumption that man as man is thinkable as a being that lacks awareness of sacred restraints or as a being that is guided by nothing but a desire for recognition.").

102. ZETTERBAUM, *supra* note 101, at 986.

103. *Id.* at 990.

104. W. GALSTON, *JUSTICE AND THE HUMAN GOOD* 164 (1980).

105. *Id.*

106. F. DOSTOYEVSKY, *THE BROTHERS KARAMAZOV*.

107. Bodenheimer, *Philosophical Anthropology and the Law*, 59 CALIF. L. REV. 653, 662 (1971).

108. Bay, *Thinking About Human Rights: A Contribution to Postliberal Theory*, in *RETHINKING LIBERALISM* 269, 277 (W. Anderson ed. 1983).

permitted man's highest purposes to emerge by satisfying all his prepotent needs."¹⁰⁹ It is with that thought in mind that I suggest that the goal of American constitutionalism should be creation and maintenance of a sustainable society. Maslow's views are altered to the extent that he does not take into consideration environmental constraints, something that surely is indispensable in considering the satisfaction of a person's prepotent needs. We cannot, that is, assume with Locke and Rousseau that humans ever lived in a state of nature, historically or contemporaneously. L. T. Hobhouse made the point in these words:

The organizer of industry who thinks that he has "made" himself and his business has found a whole social system ready to his hand in skilled workers, machinery, a market, peace, and order—a vast apparatus and a pervasive atmosphere, the joint creation of millions of men and scores of generations. Take away the social factor and we have not Robinson Crusoe, with his salvage from the wreck and his acquired knowledge, but the naked self living on roots, berries, and vermin. *Nudus intravi* should be the text over the bed of the successful man, and he might add *sine sociis nudus exirem*.¹¹⁰

So much for a definition of human needs. The goal of government in the United States is to help satisfy needs, however defined, to help individuals everywhere attain a condition of dynamic homeostasis. In like manner, societies—in present context, the United States of America—should seek to attain and maintain a plateau of dynamic equilibrium. To achieve such conditions, constitutionalists must consider not only the American people but peoples everywhere.

I have suggested in this section that certain basic human needs should be identified by constitutionalists, who should then bend their efforts toward their realization. A number of questions have been left dangling, including the troubling problem of how to reconcile conflicting human needs. Some observations by Professor H. J. McCloskey will serve to conclude this section:

I wish to suggest that talk about human needs, to be meaningful and useful, must be spelt out in terms of natural goods, goods based on human nature and human ends, where the ends are determined by our natures, either in terms of movement from the potential to the actual in the sense evident in much liberal writing, or in the teleological, purposive sense, as in Thomist natural law ethics. . . .

I am therefore suggesting that, *ceteris paribus*, needs are things which ought, where possible, to be available, not withheld, prevented, and indeed, be supplied where necessary; that where needs cannot be

109. Fitzgerald, *Abraham Maslow's Hierarchy of Needs—An Exposition and Evaluation*, in *HUMAN NEEDS AND POLITICS* 36, 38 (R. Fitzgerald ed. 1977).

110. L. HOBHOUSE, *supra* note 85, at 140-41.

met, society or the world ought to be reordered as far as possible, so that they are capable of being met, or obtained by the person with the need, provided that greater goods are not thereby lost or jeopardized; that talk of human needs and needs of particular persons involves reference to natures, the perfection, development, non-impairment of which are good.¹¹¹

To put my point in traditional terminology, satisfaction of human needs should be considered to be *the* basic human right. If that requires, as it does, reordering society, as McCloskey suggests, it is long past time that that portentous question be faced. It cannot be burked.

III. TAKING NEEDS SERIOUSLY: THE PROBLEM EXPLORED

I am proposing two things. First, we as humans have a right, at least in the ideal, to satisfaction of those human needs that human action can reasonably be expected to satisfy. There is no reason at this juncture to choose from among the several definitions of human needs, although surely it is correct to say that if Maslow's is not followed, a viable alternative should be proffered. Second, we as humans do not have a right to satisfaction of needs that the environment, broadly defined, will not accommodate. *Homo sapiens* lives not only in an organizational society, but also reacts to and is affected by the total planetary milieu.

This section delineates several questions, each pertinent to the larger discussion and each aiming at contributing to an understanding of our fundamental question: *Were the Constitution to be rewritten today, what provisions would be put in it?* What *should* be put in it? Here, again, I do not write on a *tabula rasa*. Others have addressed the problem in the past and others are doing so today. As for the former, Rexford Tugwell and Leland D. Baldwin¹¹² come to mind; as for the latter, a Committee on the Constitutional System, recently formed by Lloyd Cutler and Douglas Dillon,¹¹³ evidences a high degree of concern about the present-day viability of ancient constitutional mechanisms. Obviously, the following questions overlap; they should not be considered discretely.

111. McCloskey, *Human Needs, Rights and Political Values*, 13 AM. PHIL. Q. 1, 7 (1976).

112. See L. BALDWIN, *REFRAMING THE CONSTITUTION: AN IMPERATIVE FOR MODERN AMERICA* (1972); R. TUGWELL, *THE EMERGING CONSTITUTION* (1974). No doubt others are pursuing parallel lines of inquiry. For one such effort, published—in all places—in *Esquire*, see MacDonald, *Updating the Constitution of the United States*, *ESQUIRE*, May 1974. See also J. BURNS, *THE POWER TO LEAD: THE CRISIS OF THE AMERICAN PRESIDENCY* (1984).

113. The Committee consists of several dozen lawyers, political scientists, journalists, and other interested people. It has offices at 1775 Massachusetts Avenue, N.W., Washington, D.C. 20036, and its executive director is Peter Schaufli. It is fair to say that the Committee has not yet tackled the systemic problems which are the focus of this essay. See Miller, *It's Time for Constitutional Change*, *The Miami Herald*, April 8, 1984, at 1E (discussion of Committee on Constitutional System).

1. *What type of society do Americans want? And what type of governmental apparatus would be best suited to achieve it?* Answers to these questions are indispensable. Without them, no amount of constitutional tinkering, by amendment or otherwise, or no amount of constitutional drifting, by updating the Constitution through interpretation, will do much more than paste Band-Aids on the outside of an unwieldy and increasingly inadequate constitutional structure. The problems confronting Americans today are *systemic*. They cut to the core of the organization of society. They cannot and will not be cured by small changes. Whether they can be rectified by large changes and whether law, including the fundamental law of the Constitution, is sufficient to the need are difficult questions that must also be confronted and resolved.

I have suggested above that pragmatism, as such, is inadequate to the manifest requirements. A constitution of human needs (and deserts) necessitates something more than the "muddling through"¹¹⁴ that has long characterized American policy-making. Before he became a mover and shaker of events, Professor Henry Kissinger made the same basic point in an essay about policy-making.¹¹⁵ So, too, with Dean Acheson, who once remarked that Americans follow what might be called the "aspirin theory" of policy-making.¹¹⁶ We call our problems headaches, said Acheson, and believe that they are curable with a quick fix (an aspirin tablet); we do not realize that the problems of governance will always be with us, rather like the pains of individuals making a living.

Nations, like individuals, must know what they want and strive to attain it. The goals or ends of society cannot be determined through the exercise of human reason. As Professor Herbert Simon has said, "Reason, taken by itself, is instrumental. It can't select our final goals, nor can it mediate for us in pure conflicts over what final goal to pursue—we have to settle these issues in some other way. All reason can do is help us reach agreed-on goals more efficiently."¹¹⁷ (With that statement, Simon substantially undercuts most of what passes for constitutional scholarship today.) Goals are culturally determined; they cannot be promulgated by fiat. Laws can help us achieve such goals, and even can help educate the populace along lines that will assist in setting those goals, but we must recognize that, as Iredell Jenkins has observed,

114. See C. LINDBLOM, *THE POLICY-MAKING PROCESS* (1968).

115. H. KISSINGER, *THE NECESSITY FOR CHOICE* 342 (1961).

Pragmatism, at least in its generally accepted forms, produces a tendency to identify a policy issue with the search for empirical data. It sees in consensus a test of validity. Pragmatism is more concerned with method than with judgment. Or, rather, it seeks to reduce judgment to methodology and value to knowledge. The result is a greater concern with the collection of facts than with the interpretation of their significance.

The point is that principle or purpose is lost, action is substituted for thought, and a series of *ad hoc* adjustments are made. That will no longer do.

116. *Quoted in Spaeth, Book Review*, 1 *STAN. L. REV.* 179 (1948).

117. H. SIMON, *REASON IN HUMAN AFFAIRS* 106 (1983).

law, however and by whomever promulgated, is neither sovereign nor omniscient.¹¹⁸

Pragmatism is inadequate today because social conditions have changed so radically since it came into prominence. It was the "philosophy" appropriate to a developing nation that was the United States during the 19th century, by providing a means for social experimentation and maneuver. Errors in judgment could be and were made but the ultimate results were generally satisfactory, simply because pragmatism and the social conditions of the era permitted a margin for error. That age, I have argued above, is over. The requirement today, and surely in the future, is for an avowed ideology—something alien to the American mind but something that has become a prerequisite to serious thinking about constitutionalism. That ideology, I am suggesting, is one that should be built around the fundamental notion that the only valid end of government is to satisfy human needs within environmental constraints.

2. *What is the environment in which the future Constitution must exist and operate?* Even if not changed in any substantial manner, the Constitution will have to deal in the next fifty years with problems as yet not known or even unforeseeable. Rapid social change will continue, of that there can be little doubt. Already, however, at least two major trends are discernible. Taken together, they completely alter the milieu in which constitutional institutions must operate. Only an outline can be given here.

First, the society relevant to constitutionalism is global, not national and certainly not local. The meaning is clear: human needs *qua* needs and *qua* rights must be analyzed in the context of the entire planet. The earth has become what Marshall McLuhan called a global village but which is more accurately labeled a global city. The urbanization of the world is proceeding at a rapid clip. Constitutionalists must, therefore, not only proceed from the proposition that needs must be perceived in their social setting but that the society involved is the so-called world community. No nation, certainly not the United States, can isolate itself in lonely splendor from the remainder of the planet. That adds a major new dimension to any consideration of what constitutions are and what they should be. I am not suggesting at this time the development of a constitution for the world community, although that may not be a bad idea,¹¹⁹ but have the lesser goal of demonstrating that the American constitution and constitutionalists must resolutely confront the fact that the United States is perhaps the most important single unit of a planet divided into nation-states. The Constitution of 1787 is largely silent about foreign affairs; the spare provisions of the Document, and its silences, were left to gather content from experience. That no longer suffices. Too much is left to chance and hap-

118. I. JENKINS, *SOCIAL ORDER AND THE LIMITS OF LAW: A THEORETICAL ESSAY* (1980).

119. The structure of the United Nations may be seen as a struggling and as yet feeble attempt along those lines. That the "state system" is verging on obsolescence, or has already reached that point, seems to be increasingly obvious. See R. FALK, *THE END OF WORLD ORDER* (1983).

penstance. A constitution of human needs must perforce be one that recognizes and directly deals with the demands and expectations of peoples the world over. Said another way, in the late 18th century the continuing viability of the several states was an important question of public policy; 200 years later, the continuing viability of the nation-state as a form of social order is an equally important, even crucial, question of public policy.

Second, the planet on which we live is both endangered and endangering. It is endangered in main part because of the exponential growth in human numbers since about 1650. We are still on the upswing of a "J-curve" of population growth. More than 4.7 billion people now throng the earth; by the year 2000 that figure will be at least six billion, with the bulk in the Third World. That very mass of humans is contributing to—is the major cause of—the rapid extinction of other species, to depletion of rain forests and other flora critical of humankind's welfare, and to the spread of environmental degradation in general. Earth is endangering because of a runaway technology that seems to be beyond human control, a technology that has not only produced weapons of destructive power that civilization itself is threatened but also has, through new health techniques, enabled people to live longer than ever before. The "crisis of crisis" or "climacteric" that humans everywhere are now experiencing can in major part be traced to the impact of technology upon the social structure.

No one seems to know how to tame technology, to ensure that it is employed for humane ends, to avoid the deleterious second-order consequences of what are otherwise beneficent techniques. We must deal with what Max Weber called "the seemingly irresistible advance of routinization, rationalization and bureaucratization,"¹²⁰ all the product of technological change. Jacques Ellul has taken Weber a giant step further. Focusing on what he calls "technique," he notes "the transition from the individualist to the collectivist society." Ellul defines *technique* as more than machines, technology, or procedures for attaining a goal. "In our technological society, technique is *the totality of methods rationally arrived at and having absolute efficiency* (for a given stage of development) in *every* field of human activity. Its characteristics are new; the technique of the present has no common measure with that of the past."¹²¹ Technique imposes centralism upon the economy. In politics, the technocrat views the state as an enterprise providing services that must function efficiently. In turn, efficiency requires administration (bureaucracy).

These two factors—no doubt there are others—add up to the fact that, as Fritjof Capra has observed, humans are at a great turning point in history,¹²² one that necessitates development of a new paradigm to replace the outmoded

120. W. MOMMSEN, *THE AGE OF BUREAUCRACY: PERSPECTIVES ON THE POLITICAL SOCIOLOGY OF MAX WEBER* 103 (1974).

121. J. ELLUL, *THE TECHNOLOGICAL SOCIETY* 305 (J. Wilkinson trans., paperback ed. 1964).

122. See F. CAPRA, *THE TURNING POINT: SCIENCE, SOCIETY, AND THE RISING CULTURE passim* (1982).

Newtonian-Cartesian paradigm that was so influential in Western thought. In net, the environment that constitutionalists must deal with today and in the future is almost completely different from that of 1787. If it is accurate, as I think it is, that laws and even constitutions tend to be more *a posteriori* than *a priori*, the consequences are obvious for the American constitutional order. The two factors also present the challenge of whether humans can use law and constitutions to create a better social order—what was above called a sustainable society.

3. *How can the indubitable governing power of private groups be curbed and channelled?* This question cuts to the core of governance in the world community (regarding the position and power of multinational corporations and other transnational private groups) and internally in the United States (as in the theory of political pluralism and its present-day viability in the domestic constitutional order). It is one of the cardinal questions of modern constitutionalism. In this section, I shall be brief and concentrate upon the giant corporation as being prototypal of private groups generally.¹²³

That groups called private under orthodox legal theory in fact exercise governing power should occasion no surprise. In total impact, they probably are as important as the organs of public government. Since, moreover, the two forms of government (public and private) are closely intertwined, they are creating in the United States, as well as elsewhere, an indigenous form of corporatism. The admixture of public and private power, for that matter, is far from a new development; to some degree, it has always characterized the American political economy. In section IV, I will suggest that constitutional norms should be applied to socially important private groups.

During the past century, perhaps as Galbraith¹²⁴ has said because of technological imperatives, corporations have waxed increasingly large and strong. Many straddle the United States; and most of any real consequence operate in many other countries. This apparently is in accord with the apparent wishes of the Founding Fathers, particularly Alexander Hamilton. When in 1866 the Supreme Court discovered through a blinding flash of revelation that the corporation was a person within the meaning of the fourteenth amendment's due process clause,¹²⁵ what the framers started and what received a major impetus from the Marshall-Taney Courts became utterly clear: American was to be a corporate society, perhaps the corporate society *par excellence*. This was affirmed when the Justices wrote their own version of the Sherman

123. For further discussion by the present author, see, for example, A. MILLER, *THE MODERN CORPORATE STATE: PRIVATE GOVERNMENTS AND THE CONSTITUTION* (1976); Miller, "Constitutionalizing" the Corporation, 22 *TECHNOLOGICAL FORECASTING & SOC. CHANGE* 95 (1982); Miller, *A Modest Proposal for Helping to Tame the Corporate Beast*, 8 *HOFSTRA L. REV.* 79 (1979); Miller, *The Constitutional Law of the "Security State,"* 10 *STAN. L. REV.* 620 (1958).

124. J. GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967).

125. *See Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394, 396 (1886).

antitrust law in 1911¹²⁶ and when, in 1932,¹²⁷ they determined through a marvelous intuition known only to them that bigness in and of itself is no violation of the antitrust laws. Those laws have become both a mere charade, as Thurman Arnold once observed,¹²⁸ and a welfare state for many lawyers.

The time has come—indeed, it is long past—when the governing capacities of corporations are recognized in legal and constitutional theory. Two points are pertinent here. First, the governance of corporations by government is more ostensible than real. Corporate charters, which even under the *Dartmouth College*¹²⁹ doctrine could give leverage against corporations, are mere simulacra of control. Stockholders, as individuals, own but do not control; self-appointed oligarchies are in charge of the firms. Second, governance of Americans by corporate managers is an indubitable fact of life. They do so in the internal orders of the companies, whose activities are a form of political order. The “iron triangles” of Washington, D.C. illustrate how corporate management has a significant role in the formulation of public policies. The triangle consists of the industry supposedly being regulated, the relevant administrative agency, and the congressional committee having jurisdiction. (Professor Hugh Heclo prefers the term “issue networks,” but the effect is the same.)¹³⁰

Corporations *are* governments and should be recognized as such. They have, however, only a thin claim to legitimacy for their power to rule. Dean Edward Mason asked in 1959: Who selected corporate managers “if not to rule over us, at least to exercise vast authority, and to whom are they responsible? The answer to the first question is obvious: they selected themselves. The answer to the second question is, at best, nebulous. This, in a nutshell, is the problem of legitimacy.”¹³¹ This is the age of collective action. The American economy is dominated by huge corporate combines not even remotely in the contemplation of those who wrote the Constitution and the Bill of Rights.

126. See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

127. See *United States v. Swift & Co.*, 286 U.S. 106 (1932). For a discussion of how the Supreme Court helped further corporate growth, see W. ADAMS & H. GRAY, *MONOPOLY IN AMERICA* (1956).

128. T. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937). See W. ADAMS & H. GRAY, *supra* note 127, at 2. Adams and Gray state:

Our thesis is that the currently popular deterministic explanations of economic concentration are inaccurate and misleading, that concentration is largely an artificial, institutional phenomenon which originates in, or derives sustenance from, the actions and policies of the federal government. Our study indicates that some of these policies, whether or not so intended, have had a profound effect on the structure of the economy, that they have served to promote concentration and to restrict and weaken competition; in short, that the federal government—although by tradition, popular regard, and legal mandate the defender of competition—has by a process of function perversion become one of the principal bulwarks of concentration and monopoly.

129. See *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819).

130. Heclo, *Issue Networks and the Executive Establishment*, in *THE NEW AMERICAN POLITICAL SYSTEM* 100 (A. King ed. 1978).

131. MASON, *Introduction to THE CORPORATION IN MODERN SOCIETY* 5 (E. Mason ed. 1959).

Decisions made in corporate boardrooms, on such matters as investment, prices, and plant location, directly affect, and thereby govern, Americans as well as people elsewhere. Corporations are authoritative institutions for the allocation of value; they largely determine how prices are set and economic rewards bestowed and are changing the nature of property itself. They "legislate" the terms and conditions of most contracts through use of standardized forms. As hierarchical bureaucracies, they are the local self-governments of much of American society—"the logical successor to manor, village, and town."¹³² In addition to being part of the iron triangles of the policy-making process, they use private judiciaries (arbitrators), have extensive intelligence services, run fleets of aircraft, and employ "private" armies in their security forces.

That corporations are private governments is far from a novel idea. John Davis maintained in 1897 that their growth in Western Europe and the United States "signifies nothing less than a social revolution,"¹³³ an insight extended by Arthur Bentley in 1908: "A corporation is government through and through. . . . Certain technical methods which political governments use, as, for instance, hanging, are not used by corporations, generally speaking, but that is a detail."¹³⁴ This is obviously true within the United States and in recent years has become equally true in the world community. The multinational corporations govern themselves; they are powers unto themselves. We thus find ourselves in a condition where such corporations as Exxon are more important economically *and* politically than most of the fifty states and have assets greater than most nation-states. Yet in the peculiar language of the American legal system—and others, be it said—they are considered to be as private and no greater in contemplation of the law than you or I. In our Orwellian world, corporations are not only constitutional persons, they are "more equal" than natural persons. They have constitutional rights but no concomitant constitutional duties. A natural person can be forced to fight and even to die for the collectivity called the United States, but not an artificial person (the corporation). If it "fights," as it can be required to do, it has guaranteed profits. No corporation has ever died in defense of the United States. Natural persons have other constitutional duties, such as being required to serve on juries, but not corporations: they have *no* constitutional duties. A parlous situation, indeed. The problem that constitutionalists must confront is how corporate power can be so canalized that economic (and political) power that is necessary can be made as tolerable and decent as possible.

A corollary exists to what was said immediately above: the political order known as pluralism is in obvious disarray, and has been for some time. Pluralism "worked" during the 19th century because only one truly important social group existed: the business enterprise. It does not work today—it

132. Drucker, *The Meaning of Mass Production*, 57 *COMMONWEAL* 547 (1953).

133. J. DAVIS, *CORPORATIONS* (1897).

134. A. BENTLEY, *THE PROCESS OF GOVERNMENT* 268 (1908).

does not, that is, even pass the test of pragmatism—because of the proliferation of other groups, each exercising political power and each with demands and expectations sought and enforced along narrow, parochial lines. In essence, there is no way, save in widely acknowledged emergencies (such as World War II), for enforcement of the over-all national or public interest except as it emerges from the joustings of the interest groups of the nation.¹³⁵ The common good inevitably gives way to recognition and furtherance of private rights. The consequence, Professor Michael J. Sandel asserts, is that “our public life has withered, our sense of common involvement diminished, [and] we lie vulnerable to the mass politics of totalitarian solutions. . . . Our most pressing moral and political project is to revitalize those civic republic responsibilities implicit in our tradition but fading in our time.”¹³⁶ That is not quite correct: it is doubtful that “civic republican responsibilities” were adhered to at any time in American history. Sandel, however, is correct in saying that the need is to discover and enforce them “in our time.” As noted, Americans no longer have the room for maneuver provided by the frontier. The requirement, in a word, is for a form of “communitarianism”¹³⁷ to replace the bankrupt individualism that now characterizes the nation.

IV. TAKING NEEDS SERIOUSLY: THE PROBLEM ANSWERED (AT LEAST TENTATIVELY)

We come, finally, to the crux of our inquiry: To what extent can constitutional change—legal change, in any form—help create a sustainable society? Can human needs be satisfied by conscious, purposive legal action? Are there limits to effective legal action? Must constitutional change, to be effective, be accompanied or preceded by a change in values, in the ethos of the American people? I readily concede that we have been a long time reaching this point; but the introductory matter was necessary to set the context for what follows. Recall, in this connection, Alexander Hamilton’s question about whether people can establish good government or whether they must forever react to external exigencies without being able to direct or control their destinies. We have seen enough in what has previously been said, that Hamilton’s question, as of today, is unanswered. True enough, the fifty-five men who met in Philadelphia that hot summer of 1787 (out of eighty-four who had been invited), and the thirty-nine who signed the Document then drafted, managed to create a structure of government that has done duty for almost two centuries. But the exogenous

135. See Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155 (1957) (discussing “reserve function” of state).

136. Sandel, *Morality and the Liberal Ideal*, THE NEW REPUBLIC, May 7, 1984, at 17. See M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

137. See G. LODGE, THE NEW AMERICAN IDEOLOGY c. 6 (1975). “America now appears to be heading into a return to the communal norms of both ancient and medieval worlds”; “our atomistic, individualistic ideology constitutes a fundamental aberration from the historically typical norm.” *Id.* See also G. LODGE, THE AMERICAN DISEASE (1984).

circumstances that made that success possible have, as has been noted, now disappeared. It is time to rethink the problem.

I believe that we should begin our formal answer with the concession that, as Barbara Tuchman recently observed, the thing that humans do worst is govern themselves. In her language: "Mankind, it seems, makes a poorer performance of government than of almost any other human activity."¹³⁸ This is a variation on what Professor David Ehrenfeld, in an important but neglected book, has called "the arrogance of humanism"¹³⁹—the idea that humans through the exercise of reason can plan their affairs in a manner reasonably adequate to all. Politics—political science or political economy—is the most difficult of all fields of application. Compared to it, even the most abstruse questions in natural science are relatively easy. The reason is not hard to locate. Scientists tackle only those questions that give some promise of solution; the *locus classicus* is Einstein's $E = MC^2$, a magnificent intellectual achievement. But even Einstein's brain, as well as the collective brains of others, have been unable to solve the conundrum of the human being and his relationships with others.

Second, we should also acknowledge, without further exploring, that limits to effective legal action do exist. Something more than a change in law is necessary to produce significant social change. Law, to be sure, is important and indeed indispensable; but it is a tool. Although it can be and is instrumental, it cannot by itself set the ends or goals of societal action. Consider, in this connection, the way in which the formal law, of the Constitution and of the statutes, has been altered concerning the position of blacks in society. The formal law bespeaks a condition of equality (of opportunity but certainly not of condition) but the informal or living law shows a different face. Blacks remain as second-class citizens in the main; only a few have been able to bootstrap their way out of America's underclass. Even those who have become affluent or successful still find themselves the butts of discrimination in one form or another. Whites simply will not accept blacks as social equals. That is a harsh, even unpleasant, truth. I mention it only to illustrate what should be obvious: Changes in the positive law, even in the fundamental law of the Constitution, do not necessarily mean changes in the attitudes and behavior patterns of those affected. Legal change requires a change in the value structure of the people. To believe otherwise is fantasy.

If that be so, as surely it is, then why go through what some may consider a futile exercise of proposing constitutional alterations? The answer is two-fold. First, we will never get correct answers to social problems until correct questions are asked.¹⁴⁰ One way of asking them is to look to the structure

138. B. TUCHMAN, *THE MARCH OF FOLLY* 4 (1984).

139. D. EHRENFELD, *THE ARROGANCE OF HUMANISM* (1978).

140. As Justice Frankfurter opined in *Estate of Rogers v. Commissioner*, 320 U.S. 410, 413 (1943): "In law also the right answer usually depends on putting the right question." And in *Priebe & Sons v. Untied States*, 332 U.S. 407, 420 (1947), Frankfurter stated: "but answers are not obtained by putting the wrong question and thereby begging the real one."

of the Constitution (broadly defined). Second, as has been noted, there is an educational value in what admittedly is utopian thinking. Not for nothing is Plato's *Republic* still studied. And although they may be considered to be anti-utopian, Machiavelli's *The Discourses* and *The Prince* are the actual albeit unacknowledged *vade mecum* of statecraft.¹⁴¹ Moreover, although it is true that we cannot escape the past, it is also accurate to maintain that we live today in an historically unique situation. The "climacteric" confronting humankind knows no historical parallel.¹⁴² What Plato and Aristotle, Machiavelli and Locke, Hume and Rousseau, Marx and Jefferson, to name only a few, had to say should be read in the contexts of *their times*, none of which remotely resembled the present. *Our times* pose different problems, which although on a high level of abstraction may be similar to those that have always existed, nonetheless require a different type of analysis and disquisition.

My answer to the question of achievement of a constitution of human needs will consist, in the main, of setting forth some generalized statements of what constitutions should do in the modern age. They will be accompanied by some references to history. I shall suggest that a constitution must do at least four things—structure government, delineate the obligations of government, set forth limits on government, and provide for a way of systematic, meaningful change in the fundamental law—and will take them up in that order.

1. *The structure of government.* We must begin, of course, with the world as it is, not as we wish it to be, and suggest a series of problems that should be confronted by anyone who wishes to think about what a constitution should do. The most prominent feature of the world today is its political division into nation-states, each claiming sovereignty over a designated piece of territory. Some are huge and some are small unto insignificance, but all share that common attribute of sovereignty. That, of course, is obvious and would, if analysis could end there, be no occasion for further comment. But analysis cannot stop there. Sovereignty today, even for the superpowers, exists only in the positive law. Delve below the surface of positivism and a bewildering web of interactions quickly become apparent. The net result is that no nation is truly sovereign in the politico-economic or sociological sense. Each depends in greater or lesser degree upon resources or aid of some sort from other nations. The living law of the world community consists more of cooperation than of conflict. Nations simply must deal with others. Just as natural persons attain their identity and significance from being a member of a group,

141. For a brief discussion of the American experience, see Miller, *Reason of State and the Emergent Constitution of Control*, 64 MINN. L. REV. 585 (1980). See also Paust, *Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined*, 9 HASTINGS CONST. L.Q. 719 (1982).

142. Cf. W. McNEILL, *THE GREAT FRONTIER: FREEDOM AND HIERARCHY IN MODERN TIMES* (1983). See also A. MILLER, *DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL* (1981) (discussing climacteric and its probable effect on American institutions).

so it is with nations. It is idle, even useless, to think of them as separate entities. Rather, they are parts of a larger whole. There may be, as Chief Justice John Marshall once opined, a "perfect equality of nations,"¹⁴³ but that equality lies only in the political sphere (as in the General Assembly of the United Nations). Obviously, as Professor Robert Tucker has argued, nations are unequal.¹⁴⁴ Other than in the realm of politics, nations are equal mainly in their interdependencies. None can exist without close and continuing relationships with many others.

From this it follows that when considering the structure of government under any constitution, attention must be paid to those relationships. Provision must be made, in some way, for them to be recognized in the written constitution. The Constitution of 1787, other than making foreign relations a monopoly of the national government, was more an invitation to debate about foreign policy than a delineation of what should be done and who should decide.¹⁴⁵ That no longer suffices. The further meaning is that the structure of government under any constitution must be perceived on two levels—the formal and the operative; or what Walter Bagehot called the difference between the "dignified" parts of a constitution, those which "excite and preserve the reverence of the population," and the "efficient" parts, by which "it, in fact works and rules."¹⁴⁶ Woodrow Wilson made the same point when he observed in 1885 that "The Constitution in operation is manifestly a very different thing from the Constitution of the books."¹⁴⁷

The clear implication of this is that although the Constitution applies only in the territorial jurisdiction of the United States—in general, it does not "follow the flag"—that is accurate only in its formal sense (Wilson's "Constitution of the books"). The operative fundamental law differs, even today: Under Article VI, the numerous treaties and executive agreements to which the United States is a party are "the supreme law of the land." They are constitutive actions which in their totality make up a body of at least inchoate constitutional law that extends "the Constitution in operation" far beyond the nation's borders. That body of law, in my judgment, is far more than a mere inchoation (although not studied as constitutional law).¹⁴⁸ Even some

143. In *The Antelope*, 10 Wheat. 66, 121 (1825).

144. R. TUCKER, *THE INEQUALITY OF NATIONS* (1979).

145. See E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* (4th ed. 1957); L. FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* (1981); A. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* (1976); F. WILCOX, *CONGRESS, THE EXECUTIVE, AND FOREIGN POLICY* (1971).

146. W. BAGEHOT, *THE ENGLISH CONSTITUTION*, quoted in Dorsey, *Constitutional Obligation*, in *POLITICAL AND LEGAL OBLIGATION* 179, 182 (J. Pennock & J. Chapman eds. 1970).

147. W. WILSON, *CONGRESSIONAL GOVERNMENT* 30 (1885).

148. They fall more into the category of international law, although why the principles should not be studied as a branch of constitutional law remains mysterious. Compare C. JENKS, *THE COMMON LAW OF MANKIND* 58 (1958) with W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 70 (1974).

of the attributes of political sovereignty have already been ceded by the United States to larger-than-national organizations. NATO is an example, the International Monetary Fund another, and international commodity agreements comprise a third. Others exist, but need not be listed. My point may be simply stated: However much the perfervid "patriots" in the American Legion or Daughters of the American Revolution may disagree, the United States has already moved into an era of at least multinational, although far from worldwide, resolution of some of its public policy problems.

The question is whether that beginning should be extended and formalized in the Constitution. Professor Paul A. Freund once asserted that any thoroughgoing commitment to larger-than-national institutions would require a constitutional amendment¹⁴⁹—which may well be accurate. My point is that constitutionalists must, of necessity, take the world community into consideration. America's place in the world community, as set forth in the Constitution, would eliminate in some part at least the policy by drift and happenstance. That place should be a planned development, not the product of "muddling through" the impacts of "accident and force." The pulls and tugs between hierarchy (a strong national government) and heterarchy ("states' rights") have long characterized the American experience. Similar tensions are evident today on the higher plateau of the emergent hierarchy of multinationalism if not true internationalism and the heterarchy of the state system.¹⁵⁰ The problem is to develop a constitutional instrument that will retain the nation-state as, in Bagehot's label, its "dignified" core while simultaneously allowing its "efficient" parts to operate on a larger scale. People will not lightly give up their national allegiances. They identify with them: Nationalism or Americanism is the civil religion of much of America.

The spread of corporate business throughout the world helps to create the sociological basis for development of a constitution that transcends nationalism. Every American corporation of any consequence carries on a considerable part of its activities overseas. What happened in the United States in the late 19th and early 20th centuries, when corporations spread nationwide, seems certain to be paralleled in the world community. The giant corporations were one of the major factors altering the traditional system of federalism in the United States; today, they seem to be doing the same for nationalism.

The primary characteristic of the Constitution of 1787 was divided political power—in the federal system, in the separation of powers, and in the silences

149. Freund, *Law and the Future: Constitutional Law*, 51 NW. U. L. REV. 187, 194-95 (1956).

150. See Miller, *Constitutional Law: Crisis Government Becomes the Norm*, 39 OHIO ST. L. J. 736, 742-44 (1978). Cf. *The Economist* (London), Apr. 29, 1978, at 89 ("It has seldom been more important to gear national policies to fit international goals, rather than the other way around."). See also *Common Crisis North-South: Cooperation for World Recovery* 8 (2d Report of the Brandt Commission 1983) (Willy Brandt noting "the grim political and economic confusion engulfing our societies everywhere").

of the Document, the principal one being the division between political and economic power (in the Political and Economic Constitutions).¹⁵¹ Lord Acton has suggested how the framers structured government:

The Americans proceeded to give themselves a Constitution which should hold them together more effectively than the Congress which carried them through the war, and they held a convention for that purpose in Philadelphia during the summer of 1787. The difficulty was to find terms of union between the three great states—Virginia, Pennsylvania, Massachusetts—and the smaller ones, which included New York. Therefore one chamber was given to population, and the other, the Senate, to the states on equal terms. Every citizen was made subject to the federal government as well as to that of his own state. The powers of the states were limited. The powers of the federal government were actually enumerated, and thus the states and the union were a check on each other. That principle of division was the most efficacious restraint on democracy that has been devised; for the temper of the Constitutional Convention was as conservative as the Declaration of Independence was revolutionary.

The federal Constitution did not deal with the question of religious liberty. The rules for the election of the president and for that of the vice-president proved a failure. Slavery was deplored, was denounced, and was retained. The absence of a definition of State Rights led to the most sanguinary civil war of modern times. Weighed in the scales of Liberalism the instrument, as it stood, was a monstrous fraud. And yet, by the development of the principle of Federalism, it has produced a community more powerful, more prosperous, more intelligent, and more free than any other the world has seen.¹⁵²

That is an interesting statement, but not entirely correct. It was “constitutional fetishism”¹⁵³ on Lord Acton’s part to attribute the virtues he listed in the final sentence to federalism. As we have already seen, the power, prosperity, intelligence, and freedom of Americans are really attributable to exogenous environmental factors than to the provisions of the Constitution. The framers did establish the national government of enumerated powers and left the states with mainly residual powers. The states, 200 years ago, were the stronger side of the duo, evidenced, for example, by John Jay declining

151. For discussion of the Political and Economic Constitutions, which are combining into the Corporatist Constitution, see Miller, *Toward A Definition of “The” Constitution*, 8 U. DAYTON L. REV. 633 (1983).

152. LORD ACTON, *LECTURES ON MODERN HISTORY* 295 (paperback ed. 1960). Americans, of course, are not accustomed to having their Constitution labeled as “a monstrous fraud,” and as said in the text. Acton was wrong in attributing the nation’s affluence and power to a constitutional principle.

153. I take the term “constitutional fetishism” from F. NEUMANN, *THE DEMOCRATIC AND*

appointment to the Supreme Court to become governor of New York.¹⁵⁴

The legal basis for a strong national government was created in large part by the Marshall-Taney Courts. Public policy became nationalized, in the formal law, not without opposition, to be sure, as evidenced by John C. Calhoun. Legal process could not do the job of nationalization alone; the Civil War completed the task of making the United States a united state. Federalism has not been the same since, not merely because of judicial decisions and the Civil War, but because of the marriage of capital to technology created the social basis for a unified nation. What Justice Robert H. Jackson once called a national common market¹⁵⁵ was created. Today, the states exist more as administrative districts for centrally established policies (public and private) than as sovereign entities. Such states as Texas and California, true enough, have size and economies greater than most nations. But the fact remains that 200 years after the constitutional convention, federalism tends to be more *functional* than *formal*.¹⁵⁶ The problem that this poses is obvious: If Americans want a true federal system, with strong local governments, they are going to have to move in the direction of regions rather than states as the units of federalism.¹⁵⁷ That a movement toward interstate cooperation exists is well known; it is sanctioned by the Constitution of 1787. "The interstate compact device, supplemented by commissions on interstate cooperation and by uniform legislation, is today producing cooperation among the States on a grand scale even if it has not fulfilled all of its promise."¹⁵⁸ The point is that state governmental officials quite often are at least tacitly acknowledging that some public policy problems require a larger-than-state handling and resolution.¹⁵⁹ The question this presents is whether that movement should be solidified in a new constitution. I believe that it should, that the fifty states should be merged into not more than ten to twelve regions.

There is a myth abroad in the land: that there is such a thing as the "doctrine" of separation of powers. The term, *doctrine*, connotes a carefully worked

THE AUTHORITARIAN STATE (1957).

154. Jay refused a second appointment, in 1800, as Chief Justice, citing health reasons but more probably because he thought the Supreme Court lacked "the energy, weight, and dignity which are essential to this affording due support to the national government." CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT 793, 794 (E. Witt ed. 1979).

155. See *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949).

156. This distinction is made in Miller, *The Constitutional Law of the "Security State,"* 10 STAN. L. REV. 620 (1958).

157. See M. DETRICK, *BETWEEN STATE AND NATION* (1974); *REGIONAL CONFLICT AND NATIONAL POLICY* (K. Price ed. 1982); Dixon, *Constitutional Bases for Regionalism; Centralization; Interstate Compacts; Federal Regional Taxation*, 33 GEO. WASH. L. REV. 47 (1964). See also J. GARREAU, *THE NINE NATIONS OF NORTH AMERICA* (1981) (suggesting regional governance for entire continent).

158. R. LEACH & R. SUGG, *THE ADMINISTRATION OF INTERSTATE COMPACTS* (1959).

159. A clear example, of course, is the way in which the Uniform Commercial Code was speedily adopted by the states once it had been drafted. The large number of federal grant-in-aid programs is another evidence of the point.

out set of principles or rules that govern the relationships between the three branches of the national government. Those relationships derive mainly from custom rather than from rule or principle. It is only by an indefensible fiction that specific decisions can be logically derived from the tripartite division of power in government. The norm there is more cooperation than conflict; and the very term, "separation of powers," is a misnomer. The system is really one of separated institutions sharing powers.¹⁶⁰ The "doctrine" is not a doctrine at all but an unrealized and unrealizable political theory, known as such to the framers. Madison, in *The Federalist Nos. 37, 47, and 48*, went to great lengths to show that the branches actually shared power and Hamilton in *No. 66* asserted that the separation maxim was "entirely compatible with a partial intermixture"; such overlapping was both proper and necessary, in his view.

The branches are only seemingly independent. In *America's Unwritten Constitution*, Dean Don Price invited attention to "the notorious 'iron triangle' of government" (what Douglas Cater called "subgovernments" and Professor Hugh Heclo labeled as "issue networks").¹⁶¹ This is the norm in much of national policy-making: An iron triangle as has been noted, is made up of the industry or group being "regulated," the relevant administrative agency, and the appropriate congressional committee. Price admonishes us "to quit talking about the constitutional separation of powers."¹⁶² And indeed we should. Not even the judiciary is exempt from such a statement. Judicial independence is one of the great myths of the American constitutional order. Its principal function is to underpin the stability of the governmental system and resist serious attempts to change it.¹⁶³ Judges are part of the governing coalition of the nation.¹⁶⁴ Despite appearances to the contrary, federal judges are seldom at odds with the other branches of government. "No regime is likely to allow significant political power to be wielded by an isolated judicial corps free of political restraints," Professor Martin Shapiro maintains.¹⁶⁵ When judges make law, as they do routinely, they are incorporated into the ruling elite. "The myth of judicial independence is designed to mollify the loser" in litigation, says Shapiro, who goes on to state: "One of the most important aspects of the social control practiced by courts is that of wedding the populace to the regime, of strengthening the people's perception of the regime's legitimacy and their sense of loyalty to it."¹⁶⁶ That is why it is true that one is hard pressed to identify *any* Supreme Court decision upholding personal freedoms when *important* societal matters were considered to be at issue. The

160. As classically pointed out in R. NEUSTADT, *Presidential Power* (1960), and as is shown in D. PRICE, *AMERICA'S UNWRITTEN CONSTITUTION* (1983).

161. D. CATER, *POWER IN WASHINGTON* (1964); HECLO, *supra* note 130, at 100.

162. D. PRICE, *supra* note 160, at 135.

163. See J. GRIFFITH, *THE POLITICS OF THE JUDICIARY* (1977).

164. See M. SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* c. 1 (1981).

165. *Id.* at 34.

166. *Id.* at 65.

liberties of the Bill of Rights and the Civil War amendments are honored in American constitutionalism when their exercise makes little or no difference.

If Price and Shapiro (and others) are correct, then the view, often bruited,¹⁶⁷ that the United States should move toward a parliamentary form of government may be seen in a different perspective. Under Bagehot's "efficient" Constitution, cooperation is already routine in the national government. Only in the exceptional instance—as, for example, the War Powers Resolution of 1973—is that routine disturbed. In large part, Congress has lost the will to govern—as an institution, that is, but not as individual Members participate in the iron triangles.

This conception of the idea of separated governmental powers presents another problem for the structure of government in a new constitution. Washington lawyer and presidential counsellor (to President Jimmy Carter) Lloyd Cutler believes that the formal (Bagehot's "dignified") Constitution should be altered in the direction of closer cooperation between President and Congress.¹⁶⁸ In some respects, Cutler advocates formalization *and* extension of the patterns of cooperation that Dean Price describes, so that government can pull as one and not against one another. Says Cutler:

A particular shortcoming [in the Constitution] in need of a remedy is the structural inability of our government to propose, legislate and administer a balanced program for governing. . . . The separation of powers between the legislative and executive branches . . . has become a structure that almost guarantees stalemate today. As we wonder why we are having such a difficult time making decisions we all know must be made, and projecting our power and leadership, we should reflect on whether this is one big reason.¹⁶⁹

Cutler's diagnosis may be on target but his remedies miss the mark. What he is really concerned about, but does not mention, are the manifest shortcomings of pluralism as a political order.

Since Arthur Bentley wrote in 1908, pluralism has been the prevailing ideology of most students of politics. The group basis of politics got a major intellectual jump in 1951 when David Truman published *The Governmental Process*.¹⁷⁰ Almost immediately, however, perceptive political scientists, such as Henry Kariel,¹⁷¹ detected the decline of pluralism. A few years later, Grant McConnell observed that much of government has "come under the influence or control of narrowly based and largely autonomous elites."¹⁷² So, too, with

167. See, e.g., Cutler, *To Form A Government*, 59 FOREIGN AFF. 126 (1980).

168. *Id.*

169. *Id.* at 126-27.

170. D. TRUMAN, *THE GOVERNMENTAL PROCESS* (1951).

171. H. KARIEL, *THE DECLINE OF AMERICAN PLURALISM* (1961).

172. G. MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* 339 (1966).

Theodore Lowi and, more recently, with Robert Dahl.¹⁷³ Pluralism is in disarray. It no longer "works" in the pragmatic sense.

I do not suggest at this time how the powers of government should be allocated. The principal problem is not so much *who* exercises political power as *what* decisions are made and policies promulgated. Constitutionalist will have to come to grips with this problem at some time. When they do, they will quickly learn that far more than Cutler's halting beginning is necessary.

Many other questions concerning the structure of government could be discussed. Time and space permit only their mention at this time. They include the following.

a. Implicit in the disarray of pluralism is the problem of how to get true national or public interest decisions made in a polity that is dominated by McConnell's narrowly based groups, the leaders of which are interested only in the welfare of their groups and in neither that of other groups nor of society at large.

b. Should Congress continue to be a bicameral body? Under present circumstances, Congress consists of 100 members in the Senate and 435 in the House of Representatives. Even with large staffs, it is obvious that an individual member cannot be privy to all of the some 400 public laws passed each session of Congress. This argues for a better type of Congress.

c. Should the presidency be bifurcated? The United States is the only nation of any consequence in the world today that places in one person the duties of both chief of state and head of government. (That was one of the reasons it proved so difficult to impeach Richard Nixon.) We do have an "imperial" presidency; and the problem for constitutionalists is to devise a means by which that office can be divided.¹⁷⁴

d. The bureaucracy now operates as a headless fourth branch of government. How can it be made accountable? The courts do not and indeed cannot police the millions of decisions made administratively.

e. The dimension of private governments should be recognized. A century ago the Supreme Court invented the "state action" doctrine¹⁷⁵ and thus insulated "private" enterprise from constitutional norms. That no longer will do. Americans are governed as much, perhaps more, by purported private groups as by public government. It is an anomalous constitutional situation, crying out for change.

f. Some constitutional silences should be made explicit. Perhaps the main one that requires specific attention is "reason of state."¹⁷⁶ The French con-

173. R. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL* (1982); T. LOWI, *THE END OF LIBERALISM* (1969). See L. THURLOW, *THE ZERO-SUM SOCIETY* (1980); *THE BIAS OF PLURALISM* (W. Connolly ed. 1969).

174. See M. NOVAK, *CHOOSING OUR KING* (1974).

175. In the Civil Rights Cases, 109 U.S. 3 (1883). The evolution of the state action doctrine is traced in W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS* c. 12 (5th ed. 1980).

176. See C. FRIEDRICH, *CONSTITUTIONAL REASON OF STATE: THE SURVIVAL OF THE CONSTITU-*

stitution makes provision for such a doctrine,¹⁷⁷ but the Constitution of 1787 does not. That gap has been filled, for good or ill, by governmental actions, some of which have gotten Supreme Court attention.¹⁷⁸

All of these, and more, are structural problems of American constitutionalism. They should be addressed, and soon, for all of them are important to attainment of a constitution of human needs and thus a sustainable society.

2. *The obligations of government.* We now enter a relatively unexplored field of constitutional theory. Most theory about political and legal obligation speaks in terms of the obligation of individuals *to* the collectivity (variously called society or the nation). "The great problem of political theory, especially for a period of over two centuries after the Reformation, was to explain how any man, born 'free and equal,' could be rightfully under the dominion of any other man."¹⁷⁹ I wish now to reverse that and speak about the obligations *of* the collectivity to individual persons. Not that the two conceptions are not entwined; they are: A person may be obligated to obey the commands of a particular government but is he similarly obligated to obey *any* type of government? I shall argue that a constitution of human needs entails cognizance that a person is obliged to obey government when certain "political goods" are furnished by government, and take as a point of departure a statement by Professor Nannerl Henry; drawing on Hobbes, Professor Henry says:

A person's intention, as a member of a polity, to enjoy the benefits of that polity sufficiently obliges him to obey the authority that makes those benefits possible. His obligation continues as long as the sovereign is able to deliver the political goods, and no longer.

This argument in Hobbes is the most basic form of . . . the argument to obligation from the performance of political tasks, or the provision of certain essential goods and services. According to this argument, government performs a set of functions that we necessarily desire and *need as human beings in society*. Since obedience by subjects is essential to the performance of these functions, we ought to obey government. (emphasis added).¹⁸⁰

That notion of obligation, of course, is directly contrary to that of John Locke, who espoused a contractual theory of authority. Since Locke is the putative father of the American Constitution, we thus move away from Lockean notions. I have posited above that social life for individuals is necessary for

TIONAL ORDER (1957); Miller, *Reason of State and the Emergent Constitution of Control*, 64 MINN. L. REV. 585 (1980). See also C. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN MODERN DEMOCRACIES* (1948).

177. See M. VOISSET, L'ARTICLE 16 DE LA CONSTITUTION DU 4 OCTOBRE 1958 (1969) (for comprehensive discussion of "reason of state" doctrine).

178. See Miller, *supra* note 176, and cases cited therein.

179. Pennock, *Introduction to POLITICAL AND LEGAL OBLIGATION XIII, XIV* (J. Pennock & J. Chapman eds. 1970).

180. Henry, *Political Obligation and Collective Goods*, in *POLITICAL AND LEGAL OBLIGATIONS*, *supra* note 179, at 263, 269.

human beings and that means that some political order is essential. In sum, my basic point is that obligation is a two-way street; and that humans are entitled, in return for obedience, to satisfaction of their basic needs (so far as the environment makes satisfaction possible). I deal, thus, with what economists call "public" or "collective goods" and with what political scientists call "political goods"—terms roughly synonymous with human needs. "A common, collective, or public good," Professor Mancur Olson maintains, "is . . . any good such that, if any person . . . in a group consumes it, it cannot feasibly be withheld from the others of that group."¹⁸¹ These common or collective benefits are those routinely provided by government; they include defense and police protection, the legal system generally, which are available to everyone in the nation.

I am suggesting that the traditional view of public goods should be expanded and constitutionalized. In so doing, I agree with Professor Christian Bay when he asserted that "the only acceptable justification of government, which also determines the limits of its legitimate authority, is its task of serving human needs—serving them better than would be done without any government."¹⁸² Says Professor Henry:

The major task or purpose or function of government, the reason for its existence, is to provide goods of this kind, goods that are collectively valuable, but which cannot or will not be provided without common organization and coordinated direction of effort. Examples of such collective goods are aids to economic production and exchange, the establishment of courts of justice and the application of laws in the settlement of disputes, the protection of certain rights claimed by members of the polity, and contributions to the welfare of citizens in matters such as health and education.¹⁸³

I take this to mean that a government attains legitimacy—in the sense of the right or title to rule—to the extent that efforts are made to reasonably satisfy human needs. Professor Roland Pennock appears to agree: He has written that political goods, defined as goods that "satisfy human needs whose fulfillment makes the polity valuable to man, and gives it its justification,"¹⁸⁴ are, when satisfied, the basis for legitimacy.

How, then, are the needs of members of a polity to be determined? And who is to say whether the level of political goods provided by government satisfy those needs adequately? There are two basic ways of handling such questions—the aristocratic answer and the democratic answer. According to aristocratic theory, which may be traced to Plato's *Republic*, human needs and the appropriate means for their satisfaction can best be determined by

181. M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* c. 1 (1965).

182. Bay, *supra* note 99, at 241.

183. HENRY, *supra* note 180, at 275-76.

184. Pennock, *Political Development, Political Systems, and Political Goods*, 18 *WORLD POL.* 415 (1966).

an enlightened elite. On the other hand, democratic theorists maintain that no elite is sufficient to that task and the best means for answering the questions is to allow the people themselves to participate in making decisions. I cannot take the time here to sort out the relative merits of the two theories. There can be no question that it is a crucial problem for constitutionalists. It can be said, furthermore, that whatever the formal or dignified aspects of constitutionalism may have been, and still are, the living or efficient or operative fundamental law has almost entirely been in the direction of aristocratic control. Robert Michels' "iron law of oligarchy"¹⁸⁵ seems to apply to all groups, large and small; that "law" has not been repealed. (It will of course be noted that how and who decides human needs is also a question of the structure of government.)

In what follows in this subsection, attention will be accorded to the following: (a) the requirement that government satisfy or fulfill or solve certain basic human problems of the day, including population size and growth, nuclear war, environmental degradation, and poverty. Special attention will be paid to the idea that the time has come to recognize that there should be a constitutional right to a job. (b) The Principle of Reason-Directed Societal Self-Interest,¹⁸⁶ predicated on the belief that since people will almost invariably act from self-interest, a major task of government is to create a milieu in which self-interest has reason to be enlightened. Success here, I will argue, is dependent upon whether we recognize, and act upon that recognition, that our fate is closely bound up with the fate of the whole world and, further, that there can be no enlightened (or even viable) self-interest that does not perceive the requirement for living in harmony with nature (the total environment). These two problems will be briefly discussed in that order.

In many respects the first set of problems all involve the common element of technology and its impact upon the social order. A recent comment by David F. Noble opens the discussion:

There is a war on, but only one side is armed: this is the essence of the technology question today. On the one side is private capital, scientized and subsidized, mobile and global, and now heavily armed with military-spawned command, control, and communication technologies. Empowered by the second Industrial Revolution, capital is moving decisively now to enlarge and consolidate the social dominance it secured in the first. . . .

On the other side, those under assault hastily abandon the field for lack of an agenda, an arsenal or an army. Their own comprehension and critical abilities confounded by the cultural barrage, they take refuge in alternating strategies of appeasement and accommodation, denial and delusion, and reel in desperate disarray before this

185. See R. MICHELS, *POLITICAL PARTIES* (1911) (the "iron law" is this: who says organization says oligarchy).

186. I have derived this principle from reading D. MILLER, *SOCIAL JUSTICE* (1976) and first applied it in A. MILLER, A "CAPACITY FOR OUTRAGE": *THE JUDICIAL ODYSSEY OF J. SKELLY WRIGHT* (1984) (suggesting that Judge Wright's decisions can often be reconciled by such a principle).

seemingly inexorable onslaught—which is known in polite circles as “technological change.”¹⁸⁷

I am suggesting here that a cardinal constitutional question of the day is how (perhaps *if*) technology can be so tamed so as to serve truly basic human needs.

Technology, for example, produced the nuclear weaponry that now threatens civilization itself with extinction. I have argued elsewhere that the very existence of these unique weapons of mass destruction poses a crucial constitutional question;¹⁸⁸ others have argued that such weapons should be outlawed as contrary to international law.¹⁸⁹ I shall not repeat what was said in other places, but wish to emphasize that one of the human needs that government, as the apparatus of the collectivity called society, has an obligation toward Americans and others is to defuse that growing threat. (The obligation, of course, is one owed by any government possessing nuclear weapons.)

Technology, too, has been a major, perhaps the major, contributor to the population explosion that has occurred and still is taking place throughout the world (mainly, however, in the Third World). Death control measures are one of the principal means. The requirement that this places upon government is to take action to attain an “optimum” population throughout the world, with that term being defined as one in which the population is of such a size that the economic system can adequately provide for basic material needs of all peoples. This, too, is a constitutional problem of the first order, as John Maynard Keynes noted in 1920,¹⁹⁰ but it is a problem with which few lawyers of any specialty and no law schools (to my knowledge) are concerned. The numbers of humans grows steadily greater; the world is now approaching the five billion mark, a figure that will exceed six billion by the year 2000.

That, of course, creates enormous strains on existing resources. Environmental degradation, with some exceptions, continues at a rapid clip. Here, again, a vital human need is not being met. It should be a principal focus of attention in the writing of any new constitution.

Poverty, also, fits into this pattern. According to the World Bank, more than 800 million people live on the edge of starvation, in “absolute poverty,” today. There is little chance that they will be able, as individuals or as nations, to climb out of the swamp of penury and want that is their lot. All of this

187. Noble, *Present Tense Technology*, 3 DEMOCRACY No. 2 at 8 (1983).

188. Miller, *The Constitutional Challenge of Nuclear Weapons: A Note on the Obligation to Ward off Extinction*, 9 BROOKLYN J. INT'L L. 317 (1983); Miller, *Nuclear Weapons and Constitutional Law*, 7 NOVA L. J. 21 (1982).

189. See NUCLEAR WEAPONS AND LAW (A. Miller & M. Feinrider eds. 1984).

190. “The time has come when each country needs a considered national policy about what size of population, whether larger or small than at present, or the same, is most expedient. And having settled this policy, we must take steps to carry it into operation.” J. KEYNES, *THE ECONOMIC CONSEQUENCES OF THE PEACE* 8 (1920). See Miller, *Some Observations on the Political Economy of Population Growth*, 25 LAW & CONTEMP. PROB. 624 (1960).

is well known and needs no restatement here. Rather, I should like to concentrate upon a particular provision that in my judgment should be part of a constitution of human needs—the constitutional right to a job. The following few paragraphs outline what I have in mind.¹⁹¹

The United States has always been a labor-oriented society. People are known more for what they *do* than what they *are*. This means that every aspect of life must accommodate it, including education, leisure, and retirement. Education in the United States is basically vocationally oriented (certainly it is in the law schools). Vacations are leisure time designed to renew energies so that people can return to work with renewed vigor. And retirement, in many nations, is looked upon as a well-earned rest after years of work. With the new technologies of what Noble calls the “second Industrial Revolution,” the question has become that of whether work as such can any longer be the center of one’s life. In other words, is Dr. Ralf Dahrendorf correct when he asserted that “There is no cure for today’s unemployment”?¹⁹² and was Professor Richard Rubenstein correct when he maintained that “The threat of permanent economic superfluity now confronts millions of American workers”?¹⁹³ The answers, I believe, are that Dahrendorf is correct insofar as unemployment is traceable to population redundancy and insofar as the present politico-economic system remains intact; and Rubenstein is correct in pointing to the rise of a seemingly permanent underclass, of people superfluous to the industrial system, in the United States. The damnation of worklessness, of the terminal sense of the loss of work itself, seems to be the fate of millions upon millions of men and women.

The question I am asking is whether recognition of a constitutional right to a job could help rectify that parlous condition. Of necessity, I speak of the United States alone, but with full cognizance of the fact that what is beginning to happen in this country has already happened in many places of the world. The idea of guaranteed jobs by no means is a new one. As long ago as January 1944, in his annual message to Congress, President Franklin D. Roosevelt spoke of a new Economic Bill of Rights, including the “right to a useful and remunerative job in the industries or shops or farms or mines of the Nation.”¹⁹⁴ In the early version of what was to become the Employment Act of 1946, it was stated that all Americans “able to work and seeking work have the right to useful, remunerative, regular, and full-time employment.”¹⁹⁵ The bill passed the Senate seventy-one to ten, but was emasculated when it got to the House of Representatives. The final version

191. The discussion in these paragraphs draws upon Miller, *Were the Luddites Necessarily Wrong?: A Note on the Constitutionality of the “New Technology Bill of Rights,”* 8 NOVA L. J. 515 (1984).

192. Dahrendorf, *The End of a Labor Society*, WORLD PRESS REV., Mar. 1983, at 28.

193. Rubenstein, *The Elect and the Preterite*, 59 SOUNDINGS 357, 359 (1976). See R. RUBENSTEIN, *THE AGE OF TRIAGE: FEAR AND HOPE IN AN OVERCROWDED WORLD* (1983).

194. PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 41 (Vol. 1944-45) (Address of Jan. 11, 1944).

195. See S. BAILEY, CONGRESS MAKES A LAW c. 7 (1950).

of the bill did, however, acknowledge the obligation of government to take action to maximize employment opportunities—in itself a significant milestone in American constitutional development.¹⁹⁶

Others, including a Supreme Court Justice and some economists, have echoed President Roosevelt. Justice William O. Douglas asserted in a Court conference in 1955: "There is a constitutional right in this country for a citizen to have a job."¹⁹⁷ Economists Samuel Bowles, David Gordon, and Thomas Weisskopf maintain that serious attention should be accorded to employment security, followed by action which would affirm "every worker's right to be employed with decent wages at some job or another—but not necessarily always at the same job."¹⁹⁸ Similarly, economist Lester Thurow states: "[W]e need to face the fact that our economy and our institutions will not provide jobs for everyone who wants to work. They have never done so, and as currently structured, they never will. When it comes to unemployment, we are consistently the industrial economy with the worst record."¹⁹⁹ Thurow then goes on to say: "[T]he principal way to narrow income gaps between groups is to restructure the economy so that it will, in fact, provide jobs for everyone."²⁰⁰ He calls that a moral duty as well as an economic goal. I think, however, he is talking about the Constitution and what it should provide to satisfy the human need. Thurow does call for a "fundamental restructuring of the economy."²⁰¹ The point need not be labored. Thoughtful people are beginning a dialogue about the need for guaranteed work. My point was well put by a retired policeman and former marine: "I don't think our system is all bad. . . . What I object to is, there's no planning. I don't care how much money it takes. They should put every guy that wants to work, to work."²⁰²

Other human needs should be identified and satisfied. That is, or should be, the core principle of any constitution. What those needs might be is itself a question of complexity and difficulty. My point here is that it is a question that must be answered soon. People are restive. They no longer are willing to sit by without complaint as the rich get richer while the poor drop into what appears to be a permanent underclass.²⁰³ Whether that restiveness and resentment will be translated into action is one of the critical questions of the day. This brings up the second question of this subsection.

I have mentioned above the increasingly recognized fact that the system of political pluralism is in disarray, and suggested that a Principle of Reason-Directed Societal Self-Interest be developed. My reason for so concluding may

196. See E. ROSTOW, *PLANNING FOR FREEDOM* (1959) (discussion of Employment Act).

197. Quoted in B. SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 184 (1983).

198. S. BOWLES, D. GORDON & T. WEISSKOPF, *BEYOND THE WASTE LAND: A DEMOCRATIC ALTERNATIVE TO ECONOMIC DECLINE* 275 (1983).

199. L. THUROW, *supra* note 173, at 203.

200. *Id.*

201. *Id.* at 206.

202. Quoted in S. TERKEL, *AMERICAN DREAMS LOST AND FOUND* 232 (1981).

203. Compare K. AULETTA, *THE UNDERCLASS* (1982) with Lodge & Glass, *The Desperate*

be simply stated: a condition of social pathology exists in the nation—that of factionalism.²⁰⁴ Let me explain. Professor Mancur Olson has suggested that the fact of factionalism has direct and significant impacts upon the position of industrialized nations, such as the United States and the United Kingdom, in the global community.²⁰⁵ Networks of collusive, cartelistic, and lobbying organizations are formed. Their influence on public policy results in inefficient economies and a growing ungovernability in politics. Olson thus carries James Madison's views, classically stated in *The Federalist No. 10*, a giant step further. Nearly 200 years after Madison wrote, factionalism has become *a*, perhaps *the*, most corrosive pathology of the internal American political order.

Madison, sometimes called the "father" of the Constitution, in practical effect was the philosopher of America's ruling class. He invented his argument against majority rule, set forth in *Nos. 10 and 51 of The Federalist Papers*, for the benefit of those who were the main influences for a new constitution—those Alexander Hamilton called, in the constitutional convention, the "rich and well-born."²⁰⁶ The Constitution was in fact a counterrevolutionary document. What was at stake in the convention was the type of society that would eventually emerge, and which class would control the levers of political power. History gives an answer to that question: Society was to be dominated by the propertied class; and the Founding Fathers were members of that class. Those men got which they wanted, both in the convention and in a series of judicial and congressional decisions in the early 19th century.²⁰⁷ They were to have a free hand in exploiting the nation's riches. In a fit of generosity

Plight of the Underclass, HARV. BUS. REV., July-Aug. 1982, at 60. Lodge and Glass state: Millions of Americans are looking for jobs, and other millions who could be employed have given up the search. Our concern in this article is with a particular segment of the poor and the unemployed: the 10 million people in desolate neighborhoods of our major cities who are either more or less permanently poor or unemployed, those who have been called the 'underclass.' Disproportionately black, Hispanic, and young—although by no means exclusively so—the underclass is composed of single mothers, high school dropouts, drug addicts, and street criminals. . . . They are alienated, traumatized, angry, and hopeless.

204. Concern about factionalism can be traced at least to James Madison's *Federalist No. 10*. See G. WILLS, *EXPLAINING AMERICA: THE FEDERALIST* (1981) (discussion of factionalism in *The Federalist*).

205. See M. OLSON, *THE RISE AND DECLINE OF NATIONS* (1982).

206. 1 RECORDS OF THE FEDERAL CONVENTION (M. Farrand ed. 1927), quoted in M. PARENTI, *DEMOCRACY FOR THE FEW* 44 (3d ed. 1977). Said Hamilton:

All communities divide themselves into the few and the many. The first are the rich and the well-born, the other the mass of the people. The voice of the people has been said to be the voice of God; and however generally this maxim has been quoted and believed, it is not true in fact. The people are turbulent and changing; they seldom judge or determine right. Give therefore to the first class a distinct, permanent share in government. They will check the unsteadiness of the second, and as they cannot receive any advantage by a change, they therefore will ever maintain good government.

207. See A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 157-283 (5th ed. 1976).

without parallel, the "commons" (the resources of the untapped continent)²⁰⁸ were turned over to a few. At the same time, government ensured that the many would not do to the few what the few did to them.

Madison wished to erect in the Constitution "a protective ideology for the minorities of wealth, status, and power" which was to operate as a blanket over a political system "that would guarantee the liberties of certain minorities whose advantages of status, power and wealth would, he thought, probably not be tolerated indefinitely by a constitutionally untrammelled majority."²⁰⁹ His plan was to splinter society (in *Federalist No. 10*) and to fractionate government (in *No. 51*). In the last analysis, the former meant that those with wealth and property would be societally most powerful; whereas the latter meant, should a fractious minority (other than the rich and well-born) manage to seize control of one of the branches of government, that minority would be neatly checked by the others. That was a sort of "fail-safe" plan. With the rise of other groups, coupled with the spread of the franchise, Madison's plan has now become obsolete. Factionalism has become pathological.

Each group furthers its own interests by close alliances with the relevant congressional committee and administrative agency. The larger interests of statemanship are lost. No one, not even the President, is able to overcome the fragmentation of policies and create a consistent program for furtherance of the over-all common good. "The President's institutional system for defining a coherent policy is not established or protected by the Constitution."²¹⁰ Policymaking by collusion, within the iron triangles of the actual governing structure in Washington, cannot effect either accountability or efficiency upon government. Madison failed to foresee the shape of things to come.

A cure for the social pathology of factionalism can only come when there is a recognition of and adherence to a concept of mutuality of interests, not only among the diverse interest groups of the nation but among the peoples of the world.²¹¹ How to achieve it is a problem for constitutionalists. I put it in terms of the requirement for adherence to the Principle of Reason-Directed Societal Self-Interest. By that I mean the following.

"Justice as respect for established rights, without regard to how those rights are distributed among persons," David Miller observes, "is intelligible

208. See M. JOSEPHSON, *THE ROBBER BARONS* 52 (1934). See also R. LUSTIG, *CORPORATE LIBERALISM: THE ORIGINS OF MODERN AMERICAN POLITICAL THEORY, 1890-1920 passim* but particularly at 95 (1982). R. RUBENSTEIN, *THE AGE OF TRIAGE: FEAR AND HOPE IN AN OVERCROWDED WORLD* 34-81 (1983) (on enclosure of the commons in Great Britain). The point is that the U.S. government, dominated by Hamilton's rich and well-born, gave away the commons—the land and natural resources of the nation—"to its friends or to astute first comers." M. JOSEPHSON, *supra*, at 52. For a modern update of the question of the commons, see the famous article by Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

209. R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 30, 31 (1956). See J. BURNS, *THE DEADLOCK OF DEMOCRACY* 21 (1963); E. SCHATTSCHEIDER, *PARTY GOVERNMENT* 9 (1942); G. WILLS, *supra* note 204, at xi-xxii.

210. D. PRICE, *AMERICA'S UNWRITTEN CONSTITUTION* 127 (1983).

211. See Cassen, *Mutual Interests*, in *THE BRANDT COMMISSION PAPERS: SELECTED BACKGROUND PAPERS PREPARED FOR THE INDEPENDENT COMMISSION ON INTERNATIONAL DEVELOPMENT ISSUES 1978-1979*, at 395 (1981). See also R. FALK, *supra* note 119.

when it is seen as the principle which restrains men from destructive greed."²¹² It is intelligible, that is, when those who are favored by fortune have the sense to perceive that it is in *their* interest to help the less favored. The Principle is an invitation to those Americans (and others) who are highest in the social pecking order to use their reason to perceive that *their* self-interest lies in reasonably satisfying—within environmental constraints—the needs of those who are less favored. This is not a new technique of governance. The New Deal, for example, can be viewed as an effort to siphon off social discontent among the “have-nots” of the nation by extending to them at least token or cosmetic gains but without in any way restructuring society.²¹³ So, too, with the so-called civil rights/civil liberties revolution of the Warren Court: It also can be viewed as a means by which discontent among the disadvantaged was diminished through gains in the formal law of the Constitution.²¹⁴ I am not, of course, saying that either the New Deal or the decisions of the Warren Court came about by a preconceived plan to save the system through minimal alterations in the status quo. But what I am saying is that when those movements are viewed in their sociological perspective, it can readily be perceived that there were both *manifest* and *latent* beneficiaries in each. If one asks the necessary question, *cui bono?*,²¹⁵ about each movement, then one can discern that those who benefited by the New Deal were also those who have always profited from the American constitutional order and that those who also benefited from the civil rights decisions were those who would have been greatly harmed if social discontent boiled over into social turmoil. (Another factor is relevant here but can only be mentioned: both movements came at a time of a greatly improved economy, at a time when the economic pie was getting larger, with the consequence that many theretofore disadvantaged could profit from America’s “golden age.”)²¹⁶

The fundamental constitutional problem is to transmute what was done perhaps by happenstance in the New Deal and the Warren Court decisions to a means by which the divergent interests of the many groups in America can be made to pull together. Here, again, we face an enormously difficult problem, one that has plagued political and constitutional theorists throughout known human history. I am, of course, not attempting an answer here. Rather, it is enough to point out the problem and some of the factors that must be taken into consideration by those who are concerned with it.

212. D. MILLER, *SOCIAL JUSTICE* 175 (1976):

213. See, e.g., Bernstein, *The New Deal: The Conservative Achievements of Liberal Reform*, in *TOWARDS A NEW PAST* 264 (B. Bernstein ed. 1968).

214. See Miller, *Social Justice and the Warren Court: A Preliminary Examination*, 11 *PEPPERDINE L. REV.* 473 (1984).

215. For discussion that the question, “Who benefits?”, must always be asked and explored about governmental action, see A. MILLER, *TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT* (1982).

216. America’s golden age came, not in ancient times (such as the post-revolutionary period) but in the 25 years immediately following World War II. See A. MILLER, *DEMOCRATIC DICTATORSHIP* c. 3 (1981).

The major factors concerning the problem may be summarized or telescoped into the conflict between the ideas of individualism and of what Professor George Lodge calls "communitarianism."²¹⁷ Individualism, a relative latecomer, is typical only of the societies that blossomed after the Great Discoveries. The Constitution of 1787 was based on the view that only two entities existed, the natural person and government, and the individual was dominant. Society was considered to be atomistic. Individuals were tied together, as Maine argued,²¹⁸ by contract rather than, as in feudal days, by status. The ultimate value was property, which was the way that individualism was protected (we have noted Locke's view about the protection of property being the purpose of government). Government was to be limited; it was a "necessary evil." Implicit in individualism is the assumption that human nature is fundamentally benevolent. There may be a will to power—to control events and property—but underlying exercises of power is the theory, best stated by Adam Smith, that through the operation of an "invisible hand" the common good was best achieved by everyone pursuing his own selfish ends.

That general description of individualism is the basis for American law, including the fundamental law of the Constitution. I have argued above that individualism as an ideology is aberrational. Certainly it is at loggerheads with the historical norm—prior to the Enlightenment—and to what increasingly is the contemporaneous norm struggling to emerge from the political and social confusion that a rampant individualism has produced. Yet, "because Americans cling to the old ideology, much of institutional America lacks legitimacy, and thus authority. So illegitimacy—and dubious authority—abounds."²¹⁹

Communitarianism, on the other hand, looks upon the community organically rather than atomistically. People attain their identity not as a "sovereign self," but as a member of the community, which has drives and interests of its own. There is an emerging concept of status perceivable in constitutional law.²²⁰ Equality of opportunity—the ideal of individualism—is slowly being transmuted into equality of condition, although the process has barely begun. Consensus within the collectivity is the goal, to be achieved less by adversarial contractual arrangements than by all the parties coming together in joint or mutual agreement. The individual person is expected, in the ideal at least, to take the general good as well as his own good into account when making decisions. In return for adherence to societal self-interest, individuals are entitled to certain services from government, services that far transcend those of the limited state espoused by Locke. Government is no longer a necessary evil; rather, it is a full partner in community efforts. It is indispensable, because the concept of public or political goods is expanding and because someone must arbitrate community needs.

217. See *supra* note 137 (works cited).

218. H. MAINE, *ANCIENT LAW* 165 (P. Smith ed. 1970) (first published in 1861).

219. G. LODGE, *THE AMERICAN DISEASE* 44 (1984).

220. See Phillips, *Status and Freedom in American Constitutional Law*, 29 *EMORY L. J.* 3 (1980).

The transition away from individualism to a form of communitarianism is, of course, resisted. We live today with the remnants of an outmoded and exploded ideology. But the change is coming, as Professor Lodge argues, although in ways that many do not like. Lodge maintains that there are "three characteristics of our unwanted transition—the creedal passion to stay with the old, the inefficient and illegitimate transition to the new, and our confusion about the bases of authority." These "begin to define the disease that afflicts America. It is a disease about which little is known, and for which there is as yet no remedy."²²¹ (That is only half correct: Much in fact is known about the "disease," that which we have called factionalism.) Lodge continues:

The American disease is a pathological condition, deriving from a severe developmental crisis in the evolution of American society. It is a psychotic condition, characterized by the denial of reality and the inability to develop solutions to the problems being forced upon the community by a new and unfamiliar environment. In its extreme manifestations, the American disease has the symptoms of schizophrenia, a condition for which there is essentially no cure; but in fact, the disease more closely resembles the ailment of a troubled adolescent whose grief at growing up causes him to deny reality, or to cope with it through wishful thinking or a regression into immature, counterproductive behavior.

The treatment of the American disease will necessarily include a rebuilding of the foundation of our society.²²²

The cure for the disease that Professor Lodge perceives poses the challenge for constitutionalists: How can communitarian values be furthered while at the same time retaining what is best in the idea of individualism? It is a challenge that, to my knowledge, has neither been recognized nor dealt with by those who write about constitutionalism. The basic requirement has already been mentioned: the development of a social milieu in which the values of both ideologies can be furthered.

3. *The limitations on government.* The Constitution has long been considered to be one of limitations or of rights (vested—property—rather than civil). That it has become something more than that may be seen in a number of recent Supreme Court decisions that impose a duty or obligation on government to act. As written, the Bill of Rights and the Civil War amendments speak in terms of negative limitations; nonetheless, at times they have been construed affirmatively. I begin this discussion of the third function of any constitution by illustrating how limitations have been turned into duties. That is no semantic quiddity. I shall illustrate with cases from three areas of constitutional law—race relations, legislative reapportionment, and administration of the criminal law.²²³

221. G. LODGE, *supra* note 219, at 63.

222. *Id.* at 63-64.

223. These paragraphs are based upon my previous paper, Miller, *Toward A Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199.

The point of departure for this development is Chief Justice Hughes' opinion in *West Coast Hotel Co. v. Parrish*,²²⁴ involving minimum wage legislation. There, Hughes stated that the liberty safeguarded by the Constitution is "liberty in a social organization which *requires* the protection of law against the evils which menace the health, safety, morals and welfare of the people. *Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.*" (emphasis added). The meaning should be clear: communitarianism was being read into the Constitution by the Supreme Court. I have argued elsewhere²²⁵ that in effect Hughes (and successors) read Thomas Hill Green's ideas about positive freedom into the Constitution. Positive freedom "reflected the rediscovery of the community as a corporate body of which both institutions and individuals are a part, so that the idea of collective well-being or the common good underlies any claim to private right."²²⁶ Government, Green argued, had the duty not so much of maximizing individual liberty in its negative sense but of taking action to create conditions for a minimum of well-being—a standard of living, of education, and of personal security.

It will not do to say that Hughes' (and Green's) conception of the "new liberty" has been followed *in toto*. Consider, however, *Brown v. Board of Education*²²⁷ and its progeny, particularly *Green v. County School Board*.²²⁸ In the latter decision, Justice William Brennan used language of "affirmative duty" on school boards to integrate their schools. Consider, too, *Baker v. Carr*²²⁹ and its aftermath, a series of decisions in which the Supreme Court in effect ordered the reapportionment of state legislatures (and the House of Representatives in Congress) on pain of having judges do it should the legislators fail to comply. And finally, in such cases as *Miranda v. Arizona*²³⁰ the Supreme Court "legislated" a little code of criminal procedure for police officers to follow in making arrests.

These are representative examples. Others could be mentioned but, heeding William of Occam, need not be to make the point—that the notion of constitutional obligations on government to the populace by no means is a novel idea. The question is whether it can be expanded, along Thomas Hill Green's lines, to encompass a full spectrum of human needs. So much, therefore, for the question of introducing the problem of limitations on government as a constitutional function. The teaching of the cases mentioned immediately above is two-fold. First, and perhaps of greater importance, a principle of American

224. 300 U.S. 379 (1937).

225. Miller, *An Affirmative Thrust to Due Process of Law?*, 30 GEO. WASH. L. REV. 399 (1962).

226. G. SABINE, A HISTORY OF POLITICAL THEORY 674 (1937).

227. 347 U.S. 483 (1954).

228. 391 U.S. 430, 437-38 (1968).

229. 369 U.S. 186 (1962).

230. 384 U.S. 436 (1966).

constitutionalism exists that states, in essence, that government cannot fail to do certain things. In Leon Duguit's formulation, governments "must do" a variety of things for the people being governed. Second, and to state the obvious, the Justices of the Supreme Court when making decisions and writing opinions often do the logically impossible—a general rule is inferred from one particular (the case being decided).²³¹

I turn now to what are considered to be the limitations on government—the Bill of Rights, the Civil War amendments, and certain provisions of the Document of 1787. Soon after the constitutional convention adjourned in September 1787, Thomas Jefferson wrote to James Madison that a bill of rights was "what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference."²³² The framers, including Madison, simply did not believe that a bill of rights was necessary. Alexander Hamilton had argued in *Federalist No. 84* that "the Constitution is itself, in every rational sense, a BILL OF RIGHTS." But in the first Congress that convened in 1789, Madison introduced the amendments that were to become the Bill of Rights. Speedily ratified, they became part of the Constitution in 1791. The basic idea was to find a means by which, in Madison's words, government could be obliged "to control itself."²³³ Reasons of state thus were supposed to give way to, or at least be balanced against, reasons of freedom and human liberty.

In general, the Bill of Rights and the other limitations on government are procedural rather than substantive. They assume that in a democratic society "deliberation is about means and presupposes that the problem of ends has been settled."²³⁴ The assumption does not hold water. In much constitutional litigation, it is the "ends" rather than the "means" that are at issue. Professor William A. Galston has made the point in these words:

In the last analysis, . . . the quest for a purely institutional or procedural solution to the practical problem of obtaining justice is futile. Every community, whether democratic or not, must rely on a rudimentary sense of fairness and equity among its members. This sense is not innate, but must rather be fostered through some system of education. The traditional American penchant for political engineering or institutional tinkering is thus profoundly one-sided; *democratic procedures are almost vacuous in the absence of collectively held moral convictions.* (emphasis added).²³⁵

Galston's point is well taken. I readily concede, however, that he poses the

231. See Miller, *Constitutional Decisions as De Facto Class Actions: A Comment on the Implications of Cooper v. Aaron*, 58 U. DET. J. URB. L. 573 (1981).

232. Quoted in H. ARENDT, *ON REVOLUTION* 143 (paperback ed. 1963).

233. THE FEDERALIST No. 51 (J. Madison).

234. Y. SIMON, *PHILOSOPHY OF DEMOCRATIC GOVERNMENT* 123 (1951).

235. W. GALSTON, *JUSTICE AND THE HUMAN GOOD* 279 (1980).

single most important barrier to realization of a plea for significant constitutional alteration—the fundamental need for “collectively held moral convictions.”

Several points may be made about the Bill of Rights and other limitations on government. First, they tend to be more hortatory admonitions to government officers to behave decently in the circumstances than binding interdictions against government activity. They are, in sum, not absolutes, although, as in the first amendment, they may speak in absolute language. Second, they have an evolving content. Their meanings have changed and continue to change through time. As Justice Felix Frankfurter once wrote, “It is of the very nature of a free society to advance in its standards of what it is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.”²³⁶ Or, as Chief Justice Earl Warren opined in 1958, the eighth amendment, and inferentially the other parts of the Bill of Rights, is to be construed in the light of the evolving standards of decency that are the hallmark of a civilized society.²³⁷ Third, only in recent years has the Supreme Court held that constitutional limitations are applicable to state governments as well as the federal government.²³⁸ Fourth, the limitations are applicable to public government only, the Justices thus far displaying an unwillingness to recognize the dimension of private governments.²³⁹ Finally, speaking generally, the civil rights and civil liberties supposedly protected by constitutional limitations are not highly valued by most Americans. Civil liberties are “fragile and susceptible to the political climate of the time”;²⁴⁰ and further, say Herbert McClosky and Alida Brill, “We are not convinced that the craving for freedom is inborn, much less that tolerance of others and the notion of reciprocity of rights are inclinations natural to everyone.”²⁴¹ We must, that is, face up to the fact of manifest illiberality of most Americans.

4. *The need for a procedure of periodic constitutional change.* Since law, including that of the constitution, tends to be far more *a posteriori* than *a priori*, since, that is, it is a reflection of events rather than a mold, and since the nation is characterized by extremely rapid social change, it is necessary

236. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

237. *Trop v. Dulles*, 356 U.S. 86 (1958).

238. *Barron v. Baltimore*, 32 U.S. 243 (1833), first held that the Bill of Rights (there the fifth amendment) was not applicable to the states. It was not until 1925, in *Gitlow v. New York*, 268 U.S. 625 (1925), that the Supreme Court began a case-by-case repudiation of the Barron principle. The process started slowly and came into fruition only during the years of the Warren Court. See generally B. SCHWARTZ, *supra* note 197 (discussion of decisions).

239. See, e.g., *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). See also 130 U. PA. L. REV. 1289 (1982) (several articles on The Public/Private Distinction).

240. H. McCLOSKEY & A. BRILL, *DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES* 437 (1983).

241. *Id.* at 4. See Miller, *Myth and Reality in American Constitutionalism*, 63 TEX. L. REV. 181 (1984).

that some means be adopted whereby necessary periodic changes can be made in the fundamental law. The framers in 1787 made *formal* constitutional alteration extraordinarily difficult: the only express way is to follow the amendment procedures set forth in Article V. Quite obviously, that has not been sufficient to the need. Hence, the result of adaptation of the Constitution of 1787 by judicial decisions, some congressional statutes, and some presidential actions. Constitutional interpretation is distinctly *not* a judicial monopoly.²⁴²

The question Americans face today is whether built-in constitutional mechanisms that are immune to such adaptations should be altered; and if so, how. I suggest that a pressing need exists for another constitutional convention; and further, that any new constitution that is drafted should contain within it specific provisions for progressive updating of the constitution as social conditions change. I shall not argue the point, but merely state it, with, of course, full cognizance of its controversial nature. It seems to me that if Americans could draft a new constitution in 1787, at a time of relative turmoil, then they should be able to do so today. Those who fear another convention display a depressing lack of confidence in the ability and bona fides of Americans today to order their own affairs. (Even if they are correct in their surmises, then we ought to know it rather than continuing on a path of drift and reaction to "accident and force.")

The case against major constitutional change has been well stated by Professor Dean Alfange:

I am unregenerate enough to remain unconvinced—not because I don't see much of the same desperate need that you do for new values and new ways of thought, but because I don't see how we can discover those new values through reexamination of constitutional provisions. The horse still comes before the cart. New values may guide us to new constitutional principles, but without those values being in place to begin with, the new Constitution will inevitably be an embodiment of our current modes of thought. If we cannot transcend the status quo through politics and legislation, we are not likely to do so through constitution-making because the process will be guided by the same political and legislative considerations that determine current policy. Moreover, if we put the status quo in the Constitution, where we can't change it, we won't be better off; we'll be worse off.²⁴³

242. For Congress, the following statutes may be mentioned: the Judiciary Act of 1789, the Sherman anti-trust law, the Budget and Accounting Act of 1921, the Employment Act of 1946, the Civil Rights Act of 1964, the National Security Act of 1947, The Budget and Impoundment Control Act of 1974, and the War Powers Resolution of 1973. Each in effect dealt with the structure of government and thus are constitutional in nature. As for the President, the prime example is perhaps the *de facto* warmaking power of the Chief Executive. President Truman's executive order establishing the National Security Agency is another example. Others include the widespread use of executive agreements in lieu of treaties and the invocation of executive privilege. Both, of course, have Supreme Court approval.

243. Letter from Dean Alfange to Arthur S. Miller (Apr. 26, 1984) (used with permission).

That is eloquent. But is it accurate? I think Professor Alfange is correct only in part: of course, the interaction of values and law (including the Constitution) must be considered. He, however, has merely stated the question rather than answering it.

Alfange, of course, is correct about the importance of values, as was Galston when he said that procedures to be adequate had to be based on collectively held moral convictions. But that is only half an answer. Values and politics must go together. James Ogilvy has said it well: "The argument over whether social change follows from changes in consciousness *or* changes in political structure obscures the fact that *both* must change if an alteration in either is to survive."²⁴⁴ Values, in other words, are meaningless without the political (read: constitutional) means to make them effective. In like manner, mere political (again, read: constitutional) change *in vacuo*, in the absence of a change in values, is ineffective. The question, thus, is not whether the horse must come before the cart; rather, it is to see that the two—value change and political change—must proceed along parallel lines.

At one time, perhaps, before the Reformation, the Church could be the source of values. That changed, however, with the rise of the nation-state to dominance. In *The Political Illusion*, Jacques Ellul explained the result: "political disputes today are what disputes between Christians were in the sixteenth century." Robert Nisbet agrees: "From about the sixteenth century the national state became much the same kind of haven for man that the Church had been from the time of the fall of Rome in the West."²⁴⁵ Since people, generally, require a faith, a belief that someone is in control, it should be easy to perceive that values, such as they are, emanate from the state today rather than any theological institution. The implication is important: there is an educational function in law; changes in law can help create a new moral climate. I do not say that law is omnicompetent but do say, with Judge J. Skelly Wright, that it can be the "conscience of a sovereign people."²⁴⁶

Morality in America, whether or not we like it, is largely a matter of rule-following, with the rules being derived from the sovereign—the state. The late Alexander Bickel called law "the value of values"; and said further: "we find our visions of good or evil in the experience of the past, in our tradition, in the secular religion of the American republic."²⁴⁷ Although the law has a "specious morality,"²⁴⁸ that is not the point I wish to derive from what was said immediately above. Rather, it is that a "nation with the soul of a church"²⁴⁹ can, through its official lawmaking organs, help set the moral climate of the United States. Said another way, changes in laws—in the

244. J. OGILVY, *MANY DIMENSIONAL MAN* 7 (1977) (emphasis in original).

245. *Id.* at 39 (quoting Ellul and Nisbet).

246. Wright, *The Role of the Courts in Expanding Freedom: The Conscience of a Sovereign People*, *THE REPORTER*, Sept. 26, 1963.

247. Quoted in LEVINSON, *infra* note 248, at 37.

248. Levinson, *The Specious Morality of the Law*, *HARPER'S MAGAZINE*, May 1977, at 37.

249. See S. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 159 (1982) (quoting G.K. Chesterton).

Constitution—can help us discover “new values and new ways of thought.”

I think that in some respects that is what the Supreme Court has been doing in the past forty years, particularly during the tenure of Chief Justice Earl Warren. Taken as a whole, the Warren Court decisions were an effort to legislate principles of social justice for America.²⁵⁰ Not that the Justices were and are wholly successful. To the contrary: in significant part the so-called Warren Court “revolution” was less a revolution than a series of minimal changes. But changes *did* come. The position of black Americans, as dreary as it still is, surely is better today than before *Brown v. Board of Education*. There has been improvement in the administration of the criminal laws. The “rotten borough” system of malapportioned legislatures no longer exists. And women now have more control over their bodies, their sovereign selves, since *Roe v. Wade*.²⁵¹ Judicial decisions may have erected standards toward which all Americans could (and should) aspire; but judges did not act alone. Other branches of government, federal and state, adhered in some degree to the newly discovered standards. All of this, as is well known, was a type of constitutional lawmaking, of finding new rights in the old Constitution and of enforcing the Bill of Rights for the first time. Few today espouse a return to the *status quo ante*, to, say, the situation of blacks before *Brown*. Is that, in Alfange’s terminology, a “new value”? I think it is. Which, then, was the horse and which was the cart?

If I am correct in the description of the past four decades of constitutional development, why should there be any great fear of a constitutional convention? The essential concern appears to be that a convention would exceed its assigned mission and propose amendments on a host of topics. “Single-issue” zealots would, it is believed, control the convention. Those fears may not be wholly groundless but they can be countered.

The counter-arguments should begin with the realization that, as matters now stand, each generation writes its own constitution—not in a planned way, to be sure, but through a series of *ad hoc* reactions to external stimuli and exigencies. The net result is that the actual—the living or operative—constitution today is related to the Document drafted in 1787 only in symbolic or metaphorical ways. Americans may and do revere the ancient parchment but it has been altered so much, without amendment, since 1787 that the reverence is not for a living instrument of governance but for the principal artifact of America’s civil religion of nationalism or Americanism.²⁵² The Constitution

250. See Miller, *Social Justice and the Warren Court: A Preliminary Examination*, 11 PEPPERDINE L. REV. 473 (1984). See also G. WHITE, *EARL WARREN: A PUBLIC LIFE* (1982).

251. 410 U.S. 113 (1973).

252. See Levinson, “The Constitution” in *American Civil Religion*, 1979 SUP. CT. REV. 123. See also Herberg, *America’s Civil Religion: What It Is and Whence It Comes*, in *AMERICAN CIVIL RELIGION* 76 (R. Richey & D. Jones eds. 1974).

The American Way of Life is the operative religion of the American people. This is the civil religion of Americans. In it we have . . . religion and national life so completely identified that it is impossible to distinguish one from the other. . . . It is an organic structure of ideas, values, and beliefs that constitutes a faith common to Americans as Americans, and is genuinely operative in their lives; a faith that markedly

of 1787, furthermore, was based on faulty premises or assumptions. Newtonian principles of balance—Isaac Newton had likened the universe to a great clock, with interacting parts—were thought to be in control. We now know that a new paradigm is required: the Constitution as it has evolved is based upon Darwinian principles of process and even Einsteinian principles of relativity. The Newtonian-Cartesian paradigm no longer is sufficient to the need. “We are living in tomorrow’s world today, still using yesterday’s ideas.”²⁵³

What dangers would a “runaway” convention pose? In answering that, we should remember that the 1787 convention was itself a “runaway” meeting. The delegates were there supposedly only to revise the Articles of Confederation; instead, they produced the Constitution. It took a lot of political maneuvering, including the writing of *The Federalist Papers*, to get the new fundamental law adopted. That leads to the second point: under Article V of the Constitution, any amendments proposed by a convention must be submitted to the states and ratified by three-fourths (thirty-eight) of them before they would become legally binding. That in itself is a major barrier. As the abortive Equal Rights Amendment evidenced, opponents of an amendment begin with a head start—they need only get one house of the legislatures of thirteen states to block passage. By its very terms, furthermore, the present Constitution prohibits denying any state equality in the United States Senate.

Of course it is possible that a convention would propose repeal of the first amendment or any other provision of the Bill of Rights. But even if McClosky and Brill are correct about the low status of civil rights and liberties in the populace generally, it strains credulity that the nation would accept such fundamental changes in its basic traditions. For that matter, as has been noted, the judiciary could—it has on more than one occasion—read such pernicious views into the Constitution.²⁵⁴ If the United States is in such a marasmic state that the Bill of Rights could be repealed, let no one think that “parchment barriers” in any constitution will prevent what determined majorities want to do. Despite some evidence to the contrary, I do not believe that this country is that far gone.

There are, moreover, benefits to be derived from the great national debate certain to be generated by convening a new group of men and women to consider the Constitution and whether and how it should be altered. That occurred in Canada, according to Professor Edgar Z. Friedenburg,²⁵⁵ when a new Canadian constitution was being drafted. Americans in turn would be forced to think hard and seriously about what type of nation they desire and how it

influences, and in influenced by, the professed religions of Americans. Sociologically, anthropologically, it is *the* American religion, undergirding American national life and overarching American society, despite all indubitable differences of ethnicity, religion, section, culture, and class.

Id. at 77-78. (Emphasis in original).

253. H. CLEVELAND, *THE MANAGEMENT OF SUSTAINABLE GROWTH* 15 (1979).

254. *See* *United States v. O'Brien*, 391 U.S. 367 (1968).

255. Friedenburg, *The Struggle for Human Rights*, *THE NATION*, Mar. 20, 1982.

should be governed. There are worse things. Indeed, surely it is valid to maintain that one of the responsibilities of citizenship is to confront such questions and deal with them in thoughtful ways. Professor Sanford Levinson says it well:

The point is that the Constitution is not a menu of self-evidently good things but a document and set of understandings that structures our political lives for ill as well as good. If the thirty-eighth [sic] state does endorse a convention, we should not recoil in fright but instead make every effort to assure that state legislatures send thoughtful men and women to it. . . . But we should not only take the prospect of a convention seriously, we should welcome it, albeit with fear and trembling. For it would give us the opportunity to define the country we wish to be and to determine whether our current structure of government allows us to be that country. If we do not ultimately trust our fellow citizens to rise to such an occasion, then we should accept the demise of our experiment in self-government. I prefer to think otherwise.²⁵⁶

Surely, Levinson is correct, Surely, too, there are millions of Americans who would fight tenaciously and effectively for a new and better constitution. The principal opposition to a constitution of human needs would not come from the single-issue crazies; rather, it would come from those who have always profited most from the American constitutional order—the moneyed and the propertied—and who would resist change because they would perceive it as jeopardizing their positions of social supremacy.

By no means do Americans have a perfect Constitution. We do not have insight into revealed truth about how humans are to be best governed. There is no quick fix, technological or political or legal, by which the increasingly apparent social pathologies can be cured. As Americans, we must face up to the harsh fact that our laws, including the Constitution, are always in flux. Hence the need, to me both unavoidable and necessary, of another constitutional convention, to be followed periodically by other conventions.

V. CONCLUSION

There is little to be said by way of conclusion. I have set forth some of the factors that I believe should be considered in any evaluation of the Constitution. Social change is certain to come—we are already well into the second industrial revolution—and with it new and continuing pressures upon institutions honored by time but little else, institutions that ever more obviously are not up to the challenges of the late 20th and early 21st centuries. This essay is an attempt to contribute to the growing debate about the nature of the American political economy—about the constitutional order—a debate that

256. Levinson, *Why Not Take Another Look at The Constitution?*, THE NATION, May 29, 1982, at 656, 657.

seems certain to be conducted not only within this nation but elsewhere in the ensuing years. The suggestions I have made are more in the way of questions that must be asked and analyzed than definitive answers to extraordinarily complex problems.

Several questions have been left dangling in the foregoing discussion—deliberately so. I have attempted in this preliminary probe into the need for constitutional change to sketch the perimeter of the question. A fuller exposition must await another time and another place. For example, the concept of human needs—what they are and how they might be satisfied—requires further explanation, in connection with the horse and cart (values and law) problem posed by Professor Alfange. So, too, with the manifest need to bring the “private” governing power of corporate social groups within the ambit of the Constitution. Of equal importance is the idea of the obligations of the collectivity called society, speaking through its apparatus, government, to the individuals within society; this must be thoroughly analyzed.

I do not, of course, expect ready or anything more than partial agreement with what I have said. The principal point is that humankind has indeed come to a great turning point in the history of *Homo sapiens*, and it is the task of constitutionalists to grapple with that fact.