



# IMPRIMIS

Because Ideas Have Consequences  
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## THE MORAL FOUNDATIONS OF REPUBLICAN GOVERNMENT

By Edwin Meese III

**Editor's Preview:** One hundred ninety-nine years old and counting, the Constitution is one of the most important documents in American history. Yet in the past decades the Constitution has been relegated to the status of a museum piece rather than a practical and valid tool of law. Critics of the Supreme Court charge that Justices increasingly render decisions, not according to the constitutional merits of a case, but in light of their own agendas. Several of the Justices, most notably William Brennan, do not dispute this. They agree with the school of legal realism, dominant today in the nation's law schools, that the Constitution is outdated and the original intentions of its framers irrelevant, that only the Supreme Court can say what the law is, and that its definitions must keep up with the times.

In this essay, Attorney General Edwin Meese takes issue with the legal realists. He carefully recounts the reasons why the Constitution was written and offers an explanation for its enduring importance in our history. His remarks imply that the authority of the Constitution ought to be restored, and that amendments ought to be put before the states according to the provisions of Article V, not simply enacted in the form of judicial decisions.

Taking the opportunity to pause and reflect on the roots of our freedom is always an important thing for us to do. But it is especially important now, as we prepare to celebrate the bicentennial of our Constitution. For our Constitution remains, as William Gladstone, the great British statesman once described it, "the most wonderful work ever struck off at a given time by the brain and purpose of man."

Too frequently we view our Constitution primarily from the standpoint of litigation, as little more than a lawyer's brief or a judge's opinion. But it is, as you know, far more than that. Not only is the Constitution fundamental law, it is also the institutional expression of the philosophical foundation of our political order, the basis of our very way of life. George Roche has explained



why this is so as clearly as anyone. "The Founding Fathers," he has written,

derived their principles of limiting government and protecting individual rights from a belief in Natural Law; that is, a belief that God had ordained a framework of human dignity and responsibility that was to serve as the basis for all human law and as the root assumption behind a written constitution.

During this bicentennial period especially it is crucial that we cast aside the notion that the Constitution is only a litigator's brief or a judge's opinion. Our task is to reawaken public opinion to the fact that our substantive constitutional values have a shape and content that transcend the crucible of litigation.

In order to successfully effect this reawakening, it is necessary to move beyond the current legal debate over jurisprudence. It is, in fact, necessary to move beyond current legal cases and controversies to the political and social milieu of the era in which our Constitution was

written. We need to understand that generation of founders not simply as a historical curiosity. Our obligation is to understand the Founders as they understood themselves.

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Now this is no small task. And, obviously, my remarks are merely an introduction to what is, by any measure, an area of inquiry as intellectually complex as it is politically rich. I would like to offer a few general observations about the moral foundations of the government the Founders designed. In particular, I will argue that the ideas of natural rights and the consent of the governed are essential to understanding the moral character of our civil society. Further, I will discuss the institutional forms of the Founders’ politics that facilitated the cultivation of virtue in our people—virtues upon which our form of government still depend.

In approaching this subject, we first need to remember that our founders lived in a time of nearly unparalleled intellectual excitement. They were the true children of the Enlightenment. They sought to bring the new found faith in human reason to bear on practical politics. Hobbes and Locke, Harrington and Machiavelli, Smith and Montesquieu—these were the teachers of our Founders. These were the authors of celebrated works that had called into question long-prevailing views of human nature and thus of politics. Our nation was created in the light cast by these towering figures. That is what Alexander Hamilton meant in *The Federalist* when he argued that

#### About the Author

Edwin Meese became the 75th attorney general of the United States on February 25, 1985. For four years prior to that, he held the cabinet-level position of counselor to the president and during Reagan’s years as governor of California, Mr. Meese served as his executive assistant and chief of staff (1969-74), and as his secretary of legal affairs (1967-68). He has also been a deputy district attorney in Alameda, California, a professor of law at the University of San Diego, a director of the Center for Criminal Justice Policy and Management, and a vice president for Rohr Industries, an aerospace and transportation company.

the “science of politics . . . like most other sciences, has received great improvement. The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients.” Our Founders, in many ways, sought to give practical effect to David Hume’s desire “that politics may be reduced to a science.”

What, then, are the moral foundations of our republican form of government? Much of the answer, I believe, can be found in our charter of fundamental principles, the Declaration of Independence. I think it is worth recalling Thomas Jefferson’s famous formulation of these first principles. “We hold these truths,” he said, “to be self-evident,”

That all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men deriving their just powers from the consent of the governed.

Now these rights were neither the result of legal privilege nor the benevolence of some ruling class. They were rights that existed *in nature* before governments or laws were ever formed. As the physical world is governed by natural laws such as gravity so the political world is governed by other natural laws in the form of natural rights that belong to each individual. These rights, like the laws of gravity, antedate even mankind’s recognition of them.

But because these rights were left unsecured by nature, as Jefferson said, governments are instituted among men. Thus there exists in the nature of things a natural standard for judging whether governments are legitimate or not. That standard is whether or not the government rests, in the phrase of the Declaration, upon the consent of the governed. Any political powers not derived from the consent of the governed are, by the laws of nature, illegitimate and hence unjust. Only by such a natural standard can arbitrary power be checked.

“Consent of the governed” is a political concept that is the reciprocal of the idea of equality. Because all men are created equal, nature does not single out who is to govern and who is to be governed. There is no divine right of kings, for example. Consent is the means whereby man’s natural equality is made politically operable.

In this theory of government, this philosophy of natural rights and the consent of the governed, we find the most fundamental moral foundation of republican government. For it presupposes a universal moral equality that makes popular government not only politically possible but morally necessary.

However accustomed we have become to ideas of natural rights and the consent of the governed, we should never forget that these were, two centuries ago, morally revolutionary ideas. During this bicentennial period we should refresh ourselves as to the truth of these ideas.

Of course, it is one thing to argue that the only legitimate foundation of government is the consent of the governed, but it is quite another matter to put this theory into practice. The key here is the Declaration's maxim that in order to secure rights "governments are *instituted* among men." It is then, by the act of choosing, by the political act of constituting a government, that the moral standard of the consent of the governed is given definite shape and formidable weight. But such an act of creation is not easy.

That is what Alexander Hamilton had in mind when he introduced the first essay in *The Federalist* by asking "whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force." For after all was said and done, after the Revolution had been won, it remained to be seen whether the glowing rhetoric of the Declaration could actually be made the standard of political practice.

One thing their recent experience with England had taught the Americans was the necessity of a constitution. And not just any sort of constitution would do. The celebrated English Constitution, after all, had allowed what they saw as a gross abuse of political power. That, we must remember, is what most of the Declaration of Independence is about: the long catalogue of abuses the Americans had suffered. This experience with the all-too-malleable English Constitution bolstered their own earlier inclinations—from the Mayflower Compact on—toward a *written* constitution. The one best way to hedge against arbitrary political power was to clearly stake out the lines and limits of the institutions that would wield power. Thus the purpose of our written Constitution was, as Walter Berns has said, to get it in writing.

This belief in a written constitution was the fulfillment of the more basic belief in the moral authority of the consent of the governed. A written constitution, when duly ratified, would stand as the concrete and tangible expression of that fundamental consent. This document would stand as testimony to the Founders' unflinching faith in (to borrow the late scholar Alexander Bickel's term) the "morality of consent."

The question facing the Americans then became how to devise such a constitution that would, in the language of the Declaration, be "most likely to effect their Safety and Happiness." Indeed, as James Madison would bluntly put it later in *The Federalist*: "A good government implies two things; first, fidelity to the object of government, which is the happiness of the people; second, a knowledge of the means by which that object can be best attained."

After the War for Independence was won, the Americans set about to secure their revolution. The states began to draft their constitutions and the confederation of the states sought to draft a constitution for its pur-



poses. By 1787, one thing had become clear. Popular government was not simply good government. The state governments, had in many instances, proved tyrannical. The national authority under the Articles of Confederation had proved inept. The period between 1776 and 1787 had shown many Americans that they did not yet possess that "knowledge of the means" by which the happiness of the people could best be secured.

By the time the Federal Convention came together in Philadelphia in May 1787, however, there was a collection of men who had thought through the causes of their present difficulties. They were convinced that the mechanics of republican government could be adjusted in order to defend against charges that it was "inconsistent with the order of society." What was at issue was the very question of the moral basis of the republican form: Could a republic be saved from its own excesses? A sufficient number of Americans believed it could. And they set about to do just that.

The new science of politics, Hamilton confidently argued, provided the "powerful means by which the excellencies of republican government may be retained and its imperfections lessened or avoided."

Now one of the basic problems of the old political order was what many began to see as an unhealthy reliance on the virtue of the people. In many ways, the earlier republicans in America, those historian Pauline Maier has dubbed the "Old Revolutionaries," had created their constitutions in light of their belief that somehow the Americans were a new breed of man, self-reliant, commonsensical and, above all, civically virtuous. They had thought themselves uniquely capable of continuing self-denial and unfaltering devotion to the public good. As a result, the constitutional order they had created depended to a great degree on "Spartan habits" and "Roman patriotism." By the mid-1780s it was clear to many that to love the public and to sacrifice personally for it was proving more easily said than done. Americans, too, it seemed, were corruptible. And this unhappy fact called into question the old assumption that Americans were somehow blessed with exceptional character.

Hamilton's perspicacious collaborator, Madison, was even more succinct. "If the impulse and opportunity be suffered to coincide," he wrote in the famous tenth *Federalist Paper*, "we well know that neither moral nor religious motives can be relied on as an adequate controul." In what is arguably one of the most famous passages in American political writing, Madison laid the theoretical foundation for the Framers' "novel experiment" in popular government. Reflecting on the institutional contrivances of the new Constitution, Madison, in *The Federalist*, No. 51 neatly captured his new theory of republican government. His theory, at its deepest level, relied on a certain understanding of human nature. Thus, he wrote, "What is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern

men, neither external nor internal controuls would be necessary." However, he concluded, "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 controul the governed; and in the next place, oblige it to controul itself." According to Madison the purpose of the Constitution's mechanics—separation of powers, bicameralism, representation, and so forth—was to hedge against an all too predictable human nature. The object was to offset "the defect of better motives." Good intentions were to be replaced by good institutions.

To many, the most shocking feature of the Framers' new science of politics was its bold and nearly unqualified reliance on the power of commerce to make civil society orderly. This was a truly radical step. Commerce, you see, had long been thought to be the primary cause of corruption of the manners and the morals of free people. And private vice, the prevailing belief held, could never produce public virtue.

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We take commerce so much for granted that this idea is puzzling to our generation. But to many of the founding generation, commerce produced greed and venality—it brought forth, as its critics said, the worst impulses of mankind. One Anti-Federalist critic of the proposed Constitution summed it up by arguing that such a reliance on commerce would encourage an "excessive fondness for riches and luxury" that would, if left untempered, and unchecked by a concern for public virtue, "totally subvert the government and erect a system of aristocratical or monarchaical tyranny," thereby losing "perhaps forever" the liberties of the people.

The new science of politics of the Constitution was as bold as those Founders who pushed the hardest for it. They were, as one historian has described them, young men of a continental vision. This was the time of Madison and Hamilton and Morris; the day of Adams and Franklin and Lee was quickly passing. They saw more in America than just America. They saw in the founding a great example for all the world. And they believed that commerce was an essential part of this vision.

So it was that these young nationalists rejected the cautious confederalism of the older generation of founders. Their object was not to secure a confederacy of small and virtuous republics of public spirited citizens. Their object was—in the words of one of their guiding

lights, Adam Smith—to establish a “great mercantile republic.” Indeed, they sought to establish nothing less than a great republican empire of commerce.

Unleashed, these nationalists believed, the commercial power of self-interest that the Anti-Federalists feared could be turned to republican advantage. By drawing people together, by making them work together for their private gain, commerce could help to tame human nature. Brutish greed would become a prudent concern for profits. A nation of shopkeepers would not be characterized by crude self-interest but by what Alexis de Tocqueville would later celebrate as “enlightened self-interest.” While commerce would surely depend upon human passions, it would also serve to moderate them. Commerce and constitutionalism together would make Americans free and prosperous at home and secure among the nations of the world. America would be, they believed, a new kind of republic in a world itself quite new.

But what of civic virtue? Would there be none? Surely there would have to be, because the new science of politics demanded it. As Madison pointed out in the Virginia ratifying convention, a certain degree of virtue was necessary if our form of civil society was to endure.

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As we have seen, the political science of the Founding Fathers did not seek to inculcate virtue in its citizens by the terms of the Constitution. But that document, as I have said, is morally praiseworthy because it *does* protect natural rights and it *does* rest upon the consent of the governed. Still, the Founders understood the relevance of what I would call the “character question.” They knew the oldest question of politics (the question Aristotle asked)—the question of what kind of people does a regime produce, what kind of character do they have—is always important.

Under the new political order of the Constitution, the cultivation of character was left to the states and the private sphere. Through the political principle of federalism, the Framers left to the people in their states sovereignty sufficient to legislate in these areas; state governments could attempt, under this scheme, directly

to promote virtue among the people. In addition, family and church and private associations were expected to provide the support for the inculcation of virtue. And, in a curious way, even the thriving commercial republic the Founders envisioned would itself promote a new kind of public virtue. It would, of course, not be virtue in the classical or the Christian sense. Nor would it be the old small republican variety starkly Spartan in its demands. Rather, it would be what the late Martin Diamond accurately described as the “bourgeois virtues”—the virtues of honesty and decency that commerce itself, that business, presupposes.

But the question we must ultimately confront is how well has our Founders’ constitutional handiwork in this regard fared? I suspect I will shock no one by suggesting that it fared very well for most of our history. For while not overtly concerned with morality, our Constitution, I submit, has produced the frame of government in which America has thrived as one of the most moral nations in the history of the world.

How is it that in America the moral concerns of republican government and the concomitant demand for individual liberty have been maintained in such a steady balance?

At its deepest level popular government—republican government—means a structure of government that not only rests upon the consent of the governed, but more importantly a structure of government wherein public opinion can be expressed and translated into public law and public policy. This is the deepest level precisely because public opinion over important public issues ultimately is a public debate over justice. It is naive to think that people only base their opinions on their conceptions of their narrow self-interest. Very often public opinion and political debates do reflect deeper concerns—if you will, moral concerns.

It is this venting of the moral concerns of a people that is the very essence of political life. In a popular form of government it is not only legitimate but essential that the people have the opportunity to give full vent to their moral sentiments. Through deliberation, debate, and compromise a public consensus can be formed as to what constitutes the public good. It is this consensus over fundamental values that knits individuals into a community of citizens. And it is this liberty to debate and determine the morality of a community that is an important part of the liberty protected by our Constitution.

The toughest political problems deserve to have full and open public debate. Whether the issue is abortion, school prayer, pornography or aid to parochial schools, the people within their communities within the several states must be allowed to deliberate over them and reach a consensual judgment.

This is not to say, of course, that the people must be allowed to choose any substantive end a majority at any given moment prefers. That is not good republican

government; that is a simplistic notion of popular sovereignty. The political theory of our Constitution rejects such a simplistic theory. As one commentator has observed, "There are certain substantive things, such as slavery, that a democratic people may not choose because those substantive ends would be inconsistent with the fundamental premises that give majorities the right to decide."

But to deny the right—the liberty—of the people to choose certain other substantive ends reduces the American Constitution to moral relativism. In that direction lies the danger, to borrow Abraham Lincoln's phrase, of "blowing out the moral lights around us."

During the past several decades an aggressively secular liberalism often driven by an expansive egalitarian impulse has threatened many of the traditional political and social values the great majority of the American people still embrace. The strong gusts of ideology have indeed threatened to blow out the moral lights around us. This has been the result of our knocking down certain institutional barriers to national political power—in particular, the abandonment of an appreciation for the necessity of the separation of powers, and for the continuing political importance of federalism.

I would argue that the demise of these two institutional arrangements has had a disastrous impact on the moral foundations of republican government. I would further argue that these deleterious developments should be abandoned as the dangerous innovations that they are. For they violate our most fundamental political maxim: That in a system of popular government, the people have the liberty and the legitimate power within certain limits to define the moral, political, and legal content of their public lives. When we allow this principle to be trans-

gressed, we risk severing the necessary link between the people and the polity. Indeed, we cut the moral chord that binds us together in our common belief that we have a vital role to play in deciding how we live our collective lives.

We have an obligation today—a moral obligation, if you will—to restore those institutional arrangements that the Founders knew to be essential to the nurturing of public virtue. We have an obligation to restrict the insensitive intrusiveness of the national government in order to allow the most important decisions to be made by the people, not by those Adam Ferguson once called the "clerks and accountants" of a large and distant bureaucracy. We have an obligation to allow the states and communities the maximum freedom possible to structure their politics and infuse them with the moral tone they find most conducive to their happiness. This is the moral obligation of our generation.

We may either reassert our right to govern ourselves or we can surrender to the stultifying leviathan of big government. We must restore those structures that will shore up our sagging moral foundations or we risk losing the liberties which rest upon those foundations.

A decade after the adoption of our Constitution, the Anti-Federalist Mercy Warren, with a good bit of melancholy, expressed her fear that in the end, her countrymen might be remembered as having been "too proud for monarchy, . . . too poor for nobility, and . . . too selfish and avaricious for a virtuous republic." While we may not ever be simply a virtuous people, we must surely endeavor to assuage Mercy Warren's fear by recognizing and perpetuating what Madison believed us to have: "sufficient virtue for self-government."

### Still the Law of the Land? Essays on Changing Interpretations of the Constitution

Featuring seven essays by participants in a Center for Constructive Alternatives March, 1986 seminar, *Still the Law of the Land?* is an inquiry into the challenge which modern jurists and legal theoreticians have posed to the U.S. Constitution.

Contributors are the Honorable J. Clifford Wallace of the U.S. Court of Appeals; Edward J. Erler, professor of political science, California State University-San Bernardino; Edwin Meese III, U.S. attorney general; Stephen J. Markman, assistant attorney general; Charles E. Rice, professor of law, University of Notre Dame; Glen E. Thurow, professor of politics, University of Dallas, and Avi Nelson, president, WMFP Television, Lawrence-Boston.

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