Chapter 5

To Establish Justice

§ 1. The Fundamental Purpose of the Justice System

It has already been pointed out that "justice system" and "legal system" are not synonymous. A legal system is a system of mechanisms, functions, and conventions for *realizing* the justice system. It is not the justice system itself, and it is inferior to it in the same manner and for the same reason that any objective of implementation is inferior to the purpose it is designed to serve.

Philosophers, most notably Plato but a great many others as well, have sparred and quarreled over the question, "What is justice?" for centuries. It has been typical of these musings to wander and float ever upwards into the rarified atmosphere of the highly abstract and to neglect the practical. The usual effect of this manner of approaching the question is to strip "justice" of its characteristics and specific examples until nothing at all remains but a word and some hymns of praise for it. At that point the word becomes road kill for orators, demagogues, and lawyers to feast upon. Once one has managed to bewilder people into thinking the concept cannot be crisply defined, the word is open to abusive use in whatever way a prancing demagogue or silver-tongued propagandist chooses to wield it.

A theory that can not be reduced to practice is rightly called *useless*. A definition that can not be applied is rightly called *nonsense*. Kant correctly pointed out that a real definition is a definition that makes an idea *applicable in practice*. In the case of the idea of justice, men may often be at loggerheads over a positive definition of "justice," but even a child is able to sense when something is *unjust*. In the context of the political community, ***unjust*** is *anything that breaches or contradicts the terms of the Social Contract*. We may usefully and practically define ***justice*** as *the prevention and negating of that which is unjust*. This is the real definition of justice.

In the United States when people speak of the justice system what they most often mean is a kind of amalgam made up of the courts, the law enforcement agencies, the grand jury, and the adversary attorneys involved in specific court cases. There is in this sort of thinking an unspoken presupposition that "justice system" and "legal system" are synonymous. This might be acceptable if all laws were just. But the fact is not every law is just and the administration and enforcement of unjust laws is an injustice system rather than a justice system. An existing body of laws at its best is a representation at a particular moment in time of known instances of injustice, the constraints that accordingly must be placed on individuals' natural freedoms, in order that the will of the Sovereign is not gainsaid by the actions of individual members of the body politic, and prescribed punishments to be meted out to individuals who choose to ignore their duty of obligation to act in conformity with the general will of the Sovereign.

It is rather surprising that the majority of the most prominent writers on the topic of government and political science rarely included in their works a discussion of the topic of the justice system, although many of them did spend a few words on the subject of law. Locke, Rousseau and Mill gave little or no attention to this topic. Montesquieu provided a lengthy if somewhat rambling discussion of the nature of different justice systems distinguished by the type of government in question. The Framers of the Constitution did devote a notable effort to the topic of the justice system as a balance and check on the powers of Congress and the Executive, but this effort was but a small part of their overall deliberations. John Adams, who was not among the delegates at the Constitutional Convention, had this to say:

> As good government is an empire of laws, how shall your laws be made? In a large society, inhabiting an extensive country, it is impossible that the whole should assemble to make laws. The first necessary step, then, is to depute power from the many to a few of the most wise and good. . .
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> The principal difficulty lies, and the greatest care should be employed, in constituting this representative assembly. It should be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them. That it may be the interest of this assembly to do strict justice at all times, it should be an equal representation, or, in other words, equal interests among the people should have equal interests in it. Great care should be taken to effect this, and to prevent unfair, partial, and corrupt elections. . .
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> But shall the whole power of legislation rest in one assembly? Most of the foregoing reasons apply equally to prove that the legislative power ought to be more complex; to which we may add, that if the legislative power is wholly in one assembly, and the executive in another, or in a single person, these two powers will oppose and encroach upon each other, until the contest shall end in war, and the whole power, legislative and executive, be usurped by the strongest. . .
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> To avoid these dangers, let a distinct assembly be constituted, as a mediator between the two extreme branches of the legislature, that which represents the people, and that which is vested with the executive power. . .
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> The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that. The judges, therefore, should be always men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness, and attention. Their minds should not be distracted with jarring interests; they should not be dependent upon any man, or body of men. To these ends, they should hold estates for life in their offices; or, in other words, their commissions should be during good behavior, and their salaries ascertained and established by law. For misbehavior, the grand assembly of the colony, the house of representatives, should impeach them before the governor and council, where they should have time and opportunity to make their defense; but, if convicted, should be removed from their offices, and subjected to such other punishment as shall be thought proper. – *Thoughts on Government*

We see the outline of Adams' thoughts on the judiciary reflected in the Constitution, although not with the level of attention to detail it gave to the legislative and executive branches of government.

Adams' crucial point about the need and role for a third branch of government (the judiciary), acting as both mediator between the other branches and as a force to check their actions when those

actions are contrary to justice, is one most prominent theorists of representative government either take too much for granted or miss entirely. In its place, they have devoted the greatest part of their efforts to the problem of insuring safeguards to be placed on the legislative and executive powers for the purpose of forestalling the erection of unjust laws in the first place, and to guard against usurpation of the powers of administering government and the corrupting of these into the power to rule. That the latter is necessary for constituting the institution of government is no more than a fact of human nature. Mill wrote in *Representative Government*,

> Now it is a universally observed fact that the two evil dispositions in question, the disposition to prefer a man's selfish interests to those which he shares with other people, and his immediate and direct interests to those which are indirect and remote, are characteristics most especially called forth and fostered by the possession of power. The moment a man, or a class of men, find themselves with power in their hands, the man's individual interest, or the class's separate interest, acquires an entirely new degree of importance in their eyes. Finding themselves worshipped by others, they become worshippers of themselves, and think themselves entitled to be counted at a hundred times the value of other people; while the facility they acquire of doing as they like without regard to consequences insensibly weakens the habits which make men look forward even to such consequences as affect themselves. This is the meaning of the universal tradition, grounded on universal experience, of men's being corrupted by power.

This fact of universal experience is so widely acknowledged that combating it by means of checks and balances was one of the most central concerns of the Framers at the Convention in 1787. It lay behind one of the most famous statements contained in *The Federalist*. In no. 51, Madison wrote,

> But the great security against a gradual concentration of the several powers [of government] in the same department consists in giving, to those who administer each department, the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. . . In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

The first point above, namely safeguarding against the passage of unjust laws in the first place, is bound up with the issue of safeguarding the republic against usurpation but is still distinguishable from the latter. This is because the latter is always a crime, but the former sometimes comes about from simple and unintentional shortsightedness and then is merely a culpable fault of legislators or agents of the executive branch. The fault must be set right, but those culpable need only be publicly instructed, not punished. Nevertheless, while the prudence of heading off unjust laws is both beneficial and obvious, it leaves unsettled the equally important issue of dealing with those acts of injustice that elude the safeguards and make it into the body of laws. Here is where the justice system, properly so-called, has a civic duty to be *proactive*, not merely reactive. Unfortunately, the legal tradition in our

republic – and in other countries as well – is one that is in almost full measure *reactive* in character. We take up reform for *proactive* justice in the next chapter because when the justice system falls short in its proactive duty this shortcoming threatens the third general objective of government: to insure domestic tranquility. Locke wrote in his *Essay*,

> [The] legislative [body] acts against the trust reposed in them when they endeavor to invade the property of the subject, and to make themselves, or any part of the community, masters or arbitrary disposers of the lives, liberties, or fortunes of the people.
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> The reason why men enter into society is the preservation of their property; and the end while they choose and authorize a legislative is that there may be laws made, and rules set, as guards and fences to the properties of all the society, to limit the power and moderate the dominion of every part and member of the society. For since it can never be supposed to be the will of the society that the legislative should have a power to destroy that which every one designs to secure by entering into society, and for which the people submitted themselves to legislators of their own making: whenever the legislators endeavor to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves in a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge which God hath provided for all men against force and violence.

It is unnecessary to belabor the point that this "common refuge against force and violence" is violent counterforce or, in other words, civil war. As much as we might wish it were not so, force is the ultimate argument, and when one side resorts to it the other can be expected to respond in kind *by right of nature*. No domestic tranquility can or should be expected when injustice by agents of the government dissolves the social compact and returns men to the state of nature.

When unjust force of government is met by the counterforce of insurrection and the people succeed in toppling those in power, the event is called a revolution. If the government institution prevails, it is called a civil war. In either case the cause is always the same, as is the culprit. The instigator of insurrection is always the government itself, and the cause is always the creation, through injustice, of a Toynbee proletariat released from its obligation and allegiance by that injustice.[1] No people ever form a social compact with the intention of subsequently dissolving that compact.

It is by no means necessary that violent insurrection must inevitably lead to either the overthrow of the government or the dissolution of the political community. If the government, confronted by the specter, backs down, rescinds its injustices and submits to reforms, it is in the common interest of the body politic to accept the government's surrender to the will of the Sovereign and continue the association. It is likewise the duty of every citizen to resort first to civil disobedience against injustice before resort to the ultimate argument of violent force. Civil disobedience expresses the will of citizens in a civic manner. But if resort to naked force is made by either side, the political community

[1] Even the American Civil War is an example of this principle. In its case, the injustice was the original compromise that let stand the institution of slavery. This institution, and not "state's rights," was the cause of the Civil War. The first insurrectionists, long before Fort Sumter, were the abolitionists.

is sundered and none are ever wise enough to foretell where the anarchy and tumult that follows will lead. The last time in the United States when a state of civil war erupted was in the mid 1960s and early 1970s. The twin causes were injustices giving birth to rebellion by the civil rights movement and to rebellion by a Toynbee proletariat over the war in Vietnam. The crime committed by government in the first case is obvious today and we need not belabor it. The crime committed by government in the second case was entirely due to a transgression committed by the Congress, namely its failure to carry out its Constitutional duty in the exercise of its power to declare *or prohibit* war.

The Tonkin Gulf Resolution was not a declaration of war; it was a cowardly moral dereliction of Congressional duty that led piecemeal to armed conflict in a foreign land unsanctioned by the will of the Sovereign. As true as it is that two U.S. Presidents were guilty of transgression of duty, leading to the anti-war insurrection, it is even more true that the principal transgression was Congressional dereliction of duty. Congress has attempted to distance itself from blame for America's involvements in wars since the Korean War. But, no matter what sophisms and legalistic semantics are used, war is war and the Constitutional duty for committing the nation to war is vested in only one place in government – the Congress – by Article I, section 8 of the Constitution.

Any act of government that contradicts any one or more of the general objectives of government is an act of injustice. In cases of the application of military force, Congress or the Executive might claim the act serves the general objective of providing for the common defense – and there can be truth in this claim – but if the manner by which the action is undertaken is, intentionally or unintentionally, designed to avoid the immediate arousal of popular disapproval then the action can only be regarded as a deliberate transgression of government's duty to insure domestic tranquility. This is exactly the situation in the cases of the Tonkin Gulf Resolution[2] and, more recently, the War Powers Act of 1973, the Authorization for Use of Military Force Against Terrorists Resolution of 2001, the Authorization for Use of Military Force Against Iraq Resolution of 2002, and certain provisions of the misnamed USA Patriot Act of 2001. The Tonkin Gulf Resolution authorized the President to employ military force in southeast Asia at his own discretion and without a declaration of war (section 2 of the resolution). This led directly to the U.S. involvement in the war in Vietnam and the civil war turmoil and bloodshed of the 1960s and 1970s that resulted from it.

These specific examples obviously also involve yet another of the six objectives of government, namely the objective of providing for the common defense, and we will return to them when we come to that chapter. The central topic of this chapter is *justice in the justice system*. It can be and is argued that all of the above acts of Congress are legal and, for the most part, the courts have upheld their *legality*. A specific example of this is provided by a 2003 U.S. Court of Appeals case, *Doe v. Bush*.

[2] Officially called the Southeast Asia Resolution, Public Law 88-408.

Legality and justice, however, are so far from being the same thing that the legality of these acts could not more emphasize the crucial need to recognize this difference. It is the nature of a court system organized around a principle of reaction, and without an accompanying principle of proaction, that justice is enshrouded in shadow even as legality stands in the sunlight. However, the Constitutional mandate is not "to establish legality"; it is ***to establish justice***. Laws are only means, not ends, of government. An entire great profession is devoted to law, another to law enforcement. But what institution in a Republic is devoted specifically to *justice?* This is our primary question.

Montesquieu wrote, "the laws given by the legislator ought to be in relation to the principle of government." As a maxim this is hardly profound. However, things said to "go without saying" rarely actually do. The principle of government in the case of the republic, he wrote, is "virtue."

> Virtue in a republic is a most simple thing: it is a love of the republic; it is a sensation, and not a consequence of acquired knowledge: a sensation that may be felt by the meanest as well as by the highest person in the state. When the common people adopt good maxims, they adhere to them more steadily than those whom we call gentlemen. It is very rarely that corruption commences with the former: nay, they frequently derive from their imperfect light a stronger attachment to the established laws and customs.
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> The love of our country is conducive to a purity of morals, and the latter is again conducive to the former. The less we are able to satisfy our private passions, the more we abandon ourselves to those of a general nature.

The wellspring of civic morality is nothing else than the Social Contract. One should now recall to mind Mill's thesis that government always affects the civic morality of the body politic through the ways and means, and the competency, of its operations. When chronic injustice creates a large and disaffected Toynbee proletariat within the body politic, it is a certain sign that civic virtue has been lost. In a quite direct sense, the objective to establish justice is an objective *founded upon the purpose of inspiring civic virtue* in the great body of the Sovereign. Civic virtue cannot be mandated; it cannot be legislated. Civic virtue, like obligation and civic duty, comes only from within one's self and never from without. Yet civic morality is so essential to the preservation and welfare of the Republic that it must be a central factor in every principle of good government. The institution of government itself *must* be such that the *unavoidable* effect government has on the civic morality and virtue of the people is turned towards properly nourishing this public spirit.

§ 2. The Institution of the Supreme Court

The establishment of the Supreme Court and of the system of lower federal courts was one of the least contentious issues at the Convention in 1787. This was certainly in large part due to the fact that the Framers had no prior experience with a national court system upon which to draw. Instead they modeled their ideas along the lines of state court systems, with which they were familiar, and upon the traditions of the British legal system which, quite naturally, had been largely transplanted to the

colonies. The constitutional establishment of the Supreme Court more or less followed the recipe prescribed by Adams in 1776 with particular modifications to suit the structure of the Congress and the Executive established by the Constitution.

The Supreme Court was established as a separate branch of the government expressly for the purpose of providing checks and balances against the other two branches. It was and is, by deliberate design, the weakest of the three branches in terms of the power it wields. In *The Federalist*, no. 78, Hamilton wrote,

> Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community; the legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated; the judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

Hamilton was certainly correct that this relative powerlessness of the judiciary branch guarantees that this branch can never become despotic in character. It is not clear, though, that this same powerlessness is consistent with the role of the judiciary as a force for checks and balances. Indeed, rather the opposite would seem to be the case. We will return to this issue later in this chapter.

There is, however, no doubt that the Framers intended for the Supreme Court to be without the power to directly enforce its verdicts or to directly compel the legislative and executive branches to obey its verdicts. Hamilton went on to write,

> This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean, so long as the judiciary remains truly distinct from both the legislature and the executive. For I agree that "there is no liberty if the power of judging be not separated from the legislative and executive powers."[3]

It is correct that the liberty of the people can never be *directly* endangered by the Court. It can, however, be *indirectly* endangered if the Court lets stand unjust laws emanating from the Congress or unjust orders and regulations emanating from the Executive branch. If the Supreme Court and the lower federal courts merely rubberstamp the acts of the other two branches, there is nothing whatsoever acting to, as Madison put it, "oblige the government to control itself." Utter independence of the Court from dependencies on or retaliations from the other two branches is essential if the

[3] Hamilton here quotes Montesquieu's *The Spirit of Laws*.

judicial branch is not to be made a mere puppet of the other two. There is no doubt whatsoever that the Framers intended for the judiciary branch to have for its first duty the "obliging of the government to control itself." Hamilton wrote,

> The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority . . . Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing. . .
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> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.
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> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption . . . It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. . . [The] constitution ought to be preferred to the statute, the intention of the people to the intention of their agents. – *ibid*.

There is not one word written in the Constitution that explicitly states this function of the Supreme Court and the lower courts. However, there is not one word in the Constitution that explicitly states what "law" is or what "legislation" is either. It has happened many times in our history that the Court has struck down laws, passed in the heat of popular passions, that violated the civil liberty of particular minorities of the citizenry. Invariably, this has always been followed by howls of rage from the supporters of the uncivil law and sour-grapes criticism that the Court presumes to "legislate." The absence of specific constitutional language granting the Courts the power *and the duty* to interpret the law – not merely according to the letter but according to the *spirit and meaning* of the Constitution – is used to support despotic demagoguery to the effect that the Court has usurped the prerogative of the democratically elected body of representatives and acted in excess of its constitutional authority. These are but the howls of would-be despots giving voice to frustration when their uncivic aims have been thwarted by the Court and their act of civic immorality has been struck down. Their railings against the Court should be regarded by all of us as nothing less than an awarded medal of honor.

The rhetoric of angry demagogues usually attempts to falsely assert that the Court has acted in a manner that shows the Court is trying to elevate itself, unconstitutionally, to a position of power that is superior to the constitutionally established power of the legislature or, in some cases, the executive.

This claim is entirely baseless, as Hamilton pointed out:

> It only supposes that the power of the people is superior to both [the judicial and the legislative]; and that where the will of the legislature declared in its statutes stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by fundamental laws, rather than by those which are not fundamental. – *ibid*.

Here by "the people" is meant: *the general will of the Sovereign* – not merely some majority of the citizenry but *all* of the citizenry. Although Rousseau coined the term "Social Contract," the idea was not new with him; it had been a fundamental premise of every one of his predecessors who championed the cause of representative government. That this social compact is the bedrock principle of the Idea of the American Republic is illustrated time and again: in the Declaration; in Adams' writings; in the *Records of the Convention;* and in *The Federalist*. The judicial branch of our government bears the principal responsibility for preserving and protecting the Social Contract.

Democracy has the peculiar twin characteristics of being our greatest security against the despotisms of the tyrant and the oligarchy and, at the same time, the greatest threat of the despotism of the majority over the minority or the individual. To resist the first two forms of despotism, the Founding Fathers established democracy as a fundamental political character of our nation; to resist the latter, they established the *form* of this democracy as that of a *republic*. We are neither a democracy pure and simple, nor a republic pure and simple, but a *democratic constitutional republic*. It is no less urgent to defend liberty and justice from the tyranny of the majority as from the tyranny of the one or the few. Hamilton wrote,

> [It] is not with a view to infractions of the constitution only, that the independence of judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence on the character of our government than but few may imagine. The benefits of the integrity and moderation of the judiciary have already been felt in more states than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget and fortify that temper in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress. – *ibid*.

None of this means that our federal courts are beyond the reach of the other branches of government. Justices of the Supreme Court hold their tenure of office "during good behavior," and can

be impeached by the House of Representatives and tried by the Senate. The Constitution delegated the power to establish the system of inferior Courts to Congress, which is constitutionally authorized to change this system any time it sees fit. The first major law passed by Congress in 1789, even before the Bill of Rights was transmitted to the States for ratification, was the Judiciary Act of 1789, which established the first system of inferior federal Courts.

One cannot say that the Supreme Court began its existence on anywhere near an equal footing with Congress. Indeed, the first Congresses showed little inclination to suffer any annoyance from actions by the Courts or to have their new power circumscribed by them in any way. The early Congresses did not fully acknowledge even the power of the Courts to exercise judicial review over its acts. The original working conditions placed upon the Justices of the Supreme Court were sufficiently onerous that for a time Presidents had difficulty finding any qualified men willing to serve as Justices, or keeping those who had agreed to serve from resigning. Between 1791 and 1792, the Supreme Court heard no cases at all, and throughout the decade of the 1790s it decided fewer than fifty cases.

Indeed, our judicial branch of government might have remained impoverished and impotent to this day had not John Jay refused President Adams' request that he return to the Court to serve as Chief Justice. Jay turned down Adams' invitation with the words,

> The efforts repeatedly made to place the Judicial Department on a proper footing have proved fruitless. I left the bench perfectly convinced that under a system so defective, it would not obtain the energy, weight and dignity which are essential to its affording due support to the National Government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess.[4]

Adams turned to John Marshall as his nominee following Jay's refusal, and this proved to be the most important Supreme Court appointment in our history. The change from an impotent body to the Court we know today was established by what many regard as the most important case ever to come before the Supreme Court: *Marbury v. Madison*, 1803. It was this case that established, once and for all, the Supreme Court's role and power of judicial review over acts of Congress. Today constitutional scholars regard Marshall on almost equal footing with George Washington as one of the single most important men in the establishment of the character of government in our Republic. For an interesting if brief history of the early Court, the reader may consult Walker and Epstein, *The Supreme Court of the United States*.

§ 3. The Principal Imperfection in the Justice System

Present day imperfections in meeting the general objective of establishing justice do not arise from

[4] Elder Witt, *Congressional Quarterly Guide to the U.S. Supreme Court*, 2nd ed., Washington, DC: Congressional Quarterly, 1990.

the character and nature of the federal court system as we know it today. All in all, the justices entrusted with what Jay called "the last resort of the justice of the nation" have acted with splendid fidelity to the constitutional duties of their office. This is a tribute as much to the people who have held this trust as to the Senate in carrying out its duty to confirm or reject nominees to the Supreme Court. The Senate may not – and has not – always acted with the dignity one might expect, and it has certainly not acted without considerable and raucous party partisanship, but the fact remains that the system has produced justices who, as a body, have provided a Supreme Court of extraordinarily good character and civic morality. In this regard, the deliberate antagonism of interests set up by the Framers has served its purpose splendidly. *All* efforts to *ideologically bias* the Court are *tyrannical*.

The principal imperfection of the justice system is found, rather, in its vulnerability. Our system works as intended when the political environment is sufficiently divided by faction such that no one party in Congress can ride roughshod over the other in the confirmation process, or when the Congress and the Executive are divided by party. In the past few years, there have been strong calls by the political parties to "improve" the process of judicial confirmation. It is a sinister misuse of the word "improve" because what these calls actually champion are changes that would make it easier for the majority to stack the Courts with appointees who could be made more responsive and malleable to the wishes and demands of the parties. Should even one of these attempts succeed, the last working constitutional safeguard of liberty with justice in the United States will be lost, the power of the Sovereign will be destroyed, and every citizen of this nation will be subjugated under the heel of a form of government essentially despotic and tyrannical in its nature. This is not hyperbole; it is merely a foreseeable lesson of history that would inevitably be played out once again. American philosopher George Santayana famously wrote,

> Those who cannot remember the past are condemned to repeat it

and no philosopher ever enounced a more important truth.

The State of Idaho provides a present day example of the inevitable consequences of a too-weak judiciary. Since 1994 the state has been under the absolute dictatorship of a single political party, in this case the Idaho Republican Party. There is an Idaho Democratic Party, but it is impotent and ineffective at the Statehouse. It gives every impression of being a party in the process of disappearing. It has not succeeded in electing a governor since 1990, and in the past decade the legislature has never once been effectively checked in any policy or act it was determined to carry out by any elected governor. The Idaho Republican Party is held together by a small band of strong leaders, all of whom hold an extreme right-wing ideology, and they enforce a formidable party discipline ensuring this view predominates in the Statehouse. They do not tolerate and they do punish dissenters in their ranks.

Supreme Court justices in Idaho are elected for six year terms. In the past, the Idaho Republican Party has not shown the least hesitation to mount active campaigns against the reelection of any justice whose rulings oppose measures the party sees fit to pass, and these campaigns nearly always succeed. A few years ago, a group of Idaho school districts banded together and filed a lawsuit against the legislature, claiming that the formula used by the legislature in apportioning funding for public schools was in violation of the State Constitution. The Idaho Supreme Court found in favor of the school districts and ordered the legislature to change its formula to comply with its constitutional duty. The legislature ignored this order and effected some inconsequential window-dressing legislation. The Idaho Supreme Court lacks the power to enforce its order and the courage to hold the legislature's feet to the fire. The issue has now faded from the newspapers and from the public memory, the injustice has gone uncorrected, and the disintegration of public education in Idaho has continued.

No public official or government employee dares to challenge the Statehouse on any constitutional issue. Article XX of the Idaho Constitution states

> § 1. Any amendment or amendments to this Constitution may be proposed in either branch of the legislature, and if the same shall be agreed to by two-thirds (2/3) of all the members of each of the two (2) houses, voting separately, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered in their journals, and it shall be the duty of the legislature to submit such amendment or amendments to the electors of the state at the next general election, and cause the same to be published for at least three (3) times in every newspaper qualified to publish legal notices as provided by law. Said publication shall provide the arguments proposing and opposing such amendment or amendments as provided by law, and if a majority of the electors shall ratify the same, such amendment or amendments shall become part of this constitution.

With their dominant majority in both houses of the legislature, the Idaho Republican Party can pass any amendment it wishes any time it wishes. With only a simple majority required to ratify, any popular piece of demagoguery can be written into the state constitution without any difficulty. Idaho officials do not challenge the legislature on constitutional grounds for fear that the legislature will simply amend the constitution to have its own way, and foreclose all hope of any future redress of grievances in the event power in the legislature ever changes hands. As of 1990, the Idaho Constitution had 48 significant amendments made to it, most of which serve to directly or indirectly increase the power of the legislature.

One example was the addition of a new section 28 to Article V, which states: ***Provisions for the retirement, discipline, and removal from office of justices and judges shall be as provided by law***. The court system in Idaho now has *no* constitutional protections from the whims of the legislature; the Idaho Constitution is written on toilet paper. No dispassionate and disinterested observer of the state government of Idaho could call Idaho a republic. It is today a soviet of oligarchs and the form of the state government is little different in temper or in practice from that of the Communist Party in the

former Soviet Union.

The Idaho State Supreme Court is merely a particularly good illustrative example of a Court systematically rendered impotent to oppose tyranny in the legislative branch. But in point of fact, this impotence is inherent in the constitution of the justice system overall. The Supreme Court of the United States has no enforcement power of its own. When the executive and legislative branches of the general government jointly choose to defy a decision by the Court, there is *nothing* the Court can do about it. During the Jackson administration the Supreme Court heard the case of *Worcester v. Georgia*, in which the Court found that the Cherokee nation occupied a territory within which the laws of Georgia could have no force. The particular laws in question concerned Georgia's claim that the Cherokee were subjects and tenants-at-will of the State of Georgia. The issue was that Georgia intended to evict the Cherokees from their land and force them to resettle in the Indian Territory (now Oklahoma). Hearing of the Court's decision, Andrew Jackson is said to have remarked, "John Marshall has made his decision. Now let him enforce it." Jackson's administration ignored the Court's decision. The state of Georgia was allowed to have its way, Congress did nothing to intervene, and the Cherokees were forced to exchange their lands in Georgia for a section of the Indian Territory and a payment of five million dollars. By 1838, all the Cherokees had been driven out of Georgia.

Public opinion is the only power remaining when Congress and the President refuse to abide by the findings of the Court. In 1973 the Court of Appeals ruled Richard Nixon had to abide by lawful subpoenas, issued by special Watergate prosecutor Archibald Cox, and turn over specific tape recordings of Oval Office conversations to federal judge John J. Sirica by no later than midnight of October 19th. He chose instead to fire Cox. On October 20th, Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus resigned rather than carry out this order. Nixon then appointed Robert Bork as acting Attorney General, and Bork fired Cox. This became known as "the Saturday Night Massacre"; it caused a firestorm of public reaction and calls for Nixon's impeachment. Even so, Nixon resisted turning over the subpoenaed tapes until November 26th and was able to hang on to his office until the following August, when impeachment proceedings finally began in the House of Representatives. The public, quite correctly, construed Nixon's actions as those of a criminal, and it was primarily – and perhaps only – because of public pressure that Congress finally acted. Even here, it did so only after a ten month delay before succumbing to the mounting public outrage.

The judicial branch of the government has no enforcement arm. The Justice Department of the United States is part of the executive branch, and if the executive branch refuses to enforce the Court's decisions, only Congress has the power to intervene through its power of impeachment. It is only too obvious that if the House of Representatives and the executive branch act in collusion, the judiciary has *no* means by which it can check abuse of power. The only power then capable of doing so is the

power of the Sovereign itself, through unseating these congressmen and the President at the next election or through civil war. It is only the politicians' recognition of this latent *threat* to their hold on power that provides a positive force for the preservation of the Republic.

This threat can be removed by careful and skillful political propaganda that erodes the civic morality of the electorate. Such propaganda succeeds when the electorate is uneducated in the principles upon which republican government is based and merely adopts the attitude of entitlement citizenship. The soviet of the Idaho Republican Party is an outstanding example of a case where this has succeeded through-and-through; one has to admit the soviet's extremely adroit political skill, the effectiveness of its propaganda, its willingness to use power to coerce and intimidate opposition, and the ruthlessness of its policy of divide-and-rule politics. Machiavelli wrote,

> Every one admits how praiseworthy it is in a prince to keep faith, and to live with integrity and not with craft. Nevertheless our experience has been that those princes who have done great things have held good faith of little account, and have known how to circumvent the intellect of men by craft, and in the end have overcome those who have relied on their word. You must know there are two ways of contesting, the one by the law, the other by force; the first method is proper to men, the second to beasts; but because the first is frequently not sufficient, it is necessary to have recourse to the second. . . Therefore, it is necessary to be a fox to discover the snares and a lion to terrify the wolves. . . Therefore a wise lord cannot, nor ought he, keep faith when such observance may be turned against him, and when the reasons that caused him to pledge it exist no longer. If men were entirely good this precept would not hold, but because they are bad, and will not keep faith with you, you too are not bound to observe it with them. Nor will there ever be wanting to a prince legitimate reasons to excuse this nonobservance. . . and he who has known best how to employ the fox has succeeded best.
>
> But it is necessary to know well how to disguise this characteristic, and to be a great pretender and dissembler; and men are so simple, and so subject to present necessities, that he who seeks to deceive will always find someone who will allow himself to be deceived.

Change "prince" to "party boss" and Machiavelli would not alter another word were he today the political advisor of a party organization. This is the nature of the enemy of republican government against whom the Court is unarmed.

§ 4. The Purpose and Objectives of Judicial Reform

Achieving a robust system of checks and balances to ensure the government *does* control itself is perhaps the most difficult balancing act in representative government. The Journal of the Convention *Records*, dated August 15th, 1787 (Farrand, vol. 2) records the following motion proposed by Madison as an amendment to the working draft of the Constitution:

> It was moved and seconded to agree to the following amendm't of the 13th sect. of the 6 article.
>
> "Every bill which shall have passed the two Houses, shall, before it come a law, be severally presented to the President of the United States and to the Judges of the supreme court, for the revision of each – If, upon such revision, they shall approve of it, they shall respectively signify their approbation by signing it – But, if upon such revision, it shall appear improper to either or both to be passed into a law; it shall be returned, with the objections against it, to that House in

> which it shall have originated, who shall enter the objections at large on their Journal, and proceed to reconsider the bill: But, if, after such reconsideration, two thirds of that House, when either the President or a Majority of the Judges shall object, or three fourths, where both shall object, shall agree to pass it, it shall, together with the objections, be sent to the other House, by which it shall likewise be reconsidered and, if approved by two thirds, or three fourths of the other House, as the case may be, it shall become law."

Madison's intent was to give the Supreme Court a veto authority over bills passed by Congress. The amendment was defeated by a vote of 3 states in favor, 8 against. The debate over this motion was fairly brief but even so it raised glimpses of several conflicting principles in trying to strike the balance between representative government, judicial review of laws, and judicial restraint. Madison recorded in his convention diary the remarks made by the different delegates:

> Mr. Pinkney [South Carolina] opposed the interference of the Judges in the Legislative business: it will involve them in parties, and give a previous tincture to their opinions.
>
> Mr. Mercer [Maryland] heartily approved the motion. It [is] an axiom that the Judiciary ought to be separate from the Legislative: but equally so that it ought to be independent of that department. The true policy of the axiom is that legislative usurpation and oppression may be obviated. He disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontrollable.
>
> Mr. Govr. Morris [Pennsylvania] regretted that something like the proposed check could not be agreed to. He dwelt on the importance of public Credit, and the difficulty of supporting it without some strong barrier against the instability of legislative Assemblies. . .
>
> Mr. Dickinson [Delaware] was strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss [for] what expedient to substitute. The Justiciary of Aragon, he observed, became by degrees the law-giver.
>
> Mr. Sherman [Connecticut]: Can one man be trusted better than all the others if they all agree? This was neither wise nor safe. He disapproved of Judges meddling in politics and parties. We have gone far enough in forming the negative as it now stands. [Sherman refers to presidential veto here]
>
> Mr. Wilson [Pennsylvania] after viewing the subject with all the coolness and attention possible was most apprehensive of a dissolution of the Govt from the legislature swallowing up all the other powers. He remarked that the prejudices [against] the Executive resulted from a misapplication of the adage that the parliament was the palladium of liberty. Where the Executive was really formidable, *King* and *Tyrant*, were naturally associated in the minds of the people; not *legislature* and *tyranny*. But where the Executive was not formidable, the last two were most properly associated. . .

In the end the delegates chose to keep the judiciary out of the law-making business altogether and, with the hindsight of history, this was a wise decision. The first duty of a judge is to judge the law in relationship to its intent, its meaning, and its standing with the purposes of the Constitution. Provided that every citizen can make an unhampered appeal to the courts – one not obstructed by factors such as prohibitive cost barriers or retaliations *of any kind* against the exercise of his liberty of appeal – review rather than preview of the laws has worked well for us. We will take this up in a later chapter. The

central most crucial issue is: ***how to insure that the findings of the Court are as binding on all branches and functions of government as they are on individuals***.

§ 4.1 Purpose and Prime Objective

It was shown in the previous section that no real insurance of this actually exists within the present constitutional system. This is not a mere theoretical concern because both abuses of power and neglects of duty in the legislative and the executive branches *have occurred* in the past and there is nothing to prevent their reoccurrence in the future. These abuses amply demonstrate that the justice system lacks teeth in precisely the arena where it needs them the most: the safeguarding of the civil liberty of every citizen from government abuse when either the executive or the legislative branches fail to act in conformity with their constitutional duties or act in outright transgression of these duties.

This is not a matter of mere adjudication of law. In that sphere, the court system has performed as well as any human institution could be practically expected, given that human error and mistaken judgments are a fact of life and that such errors and mistakes tend to be corrected over time. The danger arises when agents of the government themselves violate the social compact *and defy* the courts, or when agents of government abet in the defiance of the courts by other agents of government. It matters not, in the latter case, whether the abetting of criminal acts is active, through collusion, or passive, through refusal to carry out sworn constitutional duties.

Furthermore, delegate John Dickinson of Delaware was right to raise the concern of the judicial branch itself overstepping its constitutional boundaries and unjustly usurping the power of law-making, rather than confining itself to its constitutional duty of judicial review of the laws. It would be as dangerous to vest too much power in the hands of the courts as it is to vest too much power in the hands of *any* branch or agency of government. The question here becomes: who judges disputes when the Justices themselves are a party in the dispute? This question echoes an old one voiced by the Roman orator Quintilian in the first century AD: *Quis custodiet ipsos custodes?* ("who will watch the watchers themselves?").

In the minds of the Framers, there could be only one answer to this question: The Sovereign (that is, the people themselves) would watch the watchers. But, as Mill pointed out quite correctly, this can work only if the political community is adequately prepared for and committed to take up this duty. This can hardly be expected to be the case if the citizenry does not possess an adequate education and knowledge of the key issues of governance at stake, or is inclined to presume simple democracy and the rule of the majority suffices to secure justice for *all* citizens, or lacks the civic moral education to accord the unalienated rights of others the same respect a person demands for his own.

Again, the issue is not *legal* reform. The issue and ***purpose of reform*** is *judicial* reform, that is,

amending the justice system to better safeguard civil liberty with justice for all citizens.

Any trial lawyer of minimal professional competence can quickly spot the point from which to attack or defend the *interpretation* of this purpose: who is to be regarded as a citizen? The present *legal* definition under the Constitution is any person born or naturalized in the United States. Under this definition, therefore, an unborn child is not a citizen, nor is an alien resident, nor is any foreigner; would it then be argued that no entitlement of justice exists? It is obvious that such a conclusion is not consistent with the popular mores of American society in the latter two cases. In the case of the unborn child, this question underlies every aspect of the *legal* controversy over abortion. Opponents of abortion adopt a view reflected in the phrase "right to life" and regard abortion as murder. Murder (homicide) is the *unjustified* taking of the life of a person. The state does not commit murder when it puts to death a criminal sentenced to death by the verdict of a court; an individual does not commit murder when he kills another in defense of his own life; a soldier at war does not commit murder when he kills an enemy in battle. Is an unborn child a "person"? If so, when is it just to regard abortion as an act of homicide, and when is it just to regard it as not an act of homicide? If an unborn child is *not yet* a person, the abortion question is necessarily moot insofar as homicide is concerned. The abortion issue illustrates that the definition of who is and who is not a citizen, and the metaphysical question of who is and who is not a person, permeate every aspect of *justice* in the republic.

The issue cannot be settled upon religious grounds in a political community that makes freedom of religion a civil liberty accorded to every person as an unalienated natural right. Abortion foes can respond that "right to life" is an *unalienable* right of every person and point to the Declaration for support. On the other side of the controversy, supporters of legal abortion can respond that it is a woman's exclusive right to decide whether or not to have an abortion on the grounds that the pursuit of happiness is an unalienable right of every person. If an unborn child is not yet a person it follows that the abortion decision is a private decision in which government has no right to interfere. Again, this question comes down to metaphysical understanding of the real explanation of "person."

It is, however, obvious that a legal definition cannot be any more left to individual discretion than it can to religious discretion; if individual discretion of definition in this matter was held to be an unalienated right, what shall we say about the claims of the slave owner that a slave is not a person but, rather, is property? What shall we say to an abusive parent who claims his child is his property? Shall the definition then be left to science? This, too, is confronted with deep issues.

To be a "person" ultimately means "to be a living individual" and that raises two issues of a profoundly metaphysical nature: (1) what is "life"? and (2) what is an "individual"? If as convention we rely upon the scientific definition of biological life, it is this: "Complex physico-chemical systems whose two main peculiarities are (1) storage and replication of molecular information in the form of

nucleic acid, and (2) the presence of enzyme catalysts." By this definition, "pro-life" advocates are wrong to say "life begins at conception" because, biologically, *life was never absent at any time in the procreation process*. Is a zygote a "living thing"? According to biology, the answer is unequivocal: yes, it is. So are the sperm and the egg prior to fertilization. Then is the zygote an *individual* living entity (a person) or is it merely part of a larger living system, namely the woman herself? If the latter, at what point does that-which-began-as-a-zygote (a "potential-person-to-be") become an individual human being (a "person-in-fact")? Science at present has no generally agreed-to answer to either of these questions and the opinions of individual scientists are no different from and carry only the same weight as the opinions of anyone else.

It is not within either the purpose or the scope of *this* treatise to propose to answer these particular questions, although raising them to point out how the answers – when we get them – affect doctrines of political science *is* within the proper topic and scope of this treatise. As Madison famously put it in *The Federalist*, "What is government itself, but the greatest of all reflections on human nature?" Save only in the case that a body politic makes it part of their social compact to require adherence to a particular philosophy or religion, as a condition of association and an obligation of membership freely taken, controversies like abortion – and other difficult metaphysical issues the advances of civilizations are certain to produce in the future – do and will continue to raise very fundamental issues in regard to the administration of justice for all. Justice is never insured cheaply or easily.

And so this brings us back to the topic at hand: What institution of government is needed to better perfect the general objective of American government ***to establish justice***? We have seen that conflicts of power between the branches of government are not only possible but actual *and intentional* by design of the Constitution. Intentional conflict between the branches is purposively set up as a key part of checks and balances in a system designed to oblige government to control itself and remain the servant of the Sovereign. Justice is never served by imposing the will of a majority, much less a powerful plurality, upon a minority without their consenting to a further alienation of natural rights. Indeed, such an imposition is an *injustice* and a breach of the American Social Contract. The present dangerous imperfection in our system of government in regard to this is the inadequate mechanism for resolution of disputes when two branches of government clash over the issue of their respective powers and one or both hold that the other is in violation of the spirit and meaning of the Constitution. The Court has no constitutional power for enforcement of its verdicts and must rely on the good faith and allegiance of the other branches for this enforcement. When the dispute is between the judiciary and the executive or the legislative, who shall adjudicate the dispute and what mechanism of enforcement must attach to the adjudication power? *Quis custodiet ipsos custodes*?

Well-meaning people who overestimate the virtues of democracy and underestimate its vices will

be prone to conclude the Framers answered this question correctly in the Constitution and that ultimate power of adjudication belongs immediately and directly in the hands of the electorate itself. The precept, whether consciously attended to or not, in this conclusion can be phrased as *the right of the majority to decide*. But this precept fails to heed the vice of injustice inherent within it. In *On Liberty* Mill wrote,

> Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly, held in dread, chiefly as operating through the acts of the public authorities. But reflecting persons perceived that when society is itself the tyrant – society collectively over the separate individuals who compose it – its means of tyrannizing are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practices a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself. Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation of any individuality not in harmony with its ways, and compels all characters to fashion themselves upon the model of its own. There is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism.

In a Republic formed and bound by the Social Contract, *there is no right of the majority, save self-protection, to decide and impose its will on the unconsenting minority*. Such a supposed right is nothing else than the law of the jungle, the imposition of will by force that devolves the body politic into the state of nature. Nor have we arrived at the Utopia of Thomas More's reflections or the New Atlantis of Francis Bacon. Tyranny of the majority creates Toynbee's proletariat element within the state, and woe to today's majority when the day comes that they find themselves in the minority and the table is turned. The problem of how to achieve a just *limited* democracy and prevent the injustices of *unlimited* democracy is still one of the thorniest problems in political science. Mill went on to write,

> But though this proposition is not likely to be contested in general terms, the practical question, where to place the limit – how to make the fitting adjustment between individual independence and social control – is a subject on which nearly everything remains to be done. All that makes existence valuable to anyone depends on the enforcement of restraints upon the actions of other people. Some rules of conduct, therefore, must be imposed, by law in the first place, and by opinion on many things which are not fit subjects for the operation of law. What these rules should be is the principal question in human affairs; but if we except a few of the most obvious cases, it is one of those which least progress has been made in resolving. No two ages and scarcely any two countries have decided it alike; and the decision of one age or country is a wonder to another. Yet the people of any age and country no more suspect any difficulty in it than if it were a subject on which mankind had always been agreed. The rules which obtain among themselves appear to them self-evident and self-justifying.
>
> This all but universal illusion is one of the examples of the magical influence of custom, which is not only, as the proverb says, a second nature, but is continually mistaken for the first. . . People are accustomed to believe . . . that their feelings on subjects of this nature are better than

> reasons, and render reasons unnecessary. The practical principle which guides them to their opinions on the regulation of human conduct is the feeling in each person's mind that everybody should be required to act as he, and those with whom he sympathizes, would like them to act. No one, indeed, acknowledges to himself that his standard of judgment is his own liking; but an opinion on a point of conduct, not supported by reasons, can only count as one person's preference; and if the reasons, when given, are a mere appeal to a similar preference felt by other people, it is still only many people's liking instead of one. . . Men's opinions, accordingly, on what is laudable or blamable, are affected by all the multifarious causes which influence their wishes in regard to the conduct of others, and which are as numerous as those which determine their wishes on any other subject.

It is precisely this thorny issue the prime objective of judicial reform must address. This objective is: ***To institute an ultimate constitutional tribunal empowered to justly decide matters of constitutional dispute between the branches of government, and to provide to this tribunal the power necessary to enforce its decisions on all branches of government***.

Let us not deny the obvious: an institution of government established with this prime objective is potentially the most dangerous of all institutions of republican government if its implementation is not attended to with the utmost care and deliberation. This tribunal holds no power but the power to decide upon, *and cause to be justly resolved*, matters of dispute that are quite correctly called *constitutional crises*. Its institution must therefore be viewed and treated accordingly. For reasons I explain in the next section, I will here call this tribunal by the name ***the Cincinnati***.

There are two principal and co-equal implementation tasks in instituting the Cincinnati. The first is the task of deciding the matter of how this agency is to be established and how the powers to act entrusted to it are to be properly checked. The second is the task of defining and delimiting its powers of enforcement. Each task requires its own particular set of objectives of implementation.

§ 4.2 The Objectives of Implementation for the Cincinnati: Part I

The Cincinnati is in every consideration an extraordinary body. When government is functioning in full accord with the Social Contract, this tribunal has no function to perform and no power of action except in one circumstance only, which will be discussed in §4.4 below. When it is called upon to act, its power is absolute *within a limited term and under limited conditions* outlined below, and this power utterly ceases as soon as the circumstance that called it into action is resolved. It is in this sense the guard of the Sovereign and answers to the Sovereign alone. In its adjudicating function it is the final court of appeal, *but only for the branches of government* – executive, legislative, and judicial – and is not a court of appeal for citizens at large. In its authoritative function it supercedes the executive authority of the President, the legislative authority of the Congress, and the judicial authority of the Supreme Court.

This description of the Cincinnati is in some ways similar to, and in other ways very different from, an extraordinary office that existed in the Roman republic. The very name of that office is sufficient to

convey in full the danger attending any but the most careful and judicious definition of this tribunal body and the appointment of the people who serve in it. The name of that Roman office has come down to us in English unaltered from its original Latin word: *dictator*.

There is probably no other word in political language more chillingly repugnant to people in a free and democratic country. But in original conception, appointment to the office of *dictator* was the highest token of trust and the most solemn duty a Roman citizen could be given and *required* to assume. It was forever stained in the pages of history by Caius Julius Caesar, who perverted the office of *dictator* into that of *imperator* (emperor) in all but name. Caesar used the threat of the legions he commanded to intimidate the Roman Senate into granting him the title of dictator-for-life – an unprecedented office and an anathema to the Roman republic because the power he usurped was that of a king rather than a Roman *dictator*. After Caesar's assassination the title was so inextricably linked to his name, and so corrupted by it, that his eventual successor, Caius Julius Caesar Octavianus (Caesar Augustus), refused it as a title and was instead called the *princeps senatus* ("first on the role call of the Senate") as well as *imperator* (commander) of the Roman army. Never again did any man hold the office of *dictator* for as long as Rome existed. In the twentieth century, the word dictator was applied in this very Caesarian sense to Hitler, Mussolini, Stalin, and a host of petty tyrants.

But Caesar is not the model of a Roman *dictator*. The man who personified the title in full was Lucius Quinctius Cincinnatus. He is the man for whom the present day Society of the Cincinnati is named. His name was one of the most honored in the history of the Roman republic. He was a role model for George Washington, who was one of the founding members of the Society of the Cincinnati. The Romans invoked the office of *dictator* only during times of great national crisis. Will Durant describes this peculiar institution of Roman government.

> If all these maneuvers failed, a last bulwark of social order remained – dictatorship. The Romans recognized that in times of national chaos or peril their liberties and privileges, and all the checks and balances that they had created for their own protection, might impede the rapid and united action needed to save the state. In such cases the Senate could declare an emergency, and then either consul could name a dictator. In every instance but one the dictators came from the upper classes; but it must be said that the aristocracy rarely abused the possibilities of this office. The dictator received almost complete authority over all persons and property, but he could not use public funds without the Senate's consent, and his term was limited to six months or a year. All dictators but two [Sulla and Caesar] obeyed these restrictions, honoring the story of how Cincinnatus, called from the plow to save the state (458 B.C.), returned to his farm as soon as the task was done.

The Roman historian Livy tells us the story of Cincinnatus. The following is an excerpt:

> [Five] horsemen were sent out through the enemy's outposts and carried to Rome the news that the consul and his army were beleaguered. Nothing more surprising or unlooked-for could have happened. And so the alarm and the consternation were as great as if it had been the City, not the camp, which the enemy were investing. They sent word for the consul Nautius; but deeming him unequal to their defense, and resolving to have a dictator to restore their shattered fortunes, they

agreed unanimously on the nomination of Lucius Quinctius Cincinnatus.

> What followed merits the attention of those who despise all human qualities in comparison with riches, and think there is no room for great honors or for worth but amidst a profusion of wealth. The sole hope of the empire of the Roman People, Lucius Quinctius, cultivated a field of some four acres across the Tiber, now known as the Quinctian Meadows, directly opposite the place where the dockyards are at present. There he was found by the representatives of the state. Whether bending over his spade as he dug a ditch, or plowing, he was, at all events, as everybody agrees, intent upon some rustic task. After they had exchanged greetings with him, they asked him to put on his toga, to hear (and might good come of it to himself and the republic!) the mandates of the senate. In amazement he cried, "Is all well?" and bade his wife Racilia quickly fetch his toga from the hut. When he had put it on, after wiping off the dust and sweat, and came forth to the envoys, they hailed him Dictator, congratulated him, and summoned him to the City, explaining the alarming situation of the army. . . The plebeians too were gathered in great numbers; but they were by no means so rejoiced at the sight of Quinctius because they thought, that not only was his authority excessive, but that the man was even more dangerous than the authority itself. . .
>
> [The] dictator appeared before the people; proclaimed a suspension of the courts; ordered the shops to be closed all over the City; and forbade anybody to engage in any private business. He then commanded all those who were of military age to come armed, before sunset, to the Field of Mars, bringing each enough bread to last five days, and twelve stakes; those who were too old for war he ordered to prepare food for their neighbors who were soldiers, while the latter were getting their arms in order and looking for stakes. So the young men ran this way and that in search of stakes, and every one took them from the nearest source, nor was anyone interfered with; and all presented themselves promptly as the dictator had commanded. Then, having drawn up their columns so as to be ready for fighting as well as for marching, if need were, the dictator himself led the legions, the master of the horse his cavalry. . .
>
> Then, keeping the order of the march, he led out the whole army in a long column and surrounded the enemy's camp, commanding that at a given signal the troops should all raise a shout, and that after shouting every man should dig a trench in front of his own position and erect a palisade. . . Their cheer resounded on all sides of the enemy, and passing over their camp, penetrated that of the consul; in the one it inspired panic, in the other great rejoicing. . . Then the troops of Quinctius . . . assailed the rampart of the Aequi. Here was a new battle on their hands, and the other not yet in the least abated. At this, hard-driven by a double danger, they turned from fighting to entreaties, and on the one hand implored the dictator, on the other the consul, not to make the victory a massacre, but to take their arms and let them go. . .
>
> At Rome the senate . . . commanded Quinctius to enter the gates in triumph, with the troops that accompanied him. . . It is said that tables were spread before all the houses, and the troops, feasting as they marched, with songs of triumph and the customary jokes, followed the chariot like revelers. . . On the sixteenth day Quinctius surrendered the dictatorship which he had received for six months.

I recount this story here for five reasons. The first is to illustrate that Cincinnatus did not hold a regular office governing the day-to-day affairs of Rome but, rather, was called directly away from his private affairs into the service of the state. The second is to illustrate that the Senate and the Roman consul selected him on the sole basis of his ability to deal with the crisis. The third is to illustrate the absolute extent of his power as *dictator*. The fourth is to illustrate the speed with which he responded to the state crisis. The fifth is to illustrate how he voluntarily laid down this power immediately after the crisis was resolved, only sixteen days into a six month term, and returned to his meager farm. The student of American history will recognize in this story the example General Washington followed

after victory was achieved and the American Revolution had been won. Cincinnatus personifies and lends his name to the idea of the tribunal of the Cincinnati proposed in this treatise.

The role of the Cincinnati is not to *oblige* the government to control itself *because assuming this obligation is already pledged by our elected officials when they take the oath to preserve, protect, and defend the Constitution of the United States against all enemies, foreign and domestic*. This pledge is not made to God but to the American people themselves. But some men easily forget or break their oaths. The role of the Cincinnati is to *insure* the government *does* control itself and remains the servant, not the master, of the Sovereign. Once more, "That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." The principle is not that our government *ought* to control itself, but rather that it is *required* to control itself by virtue of a social compact its agents undertake with and are bound by to *every* citizen. Only then can justice for all be established and insured upon a firm foundation. If agents of government violate this public trust, no matter their reasons whatsoever, the outcome is *injustice*.

The absolute power bestowed upon those persons who serve as tribunes in the Cincinnati can and must only be bestowed upon persons of the highest qualifications and civic morality. They must be learned and knowledgeable in the principles of representative government and the Social Contract. They must understand the Constitution of the United States, its six general objectives, and the specific reasoning that went into its design, as documented in T*he Records of the Federal Convention of 1787* and *The Federalist*. They must be persons with no personal interest or stake in any branch of government or any political party. They must be persons with the qualities of sound judgment, practical thinking, high intellectual merit, exceptional civic learning, personal courage, tough-mindedness, demonstrated abilities of achievement, and great experience. They must, above all, be patriots of the first rank, possess the keenest sense of civic morality, and be committed absolutely to the principles upon which the American Republic is founded. Each person selected to serve in the tribunal of the Cincinnati must be, in other words, a modern day Cincinnatus.

Insuring this quality and character of the Cincinnati is the purpose of the first objective of implementation: ***To establish a process and a mechanism for the identification, qualification, and appointment of the members of the Cincinnati***.

The thought and reflection that must go into realizing this objective is not to be underestimated. In this regard, two suggestions can be rendered. Because of the apolitical – that is, non-party and non-official – requirement for service as a member of the Cincinnati, nominations of persons for appointment to this position of trust and responsibility should be placed in the hands of that branch of government with the greatest independence from political ties and the keenest understanding of the Constitution. Only one body in government answers to this description: the Justices of the Supreme

Court. The Justices should have the sole power to nominate; however, there must still be provided an appropriate check and balance, which means nominations should require the *advice and consent* of the Senate to insure the nominees for the Cincinnati receive the most thorough review. Furthermore, there should also be required a confirming *consent* (only) by the President and Vice President of the United States, the only two citizens who *nationally* represent the people of the United States as a body. It should and must be made difficult to be appointed to the Cincinnati.

Secondly, because the Cincinnati may be called upon to adjudicate crisis issues in which the members of the Court itself may be involved, the Cincinnati must be as free of obligation to or control by the Court as the Court itself is from Congress and the President. This means that appointment to the Cincinnati must be for life yet still subject to tenure contingent upon *good behavior*. The question of and objections to the concept of appointment for life to various offices of government came up many times during the Constitutional Convention. Alexander Hamilton favored life terms for both the Executive and the Senate, with only "the Assembly" (House of Representatives) being elected. Hamilton said (*Records*, vol. I),

> Yes, I confess I see great difficulty of drawing forth a good representation. What, for example, will be the inducements for gentlemen of fortune and abilities to leave their houses and business to attend annually and long? It cannot be the wages; for these, I presume, must be small. Will not the power, therefore, be thrown into the hands of the demagogue or middling politician, who for the sake of a small stipend and the hopes of advancement, will offer himself as a candidate, and the real men of weight and influence, by remaining at home, add strength to the state governments? I am at a loss to know what must be done – I despair that a republican form of government can remove the difficulties. Whatever may be my opinion, I would hold it however unwise to change that form of government. . . 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. . . Can a democratic assembly, who annually resolve in the mass of the people, be supposed steadily to pursue the public good? Nothing but a permanent body can check the imprudence of democracy. Their turbulent and uncontrolling disposition requires checks.

Hamilton's plan, as he admitted, was modeled along the lines of the British government, and his Senate would have been analogous to Britain's House of Lords. The Convention, of course, was not persuaded by his arguments and neither any part of the Congress nor the President were given life tenure in office. The case of the Justices of the Supreme Court, on the other hand, was a different matter. As Hamilton wrote in *The Federalist*, no. 78,

> That inflexible and uniform adherence to the rights of the constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to the necessary independence. If the power of making them was committed to either the executive or the legislature, there would be a danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for this special purpose, there would be too great a

> disposition to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws.
>
> There is yet a further and a weightier reason for the permanency of judicial office which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound by strict rules and precedents . . . and it will readily be conceived . . . that the records of these precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the station of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit characters; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity.

The case for life tenure in office for the Justices is indeed well made but, as the proverb in Matthew says, "Flesh is weak." The great counterargument against life tenure is: that once the Justices are appointed for life they might seek to usurp the supreme powers of government for themselves. Life tenure appointments require as a safeguard some means to check the temptations to seize power. This is from whence the safety valve of tenure "during good behavior" was introduced. Hamilton went on to write,

> Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established *good behavior* as the tenure of judicial offices . . . and that, so far from being blamable on this account, their plan would have been inexcusably defective if it had wanted this important feature of good government.

Justices who fail to conduct themselves with good behavior can be removed by impeachment. Here it is particularly important to note that the power to impeach was vested in the House of Representatives but the power to try impeachments was given to the Senate. In *The Federalist*, no. 81, Hamilton wrote,

> It may in the last place be observed, that the supposed danger of judiciary encroachments on the legislative authority . . . is, in reality, a phantom. . . This may be inferred with certainty from the general nature of the judicial power; from the objects to which it relates; from the manner in which it is exercised; from its comparative weakness; and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check, which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There can never be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it while this body was possessed of the means of punishing their presumption by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords, at the same time, a cogent argument for constituting the senate a court for the trial of impeachments.

We see stated here one of the principal reasons the Court was not given the power to also act as an enforcement agency, and why that power was delegated to the executive branch of government. We

also see that the mechanism of impeachment provides the positive check on the behavior of Justices. This essential part of the system of checks and balances is why this treatise does not advocate turning over enforcement power to the hands of the Supreme Court, and why, in consequence, the imperfection this creates calls for the institution of the Cincinnati.

But the absolute power, during periods of constitutional crisis, that the Cincinnati would be given greatly increases the potential dangers associated with life tenure unless that tenure be revocable under the condition of bad conduct on the part of one or more of its members. And this brings us to the second objective of implementation: ***To implement a mechanism for the impeachment of appointees to the Cincinnati, and removal from office, for reason of misconduct by any member of that body***.

Because of the extraordinary demand for members of the Cincinnati to be persons of the highest *civic* morality, this power of impeachment must go beyond the normal restriction, used in all other cases of government office, that such misconduct be misconduct in office – i.e., political misconduct. In the case of the Cincinnati, it must extend to private as well as public misconduct. There is, of course, a difference between the misconduct of getting a traffic ticket and felony misconduct, and the scope of impeachable misconduct must reflect a certain degree of common sense. Furthermore, there are two distinct and recognizable situations in which the impeachment power is exercised. The mechanisms of impeachment must duly recognize the difference between the two.

The first, and far simpler case, is misconduct of a member discovered and brought forth at times when the Cincinnati is not convened. Except when duly called upon to act, the Cincinnati has no powers or special privileges, its members are ordinary citizens, and do not act in the capacity of agents of the government. In this case, there seems to be no compelling reason to circumvent the usual constitutional mechanism, i.e., impeachment by the House of Representatives and trial by the Senate. Misconduct in this case, if the member be found guilty by trial in the Senate, amounts to violation of the public trust previously given that member. Impeachment amounts to no more than revocation of that trust previously given to a particular member of that body.

The second case is more complex, difficult, and far more important. It is the case where the actions of the Cincinnati, *when convened and exercising its authority*, violate the public duties entrusted to that body. The impeachment mechanism in this case requires an abundance of protections. A starting point for deliberations on that vexing question of *Quis custodiet ipsos custodes?* for this case is provided by the following propositions.

Here the most pertinent lesson to be learned from history does not come out of our own American experience but, rather, from Germany on March 23, 1933. In *The Rise and Fall of the Third Reich* William Shirer wrote,

> Before [the Reichstag] was the so-called Enabling Act . . . Its five brief paragraphs took the

> power of legislation, . . . approval of treaties with foreign states, and the initiating of constitutional amendments, away from Parliament and handed it over to the Reich cabinet for a period of four years. Moreover, the act stipulated that the laws enacted by the Cabinet were to be drafted by the Chancellor [Hitler] and "might deviate from the constitution." No laws were to "affect the position of the Reichstag" – surely the cruelest joke of all – and the powers of the President remained "undisturbed."
>
> Hitler reiterated these last two points in a speech of unexpected restraint to the deputies assembled in the ornate opera house . . . whose aisles were now lined with brown-shirted storm troopers, whose scarred bully faces indicated that no nonsense would be tolerated from the representatives of the people. . . The vote was soon taken: 441 for, and 84 (all Social Democrats) against. The Nazi deputies sprang to their feet shouting and stamping deliriously . . .
>
> Thus was parliamentary democracy finally interred in Germany. Except for the arrests of the Communists and some of the Social Democratic deputies, it was all done quite legally, though accompanied by terror. Parliament had turned over its constitutional authority to Hitler and thereby committed suicide, though its body lingered on in an embalmed state to the very end of the Third Reich[.]

It is all too evident that an improper and unchecked implementation of the Cincinnati could be perverted into an American "Enabling Act" unless sure and sufficient safeguards are set in place. In this regard, it is key to remind ourselves of the purpose of the Cincinnati: to adjudicate constitutional disputes between the branches of government, and to, if necessary, enforce compliance with the judgments, laws, or directives *of that branch of government* (judicial, legislative, or executive) in whose favor the issue is decided. It is the adjudicating and enforcement power of the Cincinnati that is to be absolute; authority is not given to that body to create legislation or amend the Constitution. Further, as will be discussed below, the Cincinnati is not a permanent body and is convened *only for the purpose of specific resolution of a specific issue*. Any action it takes that oversteps or goes beyond the resolution of the specific issue for which it was called into session *constitutes civic misconduct by that body and is sufficient ground for the full impeachment and removal of its authority*.

The practical problem presented is, of course, *how the agencies of enforcement are to know which authority they are to obey*. The Cincinnati, being a tribunal of a small number of select private citizens, does not possess its own police force or military arm. It can exercise its enforcement powers only through the agencies of the Justice Department and the Armed Forces, and this only through duly authorized chain of command. It is empowered to act only on a specific matter, and only for so long as is necessary to bring this matter to a closing resolution. It is convened only to settle a constitutional crisis, and if its actions are perverted for any other purpose, its authority is and ought to be void. The question then becomes: who judges the constitutional authority of actions of the Cincinnati?

And so again we return to that centuries old riddle: *Quis custodiet ipsos custodes*? But for the situation just outlined, the answer to that question in this particular seems quite clear and unmistakable. The purpose of the Cincinnati is to resolve disputes among the branches of government, not overthrow or replace them. If all three branches *jointly* agree that the actions of the Cincinnati

constitute abuse of power and misconduct in office, this would be sufficient reason to *immediately* impeach that body as a whole and remove its authority to act. The specific details of how a declaration is made voiding the powers of the Cincinnati are important and must be worked out carefully and thoughtfully prior to an actual implementation of the Constitutional structure of the Cincinnati. One reasonable starting point for debate and deliberation might be this: A *unanimous* joint resolution by the President of the United States, the Speaker of the House of Representatives, and the Chief Justice of the Supreme Court, declaring the Cincinnati dissolved, is sufficient to terminate its authority and power *immediately*, and return all power to the Constitutional branches of government *as if the Cincinnati had never existed at all*.

It is better by far to temporarily put up with a factious republican government than to fall victim to a cabal of oligarchs. If all three branches of government, as represented by the leaders of these branches, concur that the Cincinnati is violating the purpose for which it was formed, this in itself provides a necessary check and balance against the possibility of a perverted dictatorship taking hold. However, the extraordinary power vested in the Cincinnati likewise raises the need for extraordinary protective measures to insure that no small cabal of individuals can succeed in seizing unconstitutional power. It is easily conceivable that if the Cincinnati were guilty of forming such a cabal, they would equally well be capable of co-opting one of the three officials just named to prevent a unanimous vote.

There is, therefore, a need for a reserve measure of protection of the Sovereign interest. Because the fundamental duty of the Cincinnati is to adjudicate constitutional disputes on one specific matter, the constitutionality of their actions is clearly defined and can be judged by qualified members of the judiciary of the nation. This at once suggests a second protective judicial tier, namely *the chief justices of the state supreme courts*. If a vote of the majority of the state chief justices finds that the Cincinnati is in violation of their constitutionally prescribed duty to limit their use of power to the specific matter for which they were convened, this vote would override that of the federal reviewers and immediately impeach and dissolve the Cincinnati. The size of this body provides a number of judges small enough for debate and deliberation, yet large enough to provide protection against the formation of a dictatorial cabal.

We can see from these considerations why it was earlier emphasized that members of the Cincinnati cannot themselves be elected office holders, or officials or leaders of any political party, or of any powerful special interest, and must represent only the general interest of the Sovereign itself. It may also be seen why, in all these considerations, the House of Interests, once constitutionally established, has no role in either the appointment of the Cincinnati or in the judgment of their conduct. A special interest is not a general interest, and the Cincinnati is a body constituted to represent nothing else than the general interest of the Sovereign.

§ 4.3 The Objectives of Implementation for the Cincinnati: Part II

Next we come to the third objective of implementation: ***To implement a mechanism for calling upon the Cincinnati to convene and be empowered to perform its duty***.

The nature of the circumstances under which the Cincinnati is convened follows from the prime objective for this judicial reform. The Cincinnati is an extraordinary body, and one which would never be required if the men acting as the agents of the Sovereign in government were perfect servants of the people. Its sole reason for existence stems from the fact that our agents are not perfect men, and men who seek to usurp power have occupied our high offices from time to time dating from the days of Aaron Burr to those of the second President Bush.

The principal responsibility for establishing justice in our republic, and for judicial review of laws and interpretation of the Constitution, is vested in the Supreme Court. The judicial authority of the Supreme Court is provided for in Article III, Sec. 2 of the Constitution as amended by the Eleventh Amendment:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; ~~between a State and citizens of another State;~~[5] between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States~~, citizens or subjects~~[5]. The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State[6].
>
> In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The Eleventh Amendment was a reaction by Congress to the Supreme Court's ruling in *Chisholm v. Georgia* (1793), a case in which two citizens of South Carolina sued the state of Georgia in federal court for payment of a debt. Georgia refused to answer the summons to trial, and the Supreme Court ruled in favor of Chisholm by default. In response to that case, Congress removed the jurisdiction of the federal courts over lawsuits against a State by citizens of another state or foreign country. It is by today's standards a curious anachronism left over from our country's early view of the states as sovereign nations. It was a factor in the lawsuit leading to the Supreme Court's controversial split decision over the presidential election results of 2000, inasmuch as that suit was filed as *Bush v. Gore* rather than as a suit by either party against the state of Florida; had the suit been filed against the state

[5] This clause was struck by the Eleventh Amendment.
[6] This is the Eleventh Amendment.

of Florida, the Supreme Court would have had no jurisdiction over it and the case would have been heard and decided upon by Florida's state courts.

Constitutionally, the Supreme Court has jurisdiction over "cases in law and equity" concerning public officials of the general government. However, the Court is nowhere granted the authority to *initiate* a lawsuit. There is a hard element of common sense in this because, were the Court to initiate a lawsuit, then *ipso facto* the Court becomes a party to the suit and, as Madison observed in *The Federalist*, no. 10,

> No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay, with greater reason, a body of men are unfit to be both judges and parties at the same time; yet, what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens?

By the same reasoning, neither Congress nor the Executive can file a suit against the actions of the Supreme Court. If Congress is displeased by the actions of the Court it, and it alone, has the power to make its displeasure felt through the process of Constitutional amendment, as it did in the case of the Eleventh Amendment. But if the Court should render a decision and then this decision is flouted by the President or by Congress (without acting through the process of Constitutional amendment), what recourse is there for remedy? Or, again, should it ever happen that the Justices of the Supreme Court should render an egregious ruling subversive to the conformity of the Constitution with the Social Contract, what recourse for remedy exists? It is difficult to imagine even a hypothetical case where this might take place, given the relative powerlessness of the Court in comparison with the other two branches; yet it is not impossible to hypothesize that some sort of cabal might be formed between the Court and the Congress to unconstitutionally usurp the power of the Executive branch.

All of these situations are clearly ones that, when or should they arise, present the gravest danger to the Sovereign and the most severe potential for injustice through abuse of power. It is to remedy this, *and to better insure the establishment of justice for the Sovereign and all its citizens*, that the body of the Cincinnati is proposed as the representative tribunal of the Sovereign as a whole. Here something Rousseau wrote is of immediate pertinence:

> What we have just said . . . makes it clear that the institution of government is not a contract, but a law; that the depositories of the executive power are not the people's masters, but its officers; that it can set them up and pull them down when it likes; that for them there is no question of contract, but of obedience; and that in taking charge of the functions the State imposes on them they are doing no more than fulfilling their duty as citizens, without having the remotest right to argue about the conditions. . .
>
> It is true that such changes [to the order of government] are always dangerous, and that the established government should never be touched except when it comes to be incompatible with the public good; but the circumspection this involves is a maxim of policy and not a rule of right, and the State [that is, the Sovereign] is no more bound to leave civil authority in the hands of its

> rulers than military authority in the hands of its generals.
>
> It is also true that it is impossible to be too careful to observe, in such cases, all the formalities necessary to distinguish a regular and legitimate act from a seditious tumult, and the will of a whole people from the clamor of a faction. Here above all no further concession should be made to the untoward possibility that cannot, in the strictest logic, be refused it. From this obligation the prince derives a great advantage in preserving his power despite the people, without its being possible to say he has usurped it; for, seeming to avail himself only of his rights, he finds it very easy to extend them, and to prevent, under the pretext of keeping the peace, assemblies that are destined to the re-establishment in order; with the result that he takes advantage of a silence he does not allow to be broken, or of irregularities he causes to be committed, to assume that he has the support of those whom fear prevents from speaking, and to punish those who dare to speak. Thus it was that the *decemvirs*[7], first elected for one year and then kept on in office for a second, tried to perpetuate their power by forbidding the *comitia*[8] to assemble; and by this easy method every government in the world, once clothed with the public power, sooner or later usurps the sovereign authority.
>
> The periodical assemblies of which I have already spoken are designed to prevent or postpone this calamity . . . The opening of these assemblies, whose sole object is the maintenance of the social treaty, should always take the form of putting two propositions that may not be suppressed, which should be voted on separately:
>
> The first is: "Does it please the Sovereign to preserve the present form of government?"
>
> The second is: "Does it please the people to leave its administration in the hands of those who are actually in charge of it?"

It is an obvious impracticality to turn to the ancient idea of the Greek or Roman assemblies in a nation consisting of millions of people geographically dispersed across the breadth of a continent. The Cincinnati is the representative body acting for and in the place of such an assembly "whose sole object is the maintenance of the social treaty." There is a legal term particularly well suited to describe the act of calling this body to gather[9], namely ***the writ of mandamus***. The term "mandamus" means "We command!" and the writ is an instruction to a public officer to do his public duty. The nature of the duty assumed by the Cincinnati clearly points to who should hold the authority to issue such a writ, namely *any of the parties involved in a dispute over Constitutional power and authority*: the Supreme Court, the House of Representatives, the Senate, or the President of the United States.

The ease with which the Cincinnati could be convened by a grievance from any *one* of these parts of the general government, coupled with the absolute authority possessed by the Cincinnati once it is so called into being, should act as an obvious check upon *all* branches of the general government to not let things get so far out of hand as to move any one of these to take this extreme step. Convening of the Cincinnati at once disempowers *all* branches of the general government insofar as the specific matter of the writ is concerned, and no party to a Constitutional dispute can be certain of how the Cincinnati will decide the matter. The natural unwillingness of the members of these branches to cede

[7] The *decemvirs* were a committee of ten men appointed by the Roman Senate to formulate the Roman legal code that became known as the Twelve Tables.
[8] The term denoting the popular assemblies of the Roman Plebian classes of citizens.
[9] Either physically in one place or, as is now possible through modern technology, via electronic conferencing.

their own authority should then, all by itself, act as a factor of self-interest on the part of the members of the general government motivating them to control themselves and to seek to settle their disputes more calmly and without the instigation of a power struggle among themselves. Rousseau's first proposition as stated above can hardly help but be a chilling force acting to favor self-restraint on the part of the highest officials of the government.

To summarize this point: the third objective of implementation is the establishment of procedure by which any of the four named branches of the general government may issue a writ of mandamus, stating the specific constitutional issue and naming the parties involved, summoning the Cincinnati to convene and adjudicate.

This brings us to the fourth objective of implementation: ***To establish the constitutional mechanism by which the Cincinnati is provided the power to enforce its decisions***.

This objective goes straight to the heart of Rousseau's second proposition above. If one or more of the duly constituted regular branches of the general government should act in defiance of the decisions of the Cincinnati for resolving the constitutional crisis, this in and of itself presents the gravest threat to representative government of the nation. Such an act *ipso facto* constitutes a *criminal act* of the highest possible order, and the sole purpose behind providing the check on government vested in the hands of the Cincinnati is and can only be *righting that injustice done to the Sovereign*. The voice of the Cincinnati is to be the immediate voice of the Sovereign itself, and in a republic the Sovereign is always the supreme authority.

There is vested in the hands of government two distinct agencies for the enforcement of the limited powers of the general government: the Department of Justice and the Armed Forces of the United States. Both of these powers of enforcement, under normal circumstances, lie ultimately in the hands of the President of the United States. However, in the extraordinary circumstance that calls up the convening of the Cincinnati, this presidential authority becomes penultimate and subservient to the authority of the Cincinnati. It follows immediately from this that the highest authority over the Department of Justice and the Department of Defense transfers to the Cincinnati upon the occasion of its convening *excepting only that the authority of the Cincinnati does not extend to any act that would prevent its own impeachment* by joint resolution of the Speaker of the House, the President, and the Chief Justice of the Supreme Court, as discussed earlier, or by vote of the chief justices of the state supreme courts.

The Cincinnati, therefore, does not and cannot possess the constitutional authority to remove the Speaker, the President, the Chief Justice, or any of the state chief justices from their offices during the term in which the Cincinnati is convened. It can, however, instruct the House of Representatives to convene and hold impeachment proceedings against any official in any branch of the general

government, and to require, in the event of such impeachment, trial in the Senate. In this case, the power of Congress to impeach and remove from office shall not be prejudiced by the Cincinnati. The agents of the Department of Justice and the Department of Defense are thereby bound to obey the directives of the Cincinnati only up to the point where the Cincinnati itself transgresses this limitation of its authority, and are equally obligated to refuse to obey directives that transgress this boundary.

§ 4.4 Constitutional Amendment

It was stated earlier that there is one exceptional circumstance in which the Cincinnati ought to be convened automatically and without requiring a writ of mandamus. This circumstance is in the event that Congress ratifies an amendment to the Constitution of the United States.

There is an all-too-evident reason for involving the Cincinnati, ***in its adjudicative power only***, in the process of constitutional amendment. This is *to prevent violation of the Social Contract through the mechanism of constitutional amendment*.

Despotism of the majority can always be implemented through the amendment process. Powerful political parties enable such injustice, as does a popular and emotional furor over some issue. The record of Congress in resisting unjust populism is a mixed record. Congress has acted responsibly many times in turning back unjust amendments, but it has also on occasion given in to popular pressure or the desires of political party leadership. The outstanding example of this is the Eighteenth Amendment: Prohibition. Some apologists for the ratification of this failed amendment have called it "a noble experiment," but this label is ridiculous. The Prohibition amendment was nothing else than the imposition of a religiously-motivated constraint placed upon the citizens of this country in outright violation of the terms of the Social Contract.

Let it be clearly recognized: The electorate at large has no direct vote on the ratification of a constitutional amendment. Neither does the Supreme Court have a voice in the process (nor should it). The President of the United States has no veto power over it. Two-thirds of the states must ratify any constitutional amendment, but this restriction does not mean the legislatures of those states must consult the people before acting. Nor would direct recourse to popular vote safeguard against injustice perpetrated by means of constitutional amendment; rather, such a recourse only favors the tyranny of the majority over the minority.

The case of the state of Idaho can serve as a clear example of the dangers inherent with making it too easy to amend the Constitution. The Idaho State Constitution is a completely ineffectual safeguard of the civil liberties of the citizens of that state. It is effortlessly amendable by the current soviet legislature, and even the threat of amending it is sufficient to silence voices of protest over unjust acts or derelictions of duty by that state's legislative body. For almost two decades, Idaho has been *ruled* by

a small cabal of men whose power has proven irresistible and unchecked.

The Social Contract does not serve the Constitution; the Constitution serves, and must always serve, to preserve, protect, and defend the terms of the Social Contract. History has proven that the current process of constitutional amendment can be abused and turned against the civil liberty of the people. It is therefore altogether fitting that, before any proposed amendment to the Constitution can become a law of the land, *its compliance with the terms of the Social Contract must be judged*. It follows from this principle: Before any constitutional amendment can be submitted to the states for ratification, the Cincinnati must convene ***for the sole purpose of judging if that amendment is just within the terms of the Social Contract***. This tribunal would have no other constitutional authority than this. It could not invoke its powers of enforcement *unless the Congress should subsequently ignore its ruling and the amendment be presented to the states for ratification*. The Cincinnati could not ratify the proposed amendment. It could not amend the proposed amendment. It's sole judiciary discretion would be the power to veto or not veto the proposed amendment, to transmit the reasons for its veto, in that event, to the Congress, and to enforce its veto power if Congress acts in defiance of the judgment.

§ 5. Moral Leadership Preparation of the Cincinnati

It is possible there might have been a time – and according to some scholars there was – when it would not have been necessary to include this section in this treatise. But if so, that time is now in the distant past. Robert M. Hutchins wrote,

> What is a liberal education? It is easy to say what it is not. It is not specialized education, not vocational, avocational, professional, or preprofessional. It is not an education that teaches a man how to do any specific thing.
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> I am tempted to say that it is the education no American gets in an educational institution nowadays. We are all specialists now. Even early in high school we are told that we must begin to think how we are going to earn a living, and the prerequisites that are supposed to prepare us for that activity become more and more the ingredients of our educational diet. I am afraid we shall have to admit that the educational process in America is either a rather pleasant way of passing the time until we are ready to go to work, or a way of getting ready for some occupation, or a combination of the two. What is missing is education to be human beings, education to make the most of our human powers, education for our responsibilities as members of a democratic society, education for freedom.
>
> This is what liberal education is. It is the education that prepares us to be free men. You have to have this education if you are going to be happy; for happiness consists in making the most of yourself. You have to have this education if you are going to be a member of the community; for membership in the community implies the ability to communicate with others. You have to have this education if you are going to be an effective citizen of a democracy; for citizenship requires that you understand the world in which you live and that you do not leave your duties to be performed by others, living vicariously and vacuously on their virtue and intelligence. A free society is a society composed of free men. To be free you have to be educated for freedom. This means you have to think; for the free man is one who thinks for himself. It means that you have to think, for example, about the aims of life and of organized society.

Hutchins wrote these words in 1959. He wrote them at a time when American universities still paid lip service to delivering a liberal education that prepared students for leadership and success in our democracy, but which in fact had already lost the spark of liberal education and presented nothing more than a facade of liberal education. The civil war upheavals of the 1960s brought even this facade crashing to the ground. Allan Bloom wrote,

> About the sixties it is now fashionable to say that although there were indeed excesses, many good things resulted. But, so far as universities are concerned, I know of nothing positive coming from that period; it was an unmitigated disaster for them. I hear the good things were "greater openness," "less rigidity," "freedom from authority," etc. – but these have no content and express no view of what is wanted from a university education. . . The old core curriculum – according to which every student in the college had to take a smattering of courses in the major divisions of knowledge – was abandoned. . . You don't replace something with nothing. Of course, that was exactly what the educational reform of the sixties was doing. . . The criticism of the old is of no value if there is no prospect of the new. It is a way of removing the impediments to vice presented by decaying virtue. In the sixties the professors were just hastening to fold up their tents so as to be off the grounds before the stampede trampled them. . .
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> The reforms were without content, made for the "inner-directed" person. They were an acquiescence in a leveling off of the peaks, and were the source of the collapse of the entire American educational structure, recognized by all parties when they talk about the need to go "back to the basics." This collapse is directly traceable to both the teachings and the deeds of the universities in the sixties. . . Now it may be possible, with a lot of effort and political struggle, to return to earlier standards of accomplishment in the three R's, but it will not be so easy to recover the knowledge of philosophy, history, and literature that was trashed. . . Once broken, our link with it is hard to renew. The instinctive awareness of meanings, as well as the stores of authentic learning in heads of scholars, are lost.

Unfortunately, Bloom is far more right than wrong in his morbid assessment of the state of civic education in the United States today. He is probably wrong to lay the exclusive blame for these problems on his colleagues of the sixties, however valid his indictments of their moral cowardice and turpitude might be. The seeds of decay were planted much earlier, at the end of the nineteenth century, when Harvard University led the way in championing a "new model" of education, called the "open inquiry" model. Harvard president Charles William Eliot believed that students allowed earlier and more intense specialization would develop their particular talents to a high level – producing in time a meritocracy where the so-called most able and best-*trained* men would rise to positions of power, responsibility, and wealth. His and like-minded academic leaders' views prevailed over those of their critics, who argued that the maintenance of the classics was the only way to ensure the achievement of liberal education's goals, particularly its moral and civic goals.

The new curriculum, it was argued, would better foster mental discipline and, that by training one's mind in one subject, the student would then be prepared to learn in other areas as well because one subject could serve as well as any other for acquiring mental discipline. This is all well and good if there is something to act as an incentive for the person to afterwards expand his breadth of knowledge into greater arenas not immediately and daily connected with that person's occupation and normal

concerns. But what serves as such an incentive? The verdict of American twentieth century history has been: Nothing. The new curriculum was based on a comforting pseudo-psychology that a practical-minded individual could easily see ran contrary to the facts of life. Somewhat ironically, Harvard psychologist and philosopher William James had written (1890),

> This brings us by a very natural transition to the *ethical implications of the law of habit*. They are numerous and momentous. . . Habit is thus the enormous fly-wheel of society, its most precious conservative agent. It alone is what keeps us all within the bounds of ordinance . . . It alone prevents the hardest and most repulsive walks of life from being deserted by those brought up to tread therein. . . It dooms us all to fight out the battle of life upon the lines of our nurture or our early choices, and to make the best of a pursuit that disagrees, because there is no other for which we are fitted and it is too late to begin again. . . Already at the age of twenty-five you see the professional mannerisms settling down on the young commercial traveler, on the young doctor, on the young minister, on the young counselor-at-law. You see the little lines of cleavage running through the character, the tricks of thought, the prejudices, the ways of the 'shop,' in a word, from which the man can by-and-by no more escape than his coat-sleeve can suddenly fall into a new set of folds. . .
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> If the period between twenty and thirty is the critical one in the formation of intellectual and professional habits, the period below twenty is more important still for the fixing of *personal* habits . . . The great thing, then, in all education, is to *make our nervous system our ally instead of our enemy*. It is to fund and capitalize our acquisitions, and live at ease upon the interest of the fund. *For this we must make automatic and habitual, as early as possible, as many useful actions as we can*, and guard against the growing into ways that are likely to be disadvantageous to us, as we should guard against the plague. The more details of our daily life we can hand over to the effortlessness of automatism, the more our higher powers of mind will be set free for their own proper work.

Unlike Eliot, James was a renowned psychologist; he established the first experimental laboratory for psychology in the United States and was the most prominent American psychologist at the turn of the century. Unfortunately, it was Eliot's narrow-mindedness program of education that won out and James' dictum for acquisition of a broad spectrum of learning did not. Today's growing recognition of the urgent need for greater "interdisciplinary learning" is but a late-coming recognition of the fruits of this failed educational experiment. Some ask today, "Where have our great democratic statesmen and leaders gone?" To answer: why should we expect there to be any when we take no pains to grow them? A *laissez faire* reliance upon personal accident and individual circumstances is at its roots an unreliable reliance.

All of this is part and parcel of a much larger issue, and one we will take up at length in the tenth chapter of this treatise. For the local purposes of *this* chapter, the central concern is the following. The power and authority vested in the hands of the Cincinnati as proposed in this treatise is far too dangerous to representative government to entrust into the hands of persons unprepared and un-learned in the foundational principles of the Idea of the American Republic. Members of this body must be individuals of the very highest *civic* morality, the strongest commitment to the duties of citizenship, and who are uncompromising in regard to the first principles of the Republic.

It would be the most dangerous and irresponsible folly to presume a man's credentials or his station in life automatically suits and prepares him for a day when he might be called upon to render the most momentous of decisions and take the most courageous actions his nation might be forced to call upon him to perform. Speaking of one of his Cornell colleagues of the sixties, Bloom wrote,

> One of the pious sermonizers who failed to speak out and who fancied himself a political philosopher wrote an article for *The New York Times Magazine* explaining to the world why capitulation [to the student radicals] had been necessary at Cornell. The "social contract," he averred, was about to be broken, and we would have returned to "the state of nature," the war of all against all, the worst evil, so that anything to keep that from happening was justified. He proved therewith that he had never understood what he had been teaching, for the contract theorists (from whose teachings the American form of government was derived) all taught that the law [of the social contract] must never be broken, that the strength of the law is the only thing that keeps us away from the state of nature, therefore that risks and dangers must be accepted for the sake of the law. Once the law is broken with impunity, each man regains the right to any means he deems proper or necessary to defend himself against the new tyrant, the one who can break the law.

Bloom's scathing criticism of this colleague is entirely correct and entirely justified. When the time came for the professors of the sixties to *apply* the knowledge of which they were supposed by all to be the masters, they did not know how; and so the last pitiful remnants of liberal education in America were washed away in the tide of civil violence and radical propaganda that swept the colleges and the nation during that time. We have never recovered from it; we have never tried to recover from it.

Yet there are isolated pockets where the lessons of civic morality held out against the tide. One of them is the United States Air Force Academy in Colorado Springs, Colorado. As a country we are not altogether without scholarly resources, not without a few scattered and isolated teachers of the principles and Ideas of the American Republic. Before any member of the Cincinnati ever takes up his commission, before ever this body first convenes, it is an absolute responsibility that a course of education be established for the purpose of positively insuring every person handed the awesome public trust of this position be specifically and thoroughly educated in what is expected from one who holds such a supreme position of trust.

This means, furthermore, that the educators called upon to provide this education must be carefully screened and selected, and *not* by academic review panels – for the state of the academy in this field is largely bankrupt – but by those rare individuals who have *demonstrated* through public service that they themselves understand, and are committed to, these principles and ideas, who have *demonstrated* what President Kennedy called a Profile of Courage, and who have *demonstrated* sound judgment for selecting those who are to teach and impart the lessons of representative government and civic morality that must be the essence of those who are chosen to serve as Cincinnati. Accidents of up-bringing and circumstance still occasionally produces such civic leaders, and we must take advantage of this until such time as other reforms can make the growth of such leaders purposive and reliable.

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