A Constitutional Presidency

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I. INTRODUCTION

In this age of mass communication, media has brought politics into America's living room. The public feels, as never before, that it knows the President or a presidential candidate on a personal basis. Knowing the President in a communicative sense, however, is not necessarily the same as knowing him in a legal or constitutional sense. A President maybe a "great communicator," but he must also be a great constitutionalist. The combination makes a great President.

Such greatness requires three primary commitments: first, a commitment to the laws of nature and of nature's God as reflected in the Declaration of independence; second, a commitment to the faithful execution of the office of President; third, a commitment to preserve, protect and defend the written Constitution as the supreme law of our land.

These characteristics mark the constitutional standard for presidential action. If a President ignores this standard, he will be driven by the unprincipled winds of political expediency. Our first President, George Washington, understood the importance of raising this standard. Addressing the Constitutional Convention in 1787, Washington declared:

> It is too probable that no plan we propose will be adopted. Perhaps another dreadful conflict is to be sustained. If, to please the people, we offer what we ourselves disapprove, how can we afterwards defend our work? Let us raise a standard to which the wise and honest can repair.[1]

The standard for a constitutional Presidency has remained the same. "Wise and honest" candidates should adhere to that clear standard. On the occasion of the two hundredth anniversary of the United States Constitution, a review of this standard is properly before us. During this celebration, the Constitution is the subject of public attention and its provisions concerning the executive power should be discussed in light of the standard established by the spirit of the founding and the rule of law.

II. A CONSTITUTIONAL PRESIDENCY: NECESSARY QUALIFICATIONS

A. Eligibility

Perhaps the first and foremost element of a constitutional Presidency is eligibility. Article II, section 1, clause 4 of the Constitution states:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the age of thirty-five years, and been fourteen years a Resident within the United States.[2]

The President, therefore, must be a natural born citizen, fourteen years a resident and at least thirty-five years old. There is no other legal eligibility requirement except the oath of office, which

will be considered later. Other purely ideological notions of eligibility have been vaulted into the public debate, but they are not legally constraining. Such notions have largely focused on the relationship between religion and the state.

Some, who have wandered from the political faith of our Founding Fathers, have asserted that the Constitution renders ineligible a religious or Christian candidate. This is a form of political censorship. They chant their mantra, "church and state, church and state," without wavering. At one conference addressing Thomas Jefferson's Bill for Religious liberty, the subject of the eligibility of a religious candidate was addressed. Jefferson himself articulated the correct view of the subject in the Bill itself. He stated:

> Our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right.[3]

On one hand, no man can be required to profess a religious opinion or belief. On the other hand, no man can be required to renounce his religious beliefs as a prerequisite to seeking or serving in public office. All the mindless chanting of "separation of church and state to the contrary, does not negate that single truth.

There are those who chafe at the thought of a religious President. If the magical words of "separation of church and state" will not achieve their object, they construct their own religious test. Their test does not require a candidate or President to renounce his belief. Instead, they require a public renunciation that such a belief is relevant to government. They assume the fall-back position: `It's okay to be religious, just don't bring those religious beliefs into the public forum.' This is clearly a religious test. It violates the principle expressed by Jefferson, that no man shall be required to renounce his religious belief. It is also contrary to article VI of the Constitution which prohibits religious tests as a qualification for office.[4]

A civil ruler's religious beliefs neither expand nor contract his civil power. A President's religious beliefs do not clothe him with more or less presidential power. No President may use his religious beliefs as a pretext for the assumption of constitutionally undelegated power, even when the object is laudable. The exercise of undelegated power, as President John Quincy Adams observed, is both "criminal and odious."[5] This is true whether such power is exercised as a function of political expediency or of religious persuasion, Assuming that a given candidate is eligible, the first characteristic a constitutional President must master involves an understanding of the laws of nature and of nature's God.

B. The Laws of Nature and of Nature's God

Sir William Blackstone, the famous English jurist, following in the steps of Sir Edward Coke,

declared with precision what the law of nature entailed. He wrote:

> Man, considered as a creature, must necessarily be subject to the laws of his creator, . . . This will of his maker is called the law of nature. For as God, . . . When he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.[6]

Blackstone recognized that the law of nature is the will of God. Men may ascertain the law by their reason, though not as clearly as discovering it by revelation. Blackstone concluded with this proposition: "Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these."[7] Blackstone acknowledged that the law of nature is directly related to the operation of civil governments. Adherence to the laws of nature and of nature's God is, in essence, government under the rule of law. It is opposed to the rule of lawless men, be they religious or non-religious.

In the American experience, reliance upon the laws of nature and of nature's God was unequivocally asserted on July 4, 1776, in "A Declaration by the Representatives of the United States of America," or more simply, the Declaration of Independence. Historically and textually, the Declaration and the Constitution are tied together. They are derived from the same theory of government which is based upon the laws of nature and of nature's God. Without obedience to the principles espoused in the Declaration of independence, there can be no systematic adherence to either the execution of the office of President or the preservation of the Constitution.

C. The Declaration as Our Charter

In 1839, former President John Quincy Adams discussed with precision the tie between the Declaration and the Constitution. He noted that, by the Declaration, the colonists

> were proclaimed to be one people, renouncing all allegiance to the British crown; all copatriotism with the British nation; all claims to chartered rights as Englishmen. Thenceforth their charter was the Declaration of Independence. Their rights, the natural rights of mankind; their government, such as should be instituted by themselves, under the solemn mutual pledge of perpetual union, founded on the self-evident truths proclaimed in the Declaration.[8]

He concluded that "the Declaration of Independence and the Constitution of the United States, are parts of one consistent whole, founded upon one and the same theory of government."[9] This is the reason why the Declaration of independence is preeminent in an examination of a constitutional Presidency. Constitutional presidential power and the principles of the Declaration of independence are founded upon one and the same theory of government.

There is great blindness about this subject today. The Declaration makes good rhetoric, but its

application beyond that is politically nonexistent. Few discuss the Declaration when debating the original intent of the Constitution. Furthermore, the debate is currently limited to the judicial branch. The exercise of article II presidential power, however, is no less founded upon the Framers' intent. The independent duty of the executive to assess the constitutionality of matters within his own sphere of action necessitates this outcome. Without the guiding principles of the laws of nature and of nature's God as expressly reflected in the Declaration, however, any debate about original intent is a phantom. Original intent analysis must include the timeless legal principles embodied in the Declaration, the document of America's political origin.

Though it is not the purpose of this article to present all of the evidence to support Adams' thesis that the Declaration is the charter of our nation, several points are relevant here. First, article VII of the Constitution refers to the "independence of the United States of America." It states that the Constitution was written in the twelfth year of that independence. The date of independence is the legal birthday of our nation, and this fact is echoed throughout many of the state ratifying documents, as well as subsequent state constitutions. Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, and South Carolina all ratified the Constitution in the twelfth year of independence. Rhode island expressly ratified the Constitution in the fourteenth year of independence.[10]

Second, the qualifications for an office in Congress reaffirm the same fact. A Congressman must have been a citizen of the United States for at least seven years when elected to the first Congress in 1789. In the same manner, a Senator must have been a citizen of the United States for nine years in 1789. If the Constitution was the charter of the country establishing United States citizenship, it would have been impossible for anyone to be eligible for election to the first Congress.

Third, on the back of each dollar bill appears the Great Seal of the United States as adopted in 1792. On one side appears the phrase "*E Pluribus Unum*" which means "out of many one." On the other side "*Annuit Coeptis*" and "*Novus Ordo Seclorum*," which mean respectively "He has blessed our undertaking" and "a new order for the ages." At the bottom of the pyramid, there is a date inscribed in stone representing the foundation of our republic. That date is 1776. It is clear that the Framers knew that out of many states came one nation, though it had no form of government in 1776. They understood that our nation, blessed by God, had its origins in 1776. They acknowledged that a "new order of the ages" had begun in 1776. Furthermore, when Congress admitted many western states into the union, it did so expressly on the condition that their state constitutions when formed "should not be repugnant to the principles of the Declaration of Independence."[11]

Based on this historical foundation, it is sufficient to say that the President will not know how to properly discharge his duties in the office of President, or preserve, protect and defend the Constitution, unless he first understands the foundation upon which the Constitution is built. Familiarity with that foundation is familiarity with the immutable principles reflected in the Declaration of Independence. That document asserted that the laws of nature and of nature's God empowered the representatives of the United States to do at least three things: first, separate from England, and become a free and independent state; second, institute a new government based on consent; and third, organize a new government's power in such a way as to secure the unalienable

rights of the people. The principles of the Declaration justified the revolution and legitimized the governmental structure later reflected in the Constitution.

D. Equality, Consent and Unalienable Rights

The Declaration recognizes that the laws of nature and of nature's God provided the necessary legal basis for the people to establish a "separate and equal station" and dissolve the political bands with England. The Declaration also asserts that "all men are created equal...." The principle of equality was thus applied to men as well as nations. The law of equality is rooted in the fact that man is created in God's image and is also reflected in different clauses of the Constitution.[12] The President must observe the principle of equality, both with respect to men and with respect to nations which are lawfully constituted. The principle, however, does not require the President to deal equally with all nations, but only that he recognize a nation when lawfully constituted under international law. The purpose of equality also requires that he be no respecter of persons when executing domestic laws.

The Declaration also notes that "Governments are instituted among Men, deriving their just Powers from the Consent of the Governed." President George Washington declared: "The basis of our political systems is the right of the people to make and to alter their constitutions of government."[13] Abraham Lincoln called this "the leading principle-the sheet anchor of American republicanism."[14] This principle requires that civil government exercise only those powers which are specifically granted. Such is the case with the national government. If a power is not granted, the national government does not possess it and therefore may not act as though it does possess it.

The Founders were cognizant of different types of political power and the Declaration of independence reflects this understanding. The Declaration refers to God in a judicial capacity when it appeals to the "Supreme Judge of the world." It also makes legislative references to God as the lawgiver by the phrase "the laws of nature and of nature's God." And lastly, it appeals to Him in an executive capacity by declaring "firm reliance on the protection of Divine Providence."[15] S The government which was eventually created by the Constitution reflected these divisions. Article I focuses on legislative power, article II on executive, and article III on judicial. The laws of nature and of nature's God enabled the Framers to establish a government, defining and separating these types of legitimate constitutional powers.

The experience of the Framers with the King and the Parliament of Great Britain, and their familiarity with the writings of Montesquieu,[16] confirmed that the separation of powers was essential to the security of individual rights and liberties. Alexander Hamilton reflected the particulars of this theme in Federalist 78. He declared:

> 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.[17]

The President must make an independent determination of whether the Constitution extends a given power to his branch, as well as determine if another branch's exercise of its power, is constitutional as it may pertain to the executive sphere. In a nutshell, the rule is, only those powers granted may be exercised.[18] A constitutional President must understand that the laws of nature and of nature's God guided the Founders to declare independence, to create a government, and to separate its powers into different branches. Likewise he must understand that it is the Constitution which empowers the presidential office, not any branch of government, executive or otherwise.

Lastly, the Declaration of independence asserts that all men are "endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness...." Unalienable means undeniable or inherent. According to the laws of nature and of nature's God, governments are legitimately instituted in order to secure the unalienable rights of the people. This is not a difficult proposition to master. God endows men with unalienable rights, irrespective of a man's religious belief or lack thereof. All men, male and female, have certain unalienable rights simply because they are human beings created in God's image.[19] A constitutional President must recognize the purpose for which governments are instituted - to secure unalienable rights.

The Declaration acknowledges that the Creator is the source of the unalienable rights which the people necessarily retain. Civil government, including the President, must refrain from any interference with the exercise of those God-given rights. The national government, however, may regulate those rights which it creates, or which are not God-given as long as the latter are acknowledged in the Constitution.[20]

E. Summary

The President must incorporate many principles into the execution of his office. He must have a working familiarity with the laws of nature and the principles of the Declaration of Independence. He must understand the relationship between them and the Constitution. As he executes the law, the President must consciously seek to maintain and protect equality and the people's unalienable rights. He must not exercise any power not constitutionally granted by the people to the office of the President. Likewise he may not expand or contract his power because of his religious principles, nor may he permit their dissolution by any other branch or popular sentiment. These are minimal prerequisites for a constitutional Presidency.

III. A CONSTITUTIONAL PRESIDENCY: LEGITIMATE EXERCISE OF POWER

A. Executive Power

Executive or presidential power is tied to the word "execute," that is, the wielding of power under the rule of law in order to enforce the law. Three principles describe the nature or purpose of

executive power. First, the executive has no power to promulgate rules or judge cases. In other words, executive power is not legislative or judicial power. It is not the power to make law or change law. Second, the executive power is primarily active, not passive. That is, the executive does not wait for someone to come and request enforcement of a law. This is contrasted to judicial power which is passive or responsive in nature. The judiciary has no power to seek out a case or controversy, but must wait for one to come to it. The executive, on the other hand, need not wait but may seize the initiative. Third, executive power involves a discretionary element. The executive has some lawful discretion concerning if, when, and how certain executive powers are to be employed.

Our written Constitution reflects these three principles. The executive power is vested in the President. These powers are not legislative or judicial in kind. Article II, section 1 of the Constitution of the United States affirms this: "The executive power shall be vested in a President of the United States of America." Neither the Congress nor the Courts have executive power. Likewise, the President does not have legislative or judicial power. Beyond this, the executive power falls into two categories - those in which the President shall act, and those in which the President may act.

The Constitution extends certain powers to the President which he is compelled to exercise on his own initiative. First, the President "shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States." This is not a discretionary function which the President may assume, nor is this position contingent upon any state of war or peace, though only Congress has the power to declare war. Second, the President shall give information to Congress concerning the state of the Union, and recommend measures for their consideration. Third, he shall receive ambassadors and other public ministers. Fourth, he shall commission all the officers of the United States. Fifth, with the advice and consent of the Senate, he shall nominate ambassadors, other public ministers and counsels, judges of the Supreme Court and all other officers of the United States.[21]

Though not contained in article II, but stated in article I, if the President objects to a bill, he must return the bill with his objections. If he fails to return it within ten days, it becomes law. The executive branch equivalent to the "necessary and proper" clause, is found in article II, section 3 which declares that the President "shall take care that the laws be faithfully executed."

On the discretionary side of the ledger, the President has several powers available to him as well. First, the President may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices. Second, he may grant reprieves or pardons for offenses except in cases of impeachment. Third, he may exercise his power to make treaties as long as they are made by and with the advice and consent of the Senate. Fourth, he may fill up vacancies that may happen in the recess of the Senate. Fifth, he may convene both Houses or either House on extraordinary occasions. Sixth, in certain cases of disagreement, he may adjourn Congress. Seventh, according to article I, he has discretion as to whether to sign a bill into law, or to veto a bill.

Having briefly considered both the compulsory and discretionary powers of the President, it is

necessary to examine two parallel matters which are logical prerequisites to the President's ability to "execute the office of President" and "defend the Constitution." The first concerns his duty to make an independent determination of matters of constitutional law. The second concerns his familiarity with several principles of the law of nature reflected in the Declaration of Independence and incorporated in the Constitution.

B. Independent Determination of Constitutionality

All executive officers of the federal government, including the President, are bound to support the Constitution as the supreme law of the land. In addition, article II requires the President to take this oath: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." In order to fulfill this oath and execute the law, the President must independently interpret the constitutional provisions relevant to his branch. If the President delegates the responsibility associated with this duty to the Supreme Court, the Congress, or any other body, he violates the obligations of his oath.

A prevalent but erroneous belief is that the Supreme Court not only decides questions of constitutional law in cases and controversies, but that their decisions are absolutely binding on the legislative and executive branches. The Court is considered by many as the sole guardian of the Constitution and therefore its final arbiter. This unconstitutional preoccupation with judicial supremacy was proclaimed in *Cooper v. Aaron*.[22] In that case the Court asserted that the opinions of the Supreme Court are equivalent to the supreme law of the land. This perspective has been defended as essential to the independence of the judiciary. In the final analysis, however, it results in the usurpation of the power extended to Congress and the President, and of the power reserved to the people and states.

President Andrew Jackson rejected such a pretentious usurpation of power. In 1819, the Supreme Court affirmed Congress' authority to incorporate a bank in *McCulloch v. Maryland*.[23] When Congress later decided to extend the charter of the bank, Jackson vetoed the measure with these remarks:

> It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I cannot assent... . The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty . . . of the President to decide upon the constitutionality of any bill . . . as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must . . . have only such influence as the force of their reasoning may deserve.[24]

President Abraham Lincoln asserted the same principle. In 1857 the Supreme Court held that the Constitution provided protection against congressional efforts to prevent the spread of Negro slavery into new states. The Court ruled in *Dred Scott v. Sanford*[25] that black men had no rights that white men were bound to respect. In the famous debates with Stephen Douglas, Lincoln contended he was not bound by the Court's ruling because he had not been a party to the case.

> We do not propose that when *Dred Scott* has been decided to be a slave by the court, we, as a mob, will decide him to be free . . . but we nevertheless do oppose that decision as a political rule which shall be binding on the voter . . . the members of Congress or the President.[26]

In his First Inaugural Address as President, Lincoln justified his opposition to the idea that the Court's opinion would bind his sphere of action. He said:

> [I]f the policy of the Government upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.[27]

Not until after the New Deal did the President and Congress consistently and unconstitutionally concede that the judiciary possessed the exclusive right to determine the constitutionality of executive and congressional acts. Such deference is the product of presidential and congressional neglect of their independent duty and authority to determine whether their actions conform to the Constitution. This deference is misfeasance at best, or like its judicial counterpart, malfeasance at its worst.

C. Summary

Eight propositions concerning the constitutional Presidency have been discussed. First, the laws of nature and of nature's God permitted the creation of the United States and guided its organization of powers into three branches. Second, that same law defined executive power principally as the power to execute the law. Third, executive power must be exercised in a lawful way. Fourth, the lawful exercise of executive power does not include the power to make law or judge cases. Fifth, the Constitution specifies certain qualifications for the office of President and further defines the limits of that power. Sixth, these powers are contained in the office of the President and are of two types-the "he shall" and the "he may" powers. Seventh, the Constitution requires that the President take care that the laws be faithfully executed. Likewise, his oath of office presupposes two things: the first being the power to judge the constitutionality of a matter for the President's own sphere of action, and the second being that the Declaration and the Constitution reflect one and the same theory of government. Eighth, in the execution of law, the President must not show partiality, impair any unalienable right, exercise power by usurpation, or sanction any power not extended as far as his sphere of action permits.

The next section concerns how a constitutional President addresses public policy issues in light of

these eight propositions. Addressing the hard questions of public policy in this light puts the oath of a constitutional President to the test. Public policy issues demonstrate that the standard raised by the Constitution is a high one. Domestic policy will be considered first, then foreign policy briefly.

IV. DOMESTIC POLICY

A. Equality and Affirmative Action

What does the principle of equality require of a constitutional President in the context of affirmative action? President Lincoln said at Gettysburg that "our fathers brought forth on this continent, a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal."[28] Lincoln affirmed the Declaration's assertion that "all men are created equal." It is this principle which he maintained in his orbit of thinking as President during the Civil War. The principle requires that all men stand equally before the law. Giving any preference or priority to, or imposing any deprivation or suspension upon any class of persons before the law, contravenes the principle of equality. The Supreme Court noted this very principle in 1867, declaring:

> The theory upon which our political institutions rest is, that all men have certain inalienable rights - that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of all these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct [in this particular case, participation in the rebellion] is punishment, and can be in no otherwise defined.[29]

In 1977 the Equal Employment Opportunity Commission (EEOC) adopted "Affirmative Action Guidelines." The guidelines set quotas which take a man's color into account in the allocation of employment opportunities. Such a practice is opposed to the proposition that all men are created equal and stand equal before the law.

Affirmative action is also diametrically opposed to the legal principle that past wrongs do not work the corruption of blood. Each man must bear the consequences of his own wrongdoing. The wrongful acts of the parents do not taint the equal rights of the heirs. The essence of this principle, in the context of treason, is reflected in the article III, section 3 prohibition against punishments working the corruption of blood. In addition, color conscious quotas constitute unconstitutional Bills of Attainder.[30] Taking care that the law be faithfully executed, means taking care that the domestic policy of affirmative action be abolished. In principle, affirmative action, like slavery, runs contrary to equality.

B. Unalienable Rights and Life

What does the principle of unalienable rights require of a constitutional President in the context of such issues as abortion, infanticide and euthanasia? The Declaration affirms that "all men are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the

Pursuit of Happiness." This is a binding legal proposition. George Mason declared in the Virginia Constitution that "all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty.... "[31] What do these foundational statements of unalienable rights mean? The Declaration asserts that "to secure these rights, governments are instituted among men. . . ." The purpose of government is to secure the unalienable rights of the people. These rights include the unalienable right to life of unborn children, infants, handicapped and the elderly.

The first duty of a constitutional President in this context is to determine the constitutionality of *Roe v. Wade*[32] as it affects the executive sphere. If he finds that the opinion is not lawful because, for example, its trimester scheme constituted the exercise of legislative, rather than judicial power, then he need not consider it binding within his sphere of executive action. If the executive branch is called upon to execute the policy of *Roe v. Wade* or any law of Congress built on such a policy, which the President has decided to be unconstitutional, he is not bound to conform his sphere of action to that decision. The basis for such inaction is that the Court has no constitutional authority to exercise legislative power, as it did in *Roe v. Wade*. Thus, a constitutional President is not bound by *Roe v. Wade* within his sphere of action. Likewise, state governments should challenge *Roe* in federal court on the same grounds.

C. Education

Educational matters are also important for a constitutional President. According to the laws of nature and of nature's God, parents have the natural right and duty to direct the education and upbringing of their children. This prerogative and obligation is acknowledged by the Declaration of Independence which provides "that [all men] are endowed by their Creator with certain unalienable Rights."[33] It is axiomatic that parents or legal guardians alone are endowed with the unalienable right to direct the education of their child or legal dependent. Equally self-evident is the proposition that unalienable rights are broad enough to include the unencumbered exercise of parental liberty with respect to the education of their children.

Neither state nor federal jurisdiction extends to mandatory certification of teachers, approval of curriculum, or setting minimal educational standards. Government has no power to impair the obligation of parental educational contracts. In no case whatsoever does its remedial authority extend to substituting its judgment for that of parents with respect to the content, manner or object of education.[34]

The exercise of state and national jurisdiction over education also usurps intellectual freedom. It compels the subjection of children to governmentally directed or imposed ideas, opinions or beliefs. The issue is not whether children are compelled to believe certain ideas. The issue is whether children can be compelled to hear government approved ideas. Coercive exposure to governmentally selected and approved ideas is beyond the jurisdiction of civil government.[35]

The case against the federal extension of jurisdiction over education is equally compelling. Federal

jurisdiction over education was rejected at the Convention in 1787. James Madison proposed that the legislative power of the United States included power to encourage by proper premiums and provisions, the advancement of useful knowledge and discoveries. This, however, was rejected along with the power to establish a university and seminaries for the promotion of literature, the arts and sciences.[36] On each of these points, Congress has acted contrary to this original intent. National endowments now exist for all of these, as well as a Federal Department of Education.

President Jefferson acknowledged that if the federal government wanted to get into the education business, then the Constitution would have to be amended. Referring to education and the arts in his Sixth Annual Message, he declared: "I suppose an amendment to the Constitution, by consent of the States, necessary, because the objects now recommended are not among those enumerated in the Constitution, and to which it permits the public monies to be applied."[37] Furthermore, when President Madison recommended a university, Congress concluded: "The erection of a university, upon the enlarged and magnificent plan which would become the nation, is not within the powers confided by the Constitution to Congress."[38] President Monroe said the same: "I think proper to suggest also . . . that it be recommended to the States to include in the amendment sought a right in Congress to institute likewise seminaries of learning."[39] President Buchanan vetoed the first legislation bringing the federal government into education:

> I presume the general proposition is undeniable that Congress does not possess the power to appropriate money in the Treasury, raised by taxes on the people of the United States, for the purpose of educating the people of the respective States. It will not be pretended that any such power is to be found among the specific powers granted to Congress nor that "it is necessary and proper for carrying into execution" any one of these powers.[40]

The original 1867 Department of Education, therefore, made a mockery of the Constitution - it was justified as a function of the census and placed in the Department of Interior.

More recently, President Carter signed, rather than vetoed, the Department of Education Act of 1979. That Act reached far into the heart of the unalienable rights of parents. A congressional committee reported:

> The Congress declares that the establishment of a Department of Education is in the public interest, will promote the general welfare of the United States, will help ensure that education issues receive proper treatment at the Federal level, and will enable the Federal Government to coordinate its education activities more effectively.[41]

Congress, by employing the word "promote" rather than "provide," expressly incorporated the preamble of the Constitution into Congress' article I powers. The preamble, however, is not an empowering clause or a grant of authority. Congress disregarded the Constitution by acting without an empowering clause. A constitutional President should not execute laws that are so clearly beyond the jurisdiction of the federal government.

It falls to the President, however, to determine what his constitutional oath requires. The evidence points to the fact that the people have not extended by their written consent any general jurisdiction over education to the national government. The patent and copyright provision, and military education are within the purpose of specific constitutional provisions.

In the midst of all the discussion about excellence in education and the government's supposed duty to ensure excellence, the simple constitutional truth has been lost, though not irreparably. President Buchanan's warning is clear: "Should the time ever arrive when State governments shall look to the Federal Treasury for the means of supporting themselves and maintaining their systems of education and internal policy, the character of both Governments will be greatly deteriorated."[42] This is true even if the governmental support is indirect.

Perhaps the least understood form of supporting our system of education from the federal treasury is the voucher. Many suggest a federal voucher would increase parental liberty. In actuality, however, the opposite is true; parental liberty would be decreased. Federal jurisdiction would also be expanded over private schools which seek to be approved recipients of federal vouchers via parents.

Parental liberty would be decreased simply as a result of economics. An unapproved private school would have to reduce its tuition in proportion to the amount of the voucher in order to be competitive with approved private schools. The greater the voucher, the less likely an unapproved private school will be able to compete or offer equivalent services. It must sacrifice its quality or go out of business. Likewise, federal jurisdiction over approved schools will necessitate federal oversight and regulations. With these regulations, compliance inevitably follows along with increased administrative costs which eventually escalate tuition. This does not increase parental liberty, nor is it consistent with the exercise of constitutional executive power.

D. Social Welfare

The principle of government by written consent requires certain action from a constitutional President in the context of social programs, such as welfare and social security. An honest observance of our constitutional compact demonstrates that the federal government has no jurisdiction over welfare, social security, or health care.[43] President Franklin Pierce articulated this principle so clearly, that the quotation is worth commenting on in detail. The major point emphasized by Pierce is that the people clearly did not extend to any branch of the national government authority or power to make or execute any law related to welfare, social security or health care.

President Pierce vetoed an act to grant land to the states for the benefit of indigent insane persons. First, he affirmed the supremacy of the Constitution over that of special interest legislation. He said: "[It is] my deliberate conviction that a strict adherence to the terms and purposes of the federal compact offers the best, if not the only, security for the preservation of our blessed inheritance of representative liberty."[44] Then he affirmed his duty as a constitutional President to uphold the rule of law against the tyranny of men. He observed: "This bill ... Presents at the threshold the question

whether any such act on the part of the Federal Government is warranted and sanctioned by the Constitution, the provisions and principles of which are to be protected and sustained as a first and paramount duty."[45] Pierce then addressed the text of the Bill:

> The question presented, therefore, clearly is upon the constitutionality and propriety of the Federal Government assuming to enter into a novel and vast field of legislation, namely, that of providing for the care and support of all those among the people of the United States who by any form of calamity become fit objects of public philanthropy.
>
> I readily and, I trust, feelingly acknowledge the duty incumbent on us all as men and citizens, and as among the highest and holiest of our duties, to provide for those who, in the mysterious order of Providence, are subject to want and to disease of body or mind; but I cannot find any authority in the Constitution for making the Federal Government the great almoner of public charity throughout the United States. To do so would, in my judgment, be contrary to the letter and spirit of the Constitution and subversive of the whole theory upon which the Union of these States is founded.[46]

President Pierce maintained the standard of the Constitution as supreme. He was not convinced by the rhetoric concerning the general welfare clause, which today almost every politician and judge blindly asserts as having empowered him to do whatever the political winds require. Pierce said:

> I shall not discuss at length the question of power sometimes claimed for the General Government under the clause of the eighth section of the Constitution, which gives Congress the power "to lay and collect taxes, duties, imposts, and excises, to pay debts and provide for the common defense and general welfare of the United States," because if it has not already been settled upon sound reason and authority it never will be. I take the received and just construction of that article, as if written to lay and collect taxes, duties, imposts, and excises in order to pay the debts and in order to provide for the common defense and general welfare. It is not a substantive general power to provide for the welfare of the United States, but is a limitation on the grant of power to raise money by taxes, duties, and imposts. If it were otherwise, all the rest of the Constitution, consisting of carefully enumerated and cautiously guarded grants of specific powers, would have been useless, if not delusive . . . .[47]

It is interesting to note that the four-member dissent in *Steward Machine Company v. Davis* cited Pierce as controlling.[48] *Steward Machine Company* was the case that held Social Security constitutional. A constitutional President, however, must determine if such a decision is lawful. Andrew Jackson said:

> Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty . . . of the President to decide upon the constitutionality of any bill ... as it is of the supreme judges when it may be brought before them for judicial decision.[49]

A constitutional President need not be bound by such a decision if the faithful execution of his office and preservation of the Constitution render health, welfare, and retirement legislation unconstitutional.

A constitutional President should not be advocating these programs or otherwise usurping power that constitutionally resides in the people. The people never extended to Congress or to the President jurisdiction over these areas. To pretend to act for the people by exercising power not extended by the written Constitution to the national government, undermines rather than secures the liberty of the people. Unconstitutional exercise of power is never in the best interest of the people. This is a basic truth of government under law. Even if the question of jurisdiction were doubtful, it would be wise to adhere to the advice of President Monroe, who said:

> In cases of doubtful construction, especially of such vital interest, it comports with the nature and origin of our institutions, and will contribute much to preserve them, to apply to our constituents for an explicit grant of the power. We may confidently rely that if it appears to their satisfaction that the power is necessary, it will always be granted.[50]

A constitutional amendment is always preferred to usurpation of undelegated power.

E. Agriculture

Agriculture relates directly to the Presidency in an important way. The Constitution is a grant to Congress of several enumerated powers. They relate chiefly to war, peace, foreign and domestic commerce, and other subjects which may be best exercised solely by the federal government. All other powers are reserved to the state governments or to the people. These powers must be kept separate and distinct if the system is to function as intended.

One such provision gives to Congress power to collect taxes in order to pay the debts and provide for the common defense and general welfare of the United States (article I, section 8, clause 11). Nothing in the deliberations during the Constitutional Convention indicates that this provision for general welfare was ever intended to grant general, discretionary legislative authority to Congress. The powers of the federal government were instead carefully enumerated. James Madison affirmed the limited nature of this grant of power when he asserted:

> [I]t exceeds the possibility of belief, that the known advocates in the Convention for a jealous grant & cautious definition of federal powers, should have silently permitted the introduction of words or phrases in a sense rendering fruitless the restrictions & definitions elaborated by them.[51]

Madison noted that if Congress used the "general welfare clause" as a distinct grant of broad power, it would have the disastrous effect of creating two Constitutions. He stated:

> Consider for a moment the immeasurable difference between the Constitution limited

> in its powers to the enumerated objects; and expanded as it would be by the import claimed for the phraseology in question. The difference is equivalent to two Constitutions, of characters essentially contrasted with each other; the one possessing powers confined to certain specified cases; the other extended to all cases whatsoever ....[52]

Yet in 1856, Congress asserted that the Constitution's general welfare clause empowered it to establish a Federal Department of Agriculture for the purpose of collecting agricultural statistics, promoting agriculture, and procuring and distributing seeds, cuttings and bulbs.[53] The proponents of the Bill claimed that the general welfare could

> in no way be better advanced or promoted, than by such means as shall secure the largest amount of wealth from its original source, the cultivation of the soil; than by inciting to habits of industry and economy, by securing intelligence, and promoting moral and political virtue among all classes of people, upon whom rests the maintenance and perpetuity of our free institutions.[54]

After several years of debate in Congress, President Lincoln signed, in 1862, the act to establish a Department of Agriculture. The language of the new act was consistent with the general assertions of 1856. The President acknowledged that while the department was established for the "immediate benefit of a large class of our most valuable citizens," it should eventually become "the fruitful source of advantage to all our people."[55]

In January of 1863, the Commissioner of Agriculture submitted the first annual report of the Department. The Commissioner stressed that "a great national department of agriculture" could "augment the wealth, the prosperity, the permanency, and the glory of the republic."[56] He further justified the department by asserting that "whatever improves the condition and the character of the farmer feeds the life-springs of national character, wealth and power."[57]

The Commissioner affirmed that one of the chief objects of the Department was collecting, publishing and disseminating statistical and other useful information in regard to agriculture. During the first year of its operation, the department spent $60 thousand.[58] The Department of Agriculture's budget for 1988 is over $65 billion, including items such as price supports, direct income benefits, payments for non-production and storage.[59]

Constitutionally, the creation of the Department of Agriculture rested on a defective foundation. Congress has never possessed the constitutional authority to create such a department. No such power is found among the specific powers granted to Congress, nor is it "necessary and proper for carrying into execution" any one of the enumerated powers. The states may have this power, but not the Congress.

By establishing the Department of Agriculture and its functions, Congress has made the rule of expediency, rather than the rule of law, its benchmark for constitutional interpretation. It has elevated its own opinions over the Constitution, and therefore, has departed from the fundamental

maxim that the intent of the lawgiver is the law.

A constitutional President must decide what his oath requires. He must choose between a broad interpretation of the general welfare clause, which contravenes the Founders' intent, or a limited construction of the provision as it was intended. If the President construes the provision in the latter manner, then the Department of Agriculture and its functions must be abolished. If Congress refuses to repeal the enabling act, the President should not use his executive power to perpetuate such an unconstitutional usurpation of power.

F. Amendments

Another public policy issue involves constitutional amendments. Balanced budget, school prayer and pro-life amendments are being discussed today. The President may also recommend amendments to the Congress or states. President Jackson, however, warned: "When an honest observance of constitutional compacts cannot be obtained from communities like ours, it need not be anticipated elsewhere ... and the degrading truth that man is unfit for self-government admitted. And this will be the case if expediency be made a rule of construction in interpreting the Constitution."[60]

The present need for a balanced budget amendment is a direct result of the federal government spending for programs beyond its jurisdiction. The battle is over money. For instance, defense costs are played off against education. These are false alternatives. Defense is a legitimate object extended to the national government by the Constitution. Education is not.

An attempt to balance the budget by an amendment without first considering the constitutionality of the objects of spending is nonsense. Refusal to consider first the constitutionality of spending for present purposes demonstrates that an honest observance of the Constitution cannot yet be found among our politicians. Amendment supporters are saying, "Let's amend the Constitution to force the Congress to balance the budget." The Congress, however, does not obey the Constitution as it is presently written. They tax and spend for unenumerated purposes or objects, several of which have been addressed above, particularly for education and agriculture. It is foolish to believe that a constitutional amendment will help when Congress does not obey the present Constitution and amendments. The only explanation for this unconstitutional activity, is adherence to a rule of construction based on expediency and a rejection of the rule of law.

V. FOREIGN POLICY

While a detailed examination of a constitutional President and foreign policy is beyond the scope of this article, there are certain themes which should be discussed. First, Congress has power to regulate commerce with foreign nations. Second, the President and the Senate (as agents of the state governments though now popularly elected), have power to make treaties. Third, the President is Commander in Chief, but Congress controls the actual declaration of war and has the power of the purse. Foreign policy always involves commerce, treaties and military involvement. The relationship between the power to regulate commerce with foreign nations and the power to make treaties was

described early in our history. It was noted by judge Davis in *United States v. The William*:

> The care, protection, management and control, of this great national concern [commerce], is . . . vested by the Constitution, in the Congress of the United States; and their power is sovereign, relative to commercial intercourse, qualified by the limitations and restrictions, expressed in that instrument, and by the treaty making power of the President and Senate ....[61]

Commercial relations, therefore, are subject to terms of any treaty touching the same object. In other words, congressional statutes regulating foreign commerce may be pre-empted by prior treaties. Of course, the Constitution itself recognizes this in article VI.

Both commercial statutes and treaties, however, depend upon the United States Government's previous recognition of a foreign regime as the lawful government in authority. The executive branch should stipulate several preconditions which must be fulfilled by a foreign regime prior to a grant of official recognition. These principally relate to the assessed capacity of their people for self-government, government by consent, and the likelihood of the regime to secure the unalienable rights of the people. The more likely a foreign regime can conform to these standards, the more likely a meaningful treaty or commercial intercourse is desirable or possible. Many politicians do not understand the desirability of such an approach. With some regimes, no treaty should ever be made nor should these "governments" be officially recognized as representing their people. In such cases, the United States should make known that it may recognize a faction within a country as a legitimate government because that faction respects the basic criteria for government under the rule of law. The policy, however, of working with and negotiating with totalitarian governments, which we have officially recognized, only lends credibility to their official oppression of factions seeking self-government from within.

A constitutional Presidency must re-examine the extent to which certain regimes should be recognized. To acknowledge totalitarian (and in many cases, also imperialistic) regimes as lawful, can only be self-destructive. Such recognition accepts the proposition that legitimate regimes need not be established on a legitimate foundation - that lawful governments need not be based on the rule of law. The United States harms itself, the freedom it represents, and those who struggle worldwide against oppressive regimes and governments, by continued insistence that meaningful treaties or diplomatic relationships can be solidified with those governments that neither respect the rule of law nor unalienable rights.

This view is not advancing isolationism or interdependence. The purpose is to assess the type of government we are dealing with and to select the appropriate constitutional response with options ranging from peaceful and mutual intercourse, to self-defense and perhaps war. The United States must not lose sight of the proposition that American government, which is expressly founded on certain "self-evident truths," can never afford to be dependent on or interdependent with regimes centrally founded on inequality and slavery. Experience has demonstrated that our own Union was not meant to be half-slave and half-free; a house divided against itself cannot stand. The same is true about our relationship with other countries. A constitutional Presidency cannot carry out a forward

strategy for peace and freedom with some countries and, at the same time, enter into meaningful treaties with countries that refuse to secure the unalienable rights of its citizens.

Presidential recognition of a government or regime is the first item on any constitutional foreign policy agenda. The bottom line is that a regime that systematically employs its power to enslave its people or crush their unalienable rights is not a lawful government. Indeed, "whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers ... to effect their Safety."[62] United States foreign policy should not be a partner with foreign governments, communist puppets or terrorist organizations, which "become destructive" of the unalienable rights of their own people. An American foreign policy that continues to recognize "any form of government" destructive of its own people evidences just such a partnership. In the end, such a policy of recognition will work to our detriment.[63]

With respect to the military, the principle of government by consent requires a constitutional President to assume an attentive posture. The purpose of civil government is to secure the unalienable rights of the people. The national government is constitutionally empowered to secure this object. Some of the jurisdiction of the national government's military is extended to the President under article II. He is the Commander in Chief of the military forces.

A constitutional President is one who employs military power under article II in order to secure the liberty of the people. The President is empowered to defend our rights and liberties from foreign governments and terrorist regimes because the Constitution extends that power to him in writing. President John Quincy Adams said that "[t]he declaration of war is in its nature a legislative act, but the conduct of war is and must be executive."[64] In recent years, Congress has put unconstitutional restraints upon the executive branch in the discharge of this obligation. Congress has also impaired the lawful means by which the executive may prepare to defend the country.[65] Adams, however, observed the correct relationship between the two branches, concluding: "However startled we may be at the idea that the Executive Chief Magistrate has the power of involving the nation in war, even without consulting Congress, an experience of fifty years has proved that in numberless cases he has and must have exercised the power."[66] Of course, a constitutional President must work with the Senate in forming treaties, but with respect to his obligation as Commander in Chief, he has a constitutional duty to independently assess the situation and conduct the military as his judgment yields.

VI. CONCLUSION

The conclusion of the matter raises some crucial questions. Are we ready for a constitutional Presidency? Do we want the rule of law and a government that respects constitutional restraints? Or do we believe that mankind is incapable of self-government, thus subverting the whole theory upon which the union is founded? Many of the conclusions and recommendations noted in the text are far from denying self-government; nor do they require the subversion of our form of government. As such they are far from the mainstream of American political thought. To say it differently, American political thought is far removed from the mainstream of the legal and constitutional truths which

inspired the founding of America.

The American regime was built line upon line, precept upon precept. It has its foundations in the law of nature. Its structure consists of constitutional principles. We cannot expect the structure to remain intact, however, if the assaults on the foundations continue. With the demolition of the law of nature and the principles of the Declaration of independence, our constitutional government, our rights and our liberties will not remain secure.

If we oppose the self-evident truths of the founding, it is because we do not yet fully perceive the tyrannical nature of the alternative. If we recoil at the thought of a constitutional government of limited and enumerated powers, it is because we have not brought to memory past and present governments which turn upon their own people and devour their property, liberties and lives under the pretense of the general good of the people.

If we do not insist on a constitutional President, then we must live with the alternative. In our day and age, the alternative is far more disturbing than any of the public policy conclusions articulated in the text. Such an alternative places us under no law at all, constitutional or otherwise. For there can be no security in the rule of men subject to no other law than that which they create. Nor can the passage of time and precedent breathe legitimacy into such folly as is commonly supposed.

The challenge of a constitutional Presidency stands in stark contrast to the alternative. Every four years, the people are called upon to decide which type of President will govern them in an executive capacity. We should insist upon a President committed to the immutable precepts of the rule of law and its reflection in the American legal and policy arena.

NOTES

1. 6 D. Freeman, George Washington: A Biography 98 (1954).

2. This residency provision is most interesting. The Constitution requires that Congressmen be citizens for seven years and that Senators be citizens for nine years before they are eligible for their offices. The Constitution, however, requires that the President not only be a citizen, but also a resident within the United States for at least fourteen years. It may be inquired as to how George Washington was a resident within the United States for fourteen years in 1789 when he began his first term. This would mean that he was a resident of the United States in 1775. Recall that Abraham Lincoln said in 1861: "The Union is much older than the Constitution. It was formed, in fact, by the Articles of Association in 1774." A. Lincoln, First Inaugural Address (Mar. 4, 1861) reprinted in 6 Messages and Papers of the Presidents, 1789-1897, at 7 (I. Richardson ed. 1897) [hereinafter Messages and Papers]. Lincoln was saying that the colonies associated with each other for a common object in 1774, He was not declaring they were independent in 1774. He was simply asserting that the separate colonies began to first associate with each other with respect to English oppression, when twelve of them organized a Congress on this continent in 1774. It was the Articles of Association which Lincoln considered as first originating the idea of states united. He saw America as a union of colonies, acting like states, not yet independent and without any form of central government. This is why Washington was a resident, but not a citizen of the United States in 1775.

3. T. Jefferson, A Bill for Establishing Religious Freedom (1779), reprinted in 2 The Papers of Thomas Jefferson 545-46 (l. Boyd ed. 1950). This Bill, adopted in 1786, is still law in Virginia; see Va. Code Ann. §57-1 (1950).

4. U.S. Const. art. VI, cl. 3.

5. J.Q. Adams, First Annual Message (Dec. 6, 1825), reprinted in 2 Messages and Papers, *supra* note 2, at 877.

6. 1 W. Blackstone, Commentaries *39-40.

7. Id. at 42.

8. J.Q. Adams, The Jubilee of the Constitution, A Discourse Delivered at the Request of the New York Historical Society, on Tuesday, the 30th of April, 1839, reprinted in 6 Journal of Christian Jurisprudence 4 (1986).

9. Id. at 19.

10. For ratification documents of the several states in order of their ratification, see Legislative Reference Service Library of Congress Documents Illustrative of the Formation of the Union of the American States, H.R. Doc. No. 398, 69th Cong., 1st Sess. 1009-20, 1022-24, 1056 (1927) [hereinafter Documents Illustrative].

11. See *e.g.*, Nebraska, ch. 59, 13 Stat. 48 (1864); Nevada, ch. 36, 13 Stat. 31 (1864); Colorado, ch. 37, 13 Stat. 33 (1864); N. Dakota, S. Dakota, Montana, Washington, ch. 180, 25 Stat. 677 (1889); Utah, ch. 138, 28 Stat. 108 (1894); New Mexico, ch. 310, 36 Stat. 558 (1910); Arizona, ch. 310, 36 Stat. 569 (1910).

12. The principle of equality is perhaps most importantly articulated in article l, section 2 which provides for popular election of representatives to the House of Representatives. The fourteenth amendment subsequently expanded that provision to require that representatives "be apportioned among the several States according to their respective numbers...." This change, accompanied by the fifteenth, seventeenth, nineteenth and twenty-sixth amendments, provides all adult citizens with the equal opportunity to participate in selecting Representatives and Senators. The fourteenth amendment also provides that no "State shall ... Deny to any person within its jurisdiction the equal protection of the laws." With respect to equality between the states in the Senate, article V asserts that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

13. G. Washington, Farewell Address (Sept. 17, 1796), reprinted in 1 Messages and Papers, *supra* note 2, at 217.

14. 2 The Collected Works of Abraham Lincoln 266 (R. Basler ed. 1953).

15. Isaiah 33:22 also reflects this division.

16. *Cf.* B. de Montesquieu, The Spirit of Laws 182-224 (Legal Classics library spec. ed. 1984) (1st ed. 1751).

17. The Federalist No. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961).

18. Both the national and state governments are republican in nature. Republican means that the people's representatives govern according to a written delegation of authority. This is in contrast to a democratic system in which the representatives govern according to the popular consent of the majority, whether that consent is written or unwritten.

> If the people desire any branch of the national government, including the President, to engage in an activity which would require the exercise of a power not enumerated or extended (or with respect to Congress necessary and proper to carry such a power into execution), then the people need to amend the Constitution. This will ensure that there is no mistake as to the nature, extent and type of power given, or the proper scope of its exercise, including the branch to which it has been entrusted.

19. The Constitution does not expressly refer to unalienable rights. This is so because the Constitution does not primarily enumerate rights. Its principal purpose was to create a national government, granting it only limited and enumerated power. Men such as George Mason and Thomas Jefferson, however, argued extensively for a Bill of Rights to unquestionably prohibit the national government from interfering with certain rights of Americans. Some of these declared rights are unalienable, while others are merely civil, or alienable. For those rights not listed, the ninth amendment makes clear that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

20. An example of an enumerated unalienable right is found in the first amendment's free exercise clause. Not all constitutional provisions, however, deal with unalienable rights, such as the twenty dollar prerequisite to jury trials in

the seventh amendment.

21. U.S. Const. art. II, §§2, 3 (emphasis added).

22. 358 U.S. 1 (1958).

23. 17 U.S. (4 Wheat.) 316 (1819).

24. A. Jackson, Veto Message (July 10, 1832), reprinted in 2 Messages and Papers, *supra* note 2, at 581-82.

25. 60 U.S. (19 How.) 393 (1857).

26. A. Lincoln, Speeches During the Lincoln-Douglas Senatorial Campaign (July-Oct. 1858) reprinted in 3 The Collected Works of Abraham Lincoln 255 (R. Basler ed. 1953).

27. A. Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in 6 Messages and Papers, *supra* note 2, at 9-10.

28. A. Lincoln, Gettysburg Address (Nov. 19, 1863) quoted in A Documentary History of the American People 409 (A. Crane, W. Johnson & F. Dunn ed. 1951).

29. *Cummings v. The State of Missouri*, 71 U.S. (4 Wall.) 277, 321-22 (1867).

30. See Butler, But We Were Born Free: The Racial and Sexual Quota as a Constitutional Bill of Attainder, 32 Drake L. Rev. 37, 40 (1982-83).

31. Va. Const. art. 1, § 1.

32. 410 U.S. 113 (1973).

33. The Supreme Court recognized this proposition in *Abington School District v. Schempp*, 374 U.S. 203, 213 (1963). J. Powell reaffirmed this proposition in *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573, 2589 (1987) (Powell, J. concurring).

34. See K Morgan, American Education, Parental Rights and Constitutional Power (1986) (unpublished essay, CBN University).

35. The Virginia Statute for Religious Freedom, Va. G.A. (Jan. 16, 1786) currently recited at Va. Code Ann. § 57-1 (1950), set forth the principle of freedom of thought and paved the way for the Constitution's first amendment guarantee of religious liberty. Thomas Jefferson wrote to James Madison soon after the passage of the Bill, "It is honorable for us to have produced the first legislature with the courage to declare that the reason of man may be trusted with the formation of his own opinion."

"Freedom of thought," "the reason of man," "intellectual freedom" - these principles lie at the very heart of the American experience. The question arises, however, just what is freedom of thought? What is its relationship to the state? The Virginia Statute said that freedom of thought prohibited the state from doing at least three things.

1. It prohibited ministers from advancing ideas, opinions or beliefs while being paid a salary out of the public treasury.

2. It prohibited the erection and maintenance of churches in which ministers advance ideas, opinions and beliefs, where those churches were erected or maintained out of the public treasury.

3. It prohibited the state from compelling attendance at those churches to hear the minister advance ideas, opinions and beliefs.

Now a violation of any one of these three is sufficient to transgress the "natural rights of mankind" because, as Jefferson noted, "God created the mind free."

Times have changed, but the natural tendency of government to shape the opinions and ideas of the people has not. Whereas government previously used its power to shape the ideas and opinions of men through regulation or control of

religion, today it has flexed its power to shape the ideas and opinions of men through controlling and/or regulating education.

Recognition of the principle in Jefferson's day eventually disestablished the state church. Recognition of the principle in our day means disestablishment of state schools. Why? Because the principle of freedom of thought prohibits the state from doing at least three things.

1. It prohibits educators from advancing ideas, opinions or beliefs while being paid a salary out of the public treasury.

2. It prohibits the erection and maintenance of schools and universities in which educators advance ideas, opinions and beliefs, where those schools or universities are erected or maintained out of the public treasury.

3. It prohibits the state from compelling attendance at those schools in order to hear educators advance opinions and ideas.

The evil to be avoided in Jefferson's day was state control of religious ideas. The evil to be avoided in our day is state control of non-religious ideas. What Jefferson objected to was state control of any ideas, religious or otherwise. And though he compromised this principle in part in the context of education when he grew older, it is the principle itself which is our guide, not the sometimes inconsistent acts of men.

36. Documents Illustrative, *supra* note 10, at 563-64.

37. T. Jefferson, Sixth Annual Message (Dec. 2, 1806), reprinted in 1 Messages and Papers, *supra* note 2, at 410.

38. 22 Annals of Cong. 976-77 (1811) (The Microbook library of American Civilization 21624).

Representative Mitchill delivered the report of the House of Representatives rejecting President Madison's March 4, 1809, proposal for the establishment of a seminary of learning (11th Cong., 3d Sess., February 18, 1811). Id.

Several years later, Representative Wilde delivered the report on President Madison's September 1 and December 5, 1815, proposal which relates to the subject of a national seminary of learning (14th Cong., 2d Sess., Dec. 11, 1816). 30 id. at 257-60 (1816) (The Microbook library of American Civilization 21633).

Representative Atherton offered for consideration an amendment to the Constitution granting Congress power to establish a national university which was rejected (Dec. 12, 1816). Id. at 268.

Representative Wilde moved successfully to discharge indefinitely consideration of the bill for establishing a national university on the basis that such a purpose was not intended for Congress but only for the people (Mar. 3, 1817). Id. at 1063-64 (1817).

39. J. Monroe, First Annual Message (Dec. 2, 1817), reprinted in 2 Messages and Papers, *supra* note 2, at 18.

40. J. Buchanan, Veto Message (Feb. 24, 1859), reprinted in 5 Messages and Papers, *supra* note 2, at 547.

41. Senate Committee on Governmental Affairs, 1 Legislative History of Public Law 96-98, Department of Education Organization Act, pts. 1-2, 96th Cong., 2d Sess. 3 (Comm. Print 1980).

42. J. Buchanan, reprinted in 5 Messages and Papers, *supra* note 2, at 545. Congressmen love to tell with precision how clever they are in supporting the local community out of the federal treasury. They say this accomplishment entitles them to re-election. President Buchanan said this accomplishment greatly deteriorates our governments. If the President is to be constitutional in his approach to education, the Federal Department of Education must be abolished. Its functions and funding must not receive the sanction of the executive branch.

43. See A. Jackson, Veto Message (May 27, 1830), reprinted in 2 Messages and Papers, *supra* note 2, at 491.

44. F. Pierce, Veto Message (May 3, 1854), reprinted in 5 Messages and Papers, *supra* note 2, at 247-48.

45. Id.

46. Id. at 249.

47. Id. at 250-51.

48. See the dissenting opinions of four justices in *Steward Machine Company v. Davis*, 301 U. S. 548, 598-618 (1937).

49. A. Jackson, Veto Message (July 10, 1832), reprinted in 2 Messages and Papers, *supra* note 2, at 582.

50. J. Monroe, First Annual Message (Dec. 2, 1817), reprinted in 2 Messages and Papers, *supra* note 2, at 18 (emphasis added).

51. 3 The Records of the Federal Convention of 1787, at 488 (M. Farrand ed. 1911).

52. Id.

53. H.R. 321, 34th Cong., 1st Sess. (1856).

54. Id.

55. A. Lincoln, Second Annual Message (Dec. 1, 1862), reprinted in 6 Messages and Papers, *supra* note 2, at 133.

56. H.R. Doc. No. 78, 37th Cong., 3d Sess. 19-20 (1863).

57. Id. at 21.

58. Id.

59. U.S. Department of Agriculture, 1988 Budget Summary.

60. A. Jackson, Veto Message (May 27, 1830), reprinted in 2 Messages and Papers, *supra* note 2, at 491 (emphasis added).

61. *U.S. v. The William*, 28 Fed. Cas. 614, 620-23 (No. 16,700) (D. Mass. 1808), quoted in The Constitution of the United States of America, Analysis and Interpretation, S. Doc. No. 82, 92d Cong., 2d Sess. 180-81 (1972).

62. The Declaration of independence para. 2 (U.S. 1776).

63. Adams' perspective on foreign policy is vital to those who seek principled direction in this area. The foundations of American foreign policy were laid down by Adams as Secretary of State under President Monroe and later as President in his own right. It was Adams who declared that "of all the dangers which encompass the liberties of a republican state, the intrusion of a foreign influence into the administration of their affairs, is the most alarming." S. Bemis, John Quincy Adams and the Foundations of American Foreign Policy 30 (1949). See also A Hamilton, The Letters of Pacificus (1793) (Library of American Civilization 30533) and J. Madison, The Letters of Helvidius (1793) (Library of American Civilization 30734) for a discussion on the President's power to proclaim U.S. neutrality in foreign affairs.

64. J.Q. Adams, An Eulogy on the life and Character of James Madison 47 (1836).

65. See Szamvely, The Imperial Congress, Commentary, Sept. 1987, at 27. George Szamvely's excellent article articulates many of the congressional actions which have impermissibly hampered the exercise of article II powers.

66. J.Q. Adams, *supra* note 64.

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