TOWARD A MORE RESPONSIBLE CONGRESS?

CONGRESS AND RESPONSIBLE GOVERNMENT

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INTRODUCTION

Can today's Congress change from a "broken branch" to a responsible branch? Five months before the presidential election of 2008, the *New York Times* editorialized that, for Congress, such a transition depended on electing a better President.[1] The *New York Times* lamented the Senate's failure to mandate a seventy-percent reduction in greenhouse gas emissions by 2050. Though "short of what most climate scientists believe is necessary," a seventy percent reduction would still be "an important first step" toward preventing climate change.[2] The editorial went on to cite several causes of the bill's failure. The bill could not attract the sixty votes now routinely needed to put important measures to a Senate vote.[3] The bill's Democratic manager had not spent enough time discussing the bill's potential economic impact.[4] Republican leaders who were "more interested in protecting industry than the environment behaved like babies, at one point spitefully forcing a complete reading of the 492-page bill, sapping any political momentum."[5] Finally, record gas prices that spring had made the bill's timing "terrible."[6] After three-and-a-half days of "failure to mount any sort of grown-up debate," and

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1 Editorial, *Another Failure in Climate Change*, N.Y. TIMES, June 11, 2008, at A22.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

marshaling only forty-eight votes to prevent a filibuster, Democratic leaders pulled the bill.[7] No one ever thought "that dealing with climate change would be easy or cost-free," said the editorial, "[b]ut we expected better from the Senate."[8] Maybe next time America will have a President "who is willing to invest the time and the political capital necessary to push good legislation through Congress."[9]

This editorial has a complex message. It suggests a two-part test for responsible congressional action that could have come straight from *The Federalist Papers*, and it indicates, correctly in my view, that Congress's problems are but symptoms of broader problems with America's political culture. The editorial describes the Senate's failure as, first, a failure to debate in a grown-up way and, second, a failure to reach a correct result. The editorial also situates this two-part failure in a network of broader problems that includes the President's failure to push the bill through Congress, institutional obstacles to good ideas (like the Senate's cloture rule), and an electorate unwilling to bear the sacrifices (such as higher gas prices, more expensive cars, and a lower standard of living) needed to avoid much greater pain later. Stepping back to examine the elements of the *New York Times*'s account – wrong result, wrong approach, nested failures – observers of Congress might well wonder not only about Congress's prospects, but also about their own prospects. Is responsible comment on Congress's problems possible? If assessing the responsibility of congressional action involves judgments about right results, can a reference to responsible action signify more than the partisan preferences of the speaker? And if Congress's problems ultimately reflect the character of the American electorate, congressional reform depends on a level of social reform that seems beyond the deliberative capacity of the nation's institutions. American institutions are democratic institutions, and institutions that depend on the periodic approval of a given population are limited in the extent to which they can change the psychology of that population. Why, then, talk about reform, the scope of which is beyond the nation's ability to plan – reform that can come only in the aftermath of some national trauma? Why not just pray for the best?

American constitutional tradition provides at least one reason for resisting this last option. And though this reason, like any premise based on "tradition," is far from compelling, it is at least worth noting. The nation's founding documents boldly assume mankind's capacity for large-scale institutional planning. The *Declaration of Independence* assumes this capacity when it declares that people have a right "to alter or to abolish" an old government and "institute new Government" in accordance with their own calculations of what is "most likely to effect their Safety and Happiness."[10] The Constitution's

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Preamble describes the document as ordained and established by the people "in Order to form a more perfect Union, establish Justice," and pursue other goods, like "the common defence."[11] *The Federalist No. 1* opens with a boast:

> [I]t seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, 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.[12]

Statements like these place prayerful submission to Fate's inevitable course in a tradition that is something other than constitutional, and maybe even anti-constitutional.

Trying to remain within the constitutional tradition, this Essay will address two problems: first, it will analyze what responsible government is; and second, it will examine whether assessing the responsibility of institutional conduct can rise above partisan opinion. Because these problems are related, they are discussed together. This Essay focuses more on general concerns about responsible government and our assessments thereof than on the specific problem of responsibility in Congress. One reason for this focus is the logical relationship of the issues involved: we have to decide what responsible government is and how we assess responsible conduct before we decide whether Congress acts responsibly. Another reason will emerge as the discussion unfolds. As the *New York Times* editorial indicated, if responsible government is what we seek, maybe we should look more to the President than to Congress.

I. PUBLIUS ON RESPONSIBLE GOVERNMENT

Let us begin with *The Federalist Papers*. Publius[13] says a lot about responsible government. In fact, his entire work can be seen as an extended treatment of the subject.[14] The most important step to understanding Publius's position is to recognize that while he is committed to popular government, popular government is not his primary commitment. As Michael Sandel aptly puts it, Publius seeks above all else a government that will "do the right

[11] U.S. CONST. pmbl.

[12] THE FEDERALIST NO. 1, at 3 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[13] Reference to "Publius," a pseudonym, focuses attention on the public argument of the *The Federalist Papers*, not the biographies or private intentions of its authors. This serves the Dworkinian interpretive strategy defended in SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 26-33, 155-170 (2007) (explaining that fidelity to the general concepts put forth in the founding documents is more defensible than fidelity to the Framers' definitions or expected applications).

[14] The following interpretation of *The Federalist Papers* borrows from chapter three in BARBER & FLEMING, *supra* note 13, at 35-55.

thing."[15] Because Publius's controlling commitment is not to democracy per se, he is not committed to a government that is merely responsive to public opinion. Like the *New York Times* editorial that takes its bearings from what "most climate scientists believe," Publius would assume that "the right thing" is what is objectively right, as indicated by the best available evidence, and not necessarily what the public believes.[16] A distinction between what is true and what the public believes is implicit in Publius's famous definition of faction: "a number of citizens, whether . . . a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[17] Publius contends that Americans, circa 1787, needed a new national government chiefly because the democracies in the states too often acted contrary to the true interest of their people and the rights of their minorities.[18] Therefore, the distinction between good and bad policy supposes objective standards that the government can fail to meet and the public can fail to appreciate.

On the other hand, responsibility in the fullest sense is responsibility *to* someone as well as *for* something. And if "what" the government is responsible *for* is doing the right thing, then the "who" to whom it is responsible is the public – the public whose opinion may not be on the right side of a given issue at a given time. Here, obviously, is a problem: how can one be responsible *for* doing the right thing *to people* who may not know what the right thing is? To address this problem, a government must align the "*to*" of responsibility with the "*for*." Such a government – a fully responsible government – must therefore educate the public and lead the public to an appreciation of its true interest.[19] And Publius is clear in several places that to the extent a government fails in this function – fails to maintain public support for the right thing – it ceases to deserve the public's allegiance.[20]

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[15] MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 131 (1996).

[16] Editorial, *supra* note 1.

[17] THE FEDERALIST NO. 10 (James Madison), *supra* note 12, at 57.

[18] *Id.* For an overview of state transgressions that emphasizes the states' failure to fund the Revolutionary War debt, see THE FEDERALIST NO. 15 (Alexander Hamilton); CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 15-39 (2005).

[19] *See* THE FEDERALIST NO. 63 (James Madison), *supra* note 12, at 425; THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 12, at 482-83; *see also* BARBER & FLEMING, *supra* note 13, at 51-55.

[20] *E.g.*, THE FEDERALIST NO. 9 (Alexander Hamilton), *supra* note 12, at 51; THE FEDERALIST NO. 10 (James Madison), *supra* note 12, at 61.

II. THE LARGE COMMERCIAL REPUBLIC

How does Publius pursue his grand ambition of a responsible government – a government that is both democratic and generally on the right side of things? To appreciate Publius's answer we must first describe what Publius thinks the right thing is – the substantive state of affairs the Constitution seeks to advance. Publius's view of the good society seems to be what Martin Diamond called "the large commercial republic" ("LCR").[21] Diamond's Hamiltonian reading of *The Federalist Papers* is controversial, and defending it would take us far afield into interpretive, historical, social-scientific, and moral questions.[22] A full treatment of the issues is unnecessary here, however, for a Hamiltonian reading is within the pale of plausible interpretive options. Diamond's Hamiltonian reading describes a vision of the country that is at least respectable enough to serve as a working hypothesis, something to start a discussion. Hamilton, after all, was a Framer of considerable influence, an ally of Madison during the Philadelphia Convention and the ratification debate, and a co-author of *The Federalist*. In any case, I can safely accept the LCR as a working theory of constitutional ends because, as I shall contend, the best understanding of a responsible government ultimately turns on the fallibility of any conception of constitutional ends, including the LCR.

Diamond derived his theory of the LCR partly from historical sources like Adam Smith and partly from his own reflections on the socio-economic preconditions for the success of Publius's proposal in *The Federalist No. 10*.[23] Diamond reasoned, for example, that the large number of political interest groups sought in *The Federalist No. 10* would not exist in an agrarian society, however large its area and population.[24] From this, he reasoned that Publius assumed the nation would develop economically toward an urban-industrial society.[25] Diamond reasoned that Publius's shifting economic coalitions assumed actors who sought to advance the interests of specific kinds of property, as opposed to different degrees of property – the interests of, say, shipping, farming, or manufacturing, as distinguished from the interests of the poor against the rich.[26] Diamond reasoned that shifts in economic coalitions from issue to issue would be less likely where non-negotiable class interests and religious zeal obstructed economic rationality, hence his finding of

[21] MARTIN DIAMOND, THE FOUNDING OF THE DEMOCRATIC REPUBLIC 71-78 (1981) (arguing that the Framers' system could work only in a commercial society where fragmented interests and eventual commitments to growth and equal opportunity would prevent polarization along economic, religious, and racial lines).

[22] For a thoughtful criticism of Diamond's theory, see generally Alan Gibson, *The Commercial Republic & the Pluralist Critique of Marxism: An Analysis of Martin Diamond's Interpretation of* Federalist 10, 25 POLITY 497 (1993).

[23] DIAMOND, *supra* note 21, at 74.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 75.

constitutional commitments to earthly pursuits, economic growth, upward mobility, and equal opportunity for all responsible persons.[27] As Diamond described the LCR, it looked something like the nation envisioned by the late New Deal – busy, prosperous, orderly, religiously moderate, inclusive, and fair, in a proto-Rawlsian sense of "fair."[28] Participation in the lawful vocations and avocations of this society would enable the secure, commodious, and engaged living that Lockean liberals thought constituted the happiness of the great body of human kind.[29]

One objection to this or any ends-oriented view of the Constitution derives from the conventional distinction between classical republicanism and enlightenment liberalism. The latter is associated with constitutions that are "made for people of fundamentally differing views," to borrow Justice Holmes's famous account of the Constitution in *Lochner v. New York*.[30] A constitution of this type, say Holmesian liberals, is not concerned with shaping the values of its people to fit some official version of the good life. Its concern is chiefly with rights conceived as exemptions from governmental power, namely, "negative rights" as opposed to the "positive ends" linked to powers granted to the government.[31] For example, "national security" is a positive right associated with Congress's rights to "raise and support Armies" and "a Navy."[32] Note that this negative constitutionalism does not actively oppose positive goods like national security, because the desirability of such goods and the need for government to pursue them explains the origins of American-style constitutions.[33] What negative constitutionalists deny is that goods like national security and economic well-being are things we enjoy as *rights* that the government is duty-bound to provide or facilitate.[34] Negative constitutionalists thus deny that rights to healthcare, education, and other "welfare rights" (including, as it turns out, police and fire protection) define

[27] *Id.* at 78.

[28] *See* JOHN RAWLS, A THEORY OF JUSTICE 60-61, 75 (1971). Rawls offers a view of "justice as fairness" through the use of two principles of justice, the first being that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others," and the second combining "the principle of fair equality of opportunity with the difference principle," which elaborates the "intuitive idea . . . that the social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate." *Id.*

[29] For an explication of Diamond's theory and its anticipation of Rawls's difference principle, see SOTIRIOS A. BARBER, WELFARE AND THE CONSTITUTION 102-03 (2003) [hereinafter BARBER, WELFARE].

[30] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

[31] Sotirios A. Barber, *Fallacies of Negative Constitutionalism*, 75 FORDHAM L. REV. 651, 651 (2006).

[32] U.S. CONST. art. I, § 8; Barber, *supra* note 31, at 651.

[33] For a defense of this proposition, see BARBER, WELFARE *supra* note 29, at 26-29.

[34] Barber, *supra* note 31, at 658 (explaining that negative constitutionalists believe that "protecting rights is . . . a practice of forbearance on government's part").

the obligations of constitutional government.[35] Negative constitutionalists know that constitutional status for welfare rights would imply an official understanding of personal well-being beyond merely living in a society in which each non-criminal adult can legitimately determine his or her own private conception of what it means to be well off. This concept is only limited by the requirement that no "harm" flows to others, with the definition of "harmful" action being officially encoded in the criminal and civil laws.[36] Diamond denied key elements of negative constitutionalism. He denied, as we have seen, that the Constitution was unconcerned with promoting positive goods.[37] He also denied that the Constitution was unconcerned with molding the character of its people.[38] Implicitly, therefore, he disagreed with Holmes's dictum that the Constitution "[was] made for people of fundamentally differing views."[39]

Diamond held as a general truth of political science that every constitution, liberal as well as classical, was concerned with the character of its people and that each, in its own way, cultivated a distinctive human type. Furthermore, said Diamond in a proposition I will discuss below, "each political order is literally constituted by the kind of human character it aims at and tends to form."[40] Thus, Diamond argued that a genuine political constitution must be more than a mere contract for commercial purposes and the prevention of physical and economic harm[41] – more, as I would put it, than a charter for aggregating private preferences and securing negative liberties. A constitution adequate to human needs must also aim at goods like those listed in the Preamble of the United States Constitution and *The Federalist No. 1*: goods like the common defense, the general welfare, and the individual and collective dignity and happiness of the population.[42] Yet we can easily read the Constitution as aiming at little more than defending the nation, aggregating essentially economic preferences, securing the conditions for commerce, including investor confidence, and protecting the equal legal rights of individuals to function in the market and the polity. The body of the Constitution contains no direct reference to any human virtue or character.

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[35] *See* DeShaney v. Winnebago County Dep't Soc. Servs., 489 U.S. 189, 189 (1989) (holding that "the [Due Process] Clause imposes no duty on the State to provide members of the general public with adequate protective services").

[36] For a refutation of the thesis that modern liberalism is like a sea of private rights surrounding islands of governmental power, see Barber, *supra* note 31, at 657-60.

[37] Martin Diamond, *Ethics and Politics: The American Way*, *in* THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 75, 106-07 (Robert H. Horowitz ed., 3d ed. 1986).

[38] *Id.*

[39] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

[40] Diamond, *supra* note 37, at 78.

[41] *Id.* at 80.

[42] U.S. CONST. pmbl.; THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 12, at 6.

Beyond the powers to regulate and train the armed forces, including the state militias,[43] the Constitution suggests nothing about educating people. Though *The Federalist No. 1* appeals to the "patriotism" and "philanthropy" of its readers,[44] *The Federalist No. 10* rejects a policy of cultivating a population with "the same opinions, the same passions, and the same interests."[45] Though the conclusions of *The Federalist Nos. 14* and *49* echo the appeal of *The Federalist No. 1*,[46] in *The Federalist Nos. 47*, *48*, and *50*, Publius systematically rejects relying on the virtue of either the electorate or the politicians.[47] Statesmen and a patriotic people were necessary to establish the Constitution, Publius claims,[48] but he will not rely on "better motives" to maintain the Constitution. As memory of the Revolution fades, normalcy will return people to their self-serving ways, and a system of checks and balances will supply "the defect of better motives."[49] In this way, the system is supposed to produce responsible government, even when the people who govern and are governed do not have the proper goals or motives.

Publius's scheme prompts three observations. First, because assessments of institutional performance presuppose a test of good policy results, and because the substance of any such test is independent of public opinion, responsible commentators are obliged to explicate and defend the substantive theories of constitutional ends that they unavoidably assume. Diamond's LCR is such a theory. Second, though Publius deemphasizes the need for statesmanship, patriotism, and other virtues, he cannot help presupposing virtue at some level – at least the level at which institutional performance is responsibly assessed. In other words, to know whether the system is working, one has to share the "better motives" and appreciate the appropriate results. One would think that some part of the system would be competent to monitor the performance of the system as a whole. To perform this function an institution would have to be situated at a place above that of contending private interests, and one might think that the federal judiciary is that institution.[50] But the federal judiciary will not be enough; the requisite test of good policy is an objective test that any given body of judges can fail to approximate. Additionally, the limited power of judges to shape what the Constitution means in practice renders the

[43] U.S. CONST. art. I, § 8.

[44] THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 12, at 1.

[45] THE FEDERALIST NO. 10 (James Madison), *supra* note 12, at 58.

[46] THE FEDERALIST NO. 14 (James Madison), *supra* note 12, at 83; THE FEDERALIST NO. 49 (James Madison), *supra* note 12, at 343.

[47] THE FEDERALIST NO. 47 (James Madison), *supra* note 12, at 324; THE FEDERALIST NO. 48 (James Madison), *supra* note 12, at 337-38; THE FEDERALIST NO. 50 (James Madison), *supra* note 12, at 346-47.

[48] THE FEDERALIST NO. 49 (James Madison), *supra* note 12, at 341.

[49] THE FEDERALIST NO. 51 (James Madison), *supra* note 12, at 349.

[50] For an argument to this effect, see SOTIRIOS A. BARBER, THE CONSTITUTION OF JUDICIAL POWER 26-65 (1993).

judiciary an inadequate agency for institutional reforms that may prove crucial to the rational pursuit of constitutional ends. Finally, observers face an interpretive option: they can conclude either that Publius fails to provide for the virtues that he cannot help relying on, or that he provides for these virtues in an ambiguous way. Publius might rely on these virtues in a way that can be described as both providing and not providing for the "better motives" that checks and balances are supposed to replace.

Diamond chose the latter option. He saw the American constitutional scheme as actively concerned with better motives after all – actively positive public purposes and a supporting set of human qualities, attitudes, and beliefs.[51] Diamond thought that these peculiarly American qualities, attitudes, and beliefs reflect an American conception of the good and just life.[52] He saw the Framers as part of the tradition in political philosophy that had rejected the classical insistence on elevated ends like imperial glory and a religiously righteous population.[53] Because these grand ends required repressing the lowly but powerful demands of bodily security and comfort, they required virtues, such as heroic courage and self-abnegating piety, whose cultivation needed more than "precept," "exhortation" and "paternal authority" could achieve.[54] They required "a comprehensive system of character-forming conditions and constraints" – sumptuary rules and educational programs embodied in laws "with teeth in them."[55]

Joining the tradition that began with Machiavelli and included Locke, the Framers rejected the old philosophy. The high perfectionist aims of the old philosophy had ended in human misery wrought by "[g]reed and vainglory rul[ing] under the guise of virtue or piety."[56] Two centuries of "religious tyrannies and wars" together with the "new science of politics" convinced the Framers to lower "the aims and expectations of political life" and accept "as irremediably dominant in human nature the self-interestedness and passions [for security and comfort] displayed by men everywhere."[57] With self preservation and associated liberties in view, the Framers could cultivate the right virtues by "shrewd institutional arrangements" that channeled the self-interested passions in the right direction.[58] No longer seeking either heroic glory or saintliness, the new direction was towards the LCR, its "moderating private pursuit of individual economic happiness" and the individual rights that make it "decent and agreeable."[59]

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[51] Diamond, *supra* note 37, at 76.

[52] *Id.*

[53] *Id.* at 82.

[54] *Id.* at 79-80.

[55] *Id.* at 80-81.

[56] *Id.* at 82.

[57] *Id.* at 82-83.

[58] *Id.* at 83.

[59] *Id.* at 83, 91.

Relying on a natural acquisitiveness did not mean liberating acquisitiveness from all restraints, of course, for governments at all levels would continue to tax and spend to maintain the institutions of the criminal and civil law.[60] These coercive institutions would channel acquisitive energies in directions that the community approved, while tolerating those it considered harmless.[61] The civil and criminal laws would shape private institutions like families, voluntary associations, and religious institutions so that their character-forming efforts would either support the LCR or stand out of its way.[62] The Constitution would insure this last result by authorizing Congress to pursue only liberal ends – national security and prosperity initially – and eventually equal opportunity and economic fairness. Diamond saw these ends as implicit in the logic of the system from the beginning.[63] Had it worked as intended, this scheme would promote what Diamond called "bourgeois virtues,"[64] which I would describe as honesty and reliability, initiative and industriousness, religious moderation, self-government, sensitivity to the opinions of others, and a conception of lawful gain based on voluntary exchange.

III. PUBLIC REASONABLENESS

Can we say, then, that on Publius's authority a responsible Congress would pursue results favored by New Deal liberals and their successors? Perhaps, but not yet; for our discussion so far has yielded no more than a working theory of "the right result," and we must still attend to what a "grown-up debate" might be. To move forward, we must first step back and look at the text of the Constitution.

Article V, the First and Fifth Amendments, the Civil War Amendments, and the Nineteenth Amendment, taken together, suggest a more comprehensive end than those uniquely associated with the LCR. The end in question is a secular public reasonableness – a disposition to decide questions of public policy on the basis of those experiences that people commonly share without invoking biblical revelation or privileged experiences that depend on gender, race, culture, or anything short of what is evident in principle to people generally, perhaps to human beings everywhere and at all times. This disposition is a virtue, a praiseworthy way of being and appearing to be. It can also describe that state of affairs in which either the general population or a trusted leadership stratum takes pride in giving and exchanging its reasons for controversial choices.

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[60] For an argument that even minimal government is redistributive, see BARBER, WELFARE, *supra* note 29, at 14-15.

[61] Diamond, *supra* note 37, at 99.

[62] For an argument that so-called privacy rights are derived from and must be compatible with the public purposes of a liberal regime, see Barber, *supra* note 31, at 659.

[63] Diamond, *supra* note 37, at 83.

[64] *Id.* at 101.

The Federalist No. 1 assumes the general attractiveness of this virtue when it summons its readers to act in a manner that demonstrates man's capacity for "establishing good government from reflection and choice."[65] Additionally, the Declaration of Independence displays this virtue when, from "a decent respect to the opinions of mankind," it declares "the causes which impel" the revolution and supports its position with "[f]acts . . . submitted to a candid world."[66] *The Federalist Papers*, in general, assume this virtue by stressing the importance of a "sensibility to the opinion of the world" and by holding that a test of policy "in doubtful cases" is "the presumed or known opinion of the impartial world."[67] The First Amendment would guarantee a condition of this public reasonableness by proscribing an official national religion.[68] Article VI does the same by barring a "religious [t]est" for "any Office or public Trust under the United States."[69] The Fourteenth and Nineteenth Amendments secure further conditions of public reasonableness by proscribing forms of racial and gender discrimination.[70] The Due Process Clauses of the Fifth and Fourteenth Amendments, construed in light of a conceptual connection between reason and law and the instrumental character of American law, mandate reasonableness for all governmental policies in the United States.[71] Finally, Article V manifests a commitment to public reasonableness by establishing lawful ways to exercise a right that the Declaration of Independence infers from its foundational principle of human equality: "the Right of the People to alter or to abolish" their government "whenever . . . [it] becomes destructive of [the] ends" for which it was established.[72]

This crucial right to alter government needs additional comment. In *The Federalist No. 40*, Publius shows how a broad principle of public reasonableness can dissolve institutions originally designed to give that

[65] THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 12, at 1.

[66] THE DECLARATION OF INDEPENDENCE para. 1, 2 (U.S. 1776).

[67] THE FEDERALIST NO. 63 (James Madison), *supra* note 12, at 422-23.

[68] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

[69] *Id.* at art. VI.

[70] *Id.* at amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."); *Id.* at amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

[71] *Id.* at amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); *Id.* at amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."). For a defense of substantive due process "with teeth" across the board of legislation in America, see SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS 123-31 (1984) [hereinafter BARBER, WHAT THE CONSTITUTION MEANS].

[72] U.S. CONST. art. V (setting forth the procedure for amending the Constitution); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

principle practical effect.[73] Publius's problem here involves Article XIII of the Articles of Confederation, the constitutional document of the United States at the time Publius wrote *The Federalist No. 40*. Article XIII declares:

> [T]he articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.[74]

The Philadelphia Convention and the Confederation Congress acted in the teeth of Article XIII when the Convention recommended the newly proposed Constitution and Congress sent it to the states. Though Article XIII required ratification by a unanimous vote of the state legislatures, Article VII of the proposed Constitution said "Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same."[75] The Anti-Federalists considered this a lawless act that would infect future institutions with a principle of lawlessness.[76] Moreover, the Anti-Federalists said bypassing the state legislatures for ratification by popular conventions would undermine federalism, the governing principle of union in America.[77]

Publius files a response that is both blunt and evasive. He admits "that the Convention have departed from the tenor" of what Congress originally asked the Convention to do, that is to merely amend the Articles, implicitly in accordance with Article XIII.[78] He notes, however, that this particular complaint against the Convention "has been the least urged."[79] The reason for such "forbearance" can only be "an irresistible conviction of the absurdity of subjecting the fate of 12 States, to the perverseness or corruption of a thirteenth," Rhode Island, which comprises "1-60th of the people of America."[80] In this defense of the Convention, Publius assumes that the ends of government are real goods and that people can be wrong both in their

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[73] THE FEDERALIST NO. 40 (James Madison) (discussing how the Articles of Confederation could be properly replaced with a new Constitution).

[74] U.S. ARTICLES OF CONFEDERATION art. XIII.

[75] U.S. CONST. art VII.

[76] HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 8 (1981).

[77] *Id.*

[78] THE FEDERALIST NO. 40 (James Madison), *supra* note 12, at 263.

[79] *Id.*

[80] *Id.* Rhode Island was the only state that refused to send a delegation to Philadelphia. Publius may also have been recalling Rhode Island's infamous veto in 1781 of an amendment to the Articles permitting Congress to levy a five percent tax on imports. This "impost" would have given Congress a modest taxing power independent of the states, and, as was her right under Article XIII, Rhode Island vetoed on states' rights grounds. Killing what was widely viewed as a badly needed amendment, this vote earned Rhode Island nearly universal condemnation. JOHNSON, *supra* note 18, at 1-3.

conception of these goods and the means they use to achieve them. The pursuit of real goods by fallible actors puts the lessons of experiential reason (like Rhode Island's demonstrated "perverseness") above all other authorities (like Article XIII). Thus, Publius will not follow a law – even a constitution – that yields absurd consequences. Publius goes on to say:

> [I]n all great changes of established governments, forms ought to give way to substance [and] . . . a rigid adherence in such cases to the former, would render nominal and nugatory, the transcendent and precious right of the people 'to abolish or alter their governments as to them shall seem most likely to effect their safety and happiness . . . .'"[81]

To this he adds that "since it is impossible for the people spontaneously and universally, to move in concert toward their object . . . it is therefore essential, that such changes be instituted by some *informal and unauthorized propositions*, made by some patriotic and respectable citizen or number of citizens."[82]

As attractive as Publius's response might be, it evades the question whether a maxim of public reasonableness (that is, an instrumentalist maxim of substance-above-form) expresses a lawlessness that will undermine the authority of any subsequent constitution. Whether instrumentalism is consistent with lawfulness in the abstract,[83] instrumentalism does qualify allegiance to the LCR or any other regime (save one, as we shall see). If, as Diamond contended, the Constitution presupposes the LCR and in that sense embodies it,[84] then we can have reasons consistent with background constitutional principles (like the people's right to alter constitutions) to reject the LCR just as we can have reasons consistent with constitutional principles to alter or abolish the Constitution of 1789.

Thus, we can view the LCR as no more than a mere conception of the Preamble's ends. Taken severally or subsumed under "happiness" or some other comprehensive good, the Preamble's ends do not *mean* LCR (the way 'bachelor' means 'unmarried man') and the LCR does not *constitute* these ends (the way three legs and a seat, suitably formed, constitute a three-legged stool). That the LCR can be no more than a conception of preambular ends compromises the LCR's normative status. The Constitution's coherence depends on whether it works to facilitate the people's security and happiness, or a reasonable approximation of that security and happiness. After all, the Constitution expressly presents itself as an instrument of its ends; it was

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[81] THE FEDERALIST NO. 40 (James Madison), *supra* note 12, at 265 (citing THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

[82] *Id.*

[83] For an argument that instrumentalism is not only consistent with lawfulness at the constitutional level but integral to it, see BARBER & FLEMING, *supra* note 13, at 38-41.

[84] *See supra* Part II.

defended and presumably ratified as such.[85] The same holds for the value of the LCR; its normative status depends on whether, as compared to affordable alternatives, it maintains conditions for the people's security and happiness. Surely we can question the value of the LCR today in view of problems like global warming, the violent reaction of Islamic fundamentalism to the LCR's economic and cultural expansion, and what some social scientists see as a progressive "loss of happiness in market democracies."[86] Because nothing guarantees the success of the LCR, reason must continually reassess its utility in changing circumstances. Public reasonableness – in practice, the general public's sensitivity to the advice of public-spirited, informed, and scientifically-minded men and women – is the institutionalization of experiential reason in a democratic culture, and public reasonableness becomes the benchmark for judging governmental conduct as responsible or not.

Publius's position on amendability returns us to what *The Federalist No. 1* presents as the nation's founding ambition: proving mankind's capacity for rational self-government, "government from reflection and choice."[87] This capacity in any given nation can surely die. Foreign forces can kill it, as can internal decay born of error (for example, over-reliance on a strategy of checks and balances or underestimation of the corrosive effects of commercialism on public purposefulness), or perhaps even some natural predisposition. But whether government "from reflection and choice" is viable or not, it was not and cannot be *actively* abandoned. That is, people cannot abandon rational thought deliberately and with full knowledge; for doing something deliberately and knowingly is doing it for a reason, and one cannot have a reason for abandoning reason.[88] Therefore, the public cannot knowingly abandon public reasonableness through an act of amendment, for like all complex actions, an act of amendment must flow from a reason – and, again, there can be no reason for abandoning reason. This would make public reasonableness something of an unamendable institution – perishable, yes, but unamendable. Moreover, public reasonableness is the only constitutional institution that one can unequivocally swear to support and defend. Though Article V of the Constitution permits changing any constitutional provision[89] (swearing to support the Constitution does not mean swearing not to amend it), no amending procedure can amend the unamendable. Recalling Diamond's statement that "each political order is literally constituted by the kind of human

[85] For a defense of this theory of constitutional obligation, see BARBER, WHAT THE CONSTITUTION MEANS, *supra* note 71, at 39-62.

[86] *See generally* ROBERT E. LANE, THE LOSS OF HAPPINESS IN MARKET DEMOCRACIES (2000) (giving "insight into the quality of life . . . in market democracies, primarily the United States").

[87] THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 12, at 3.

[88] *See* BARBER, WHAT THE CONSTITUTION MEANS, *supra* note 71, at 224 n.43.

[89] U.S. CONST. art. V.

character it aims at and tends to form,"[90] I would say the Framers at least aspired to rule by public reasonableness, and that the Constitution fails to the extent that its formal institutions, like Congress, are unable to display this virtue in their own conduct (by debating as grown-ups, for example, and standing with the scientific community on questions like global warming) and neglect to maintain its social conditions (such as equal opportunity, economic fairness, and an educated and public-spirited citizenry).

IV. PUBLIC REASONABLENESS, THE LARGE COMMERCIAL REPUBLIC, AND A RESPONSIBLE CONGRESS

Public reasonableness, again, is both a state of affairs and a virtue. Stephen Macedo holds that it exists where people generally act from a "conviction that other people should be treated reasonably, that the application of power should be accompanied by conscientious and open efforts to meet objections with reasons . . . that all reasonable people should be able to accept."[91] Macedo finds the goal of public reasonableness integral to liberal constitutionalism because "[i]n a liberal regime, criticism of the government is accepted and even encouraged, and liberal citizens expect to be answered with reasons rather than mere force or silence."[92] Macedo clarifies the meaning of public reasonableness by identifying several figures who oppose it. His list begins with King James I of England, who claimed that he was answerable to God alone, not to his subjects, over whom God had given him absolute power.[93] The list includes a twentieth-century German political philosopher, who saw a commitment to public discussion as a bourgeois virtue that was bound to lose the contests with dictatorship, "the opposite of discussion."[94] Macedo also numbers moral skeptics like Robert Bork among the enemies of public reasonableness. They support an originalist approach to constitutional interpretation because they hold that morality is ultimately a matter of convention and that the meaning of legal/moral ideas like equal protection and due process can lie only in historical usage, not what open and self-critical reflection discloses as the best approximation of their true meaning.[95] Macedo could have gone on to list those moral skeptics in the social sciences who conceive legislative decision as aggregating essentially arbitrary private preferences, not Publius's process of "refin[ing] and enlarg[ing] the public

[90] Diamond, *supra* note 37, at 78.

[91] STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM 40-41 (1990).

[92] *Id.*

[93] *Id.* at 41-42.

[94] *Id.* at 42-43 (quoting CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 63 (George Schwab trans., 1985)).

[95] *Id.* at 43.

views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country."[96]

Macedo's regime of public reasonableness imposes a duty on the state to give reasons before restricting someone's liberty, "reasons" being arguments why restricting liberty serves the good of everyone, including the person whose liberty is restricted. An implicit distinction between real goods and apparent goods underwrites this regime. When the system works as it should, it brings the person whose liberty is restricted to a better view of his true interests. Publius's theory of responsible government manifests the same idea – that good government can show people they were wrong about something they initially thought was good. Publius states:

> [T]he people commonly *intend* the PUBLIC GOOD. . . . They know from experience, that they sometimes err . . . . [Thus they] would despise the adulator, who should pretend that they always *reason right* about the *means* of promoting it. . . . When . . . the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection. Instances might be cited, in which a conduct of this kind has saved the people from very fatal consequences of their own mistakes, and has procured lasting monuments of their gratitude to the men, who had courage and magnanimity enough to serve them at the peril of their displeasure.[97]

Central to this picture is the people's appreciation of their fallibility and resulting need for compensating institutions. Fallibilism and constitutionalism go hand in hand, whereas infalliblism in all its forms defeats constitutionalism. Because God, for example, is infallible, if we know that He wills a war, there is no point to either debating the war or risking defeat by permitting debate of the war. If God wills the war we can ignore the legislative forum for debate and the judicial forum for protecting debate, preferring instead to trust the executive, the branch that can marshal us to victory.

A special feature of Publius's picture is a relationship between leaders and followers that the nation's political culture now scorns as "elitism." Contrast Publius's expectations with Macedo's. Macedo's "public reasonableness" is a state of political culture in which people generally expect to give and receive reasons when deciding on a course that affects others.[98] Publius is not nearly as sanguine about the reasonableness of the general public. He expects a measure of reasonableness from a leadership stratum, and he assumes a political culture capable of producing leaders who deserve the public's trust.[99]

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[96] THE FEDERALIST NO. 10 (James Madison), *supra* note 12, at 62.

[97] THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 12, at 482-83.

[98] MACEDO, *supra* note 91, at 42.

[99] THE FEDERALIST NO. 10 (James Madison), *supra* note 12, at 62.

He claims that such a leader-follower pattern existed during the Revolution when common danger produced "an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions,"[100] and though he expects a return to partisanship after the constitutional period, he also expects a measure of public-spirited leadership.[101] To provide this leadership he proposes terms of election, appointment, and tenure that anticipate elevated characters in the Senate, the Presidency, and the Supreme Court.[102] Though we may detect elitism in this arrangement, just as the Anti-Federalists smelled aristocracy, Publius views this arrangement as essentially popular because he expects that leaders will ultimately account to the public.[103] While scheduled elections would guarantee public accountability for the elected branches, appointment by elected officials would extend ultimate public accountability to the judiciary as an institution, if not to individual judges holding office during good behavior. Thus, the judiciary's protection of "the liberty of the press, . . . must altogether depend on public opinion, and on the general spirit of the people and of the government."[104] Publius continues:

> The republican principle [i.e., majority rule] demands[] that the deliberate sense of the community should govern the conduct of those to whom they entrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breese of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests.[105]

Ultimately, if not immediately, the public shall judge the government, and the test of responsible government is the public's judging correctly.

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[100] THE FEDERALIST NO. 49 (James Madison), *supra* note 12, at 341.

[101] THE FEDERALIST NO. 76 (Alexander Hamilton), *supra* note 12, at 514.

[102] THE FEDERALIST NO. 63 (James Madison), *supra* note 12, at 422-23, 431 (suggesting that the six year term for senators will foster "a due sense of national character"); THE FEDERALIST NO. 68 (Alexander Hamilton), *supra* note 12, at 460-61 (describing how the electoral college voting system will ensure a man does not become President solely because of the "arts of popularity," rather than his "talents"); THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 12, at 484 (explaining how a short, four-year presidential term "can affect . . . independence"); THE FEDERALIST NO. 76 (Alexander Hamilton), *supra* note 12, at 509-15 (defending the appointment process of the judiciary); THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 12, at 528-30 (advocating for "the permanency of the judicial offices" because the necessary "inflexible and uniform adherence to the rights of the constitution and of individuals" is not obtainable through temporary terms).

[103] *See* THE FEDERALIST NO. 55 (James Madison), *supra* note 12, at 377.

[104] THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 12, at 580.

[105] THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 12, at 482; *see also* THE FEDERALIST NO. 10 (James Madison), *supra* note 12, at 60 (defining the "republican principle" as majority rule).

Generalizing from Macedo's account, we can say that a practice of open public deliberation is undermined by claims that favor: (1) any source of authority (i.e., God or the community) that is considered to be beyond coherent questioning; (2) necessity in such forms as emergencies or laws of history, economics, or physics that either leave no time for deliberation or make it inconsequential; and (3) the skeptical beliefs that ultimately there is nothing to talk about and that talk serves only to facilitate self service or mask it as virtue. These kinds of claims emanate from sources like the Religious Right, free-market ideology, and a social-science establishment that remains heavily invested in the non-cognitivist metaethics of the old Logical Positivism.[106] The great political and cultural power of these forces indicates what a regime of public reasonableness must face. Why debate a proposition – why submit it to a truth-seeking process – when the proposition's truth is guaranteed by God or the laws of economics or when debate can approximate no truth (about what is good or right) that can justify action? Why debate a proposition that can be true for one person, yet false for another; or that can be neither true nor false; or whose truth depends on the will of someone or some community?[107]

Putting aside these obstacles to a regime of public reasonableness, let us ask what a responsible government and a responsible Congress would be, were we to assume they could exist at all. As a first approximation one could locate a responsible Congress within a system that pursues and maintains the aims and conditions of the LCR – economic growth, scientific progress, equal opportunity, fairness, and the rest.[108] By this standard the Eighty-eighth Congress acted responsibly by enacting the 1964 Civil Rights Act,[109] and the 107th Congress irresponsibly enacted massive tax cuts that, as predicted, exacerbated the income gap.[110]

Yet the value of the LCR depends on whether self-critical and experiential reason confirms that people are better off in the LCR than they would be in some affordable alternative – whether the demands and conditions of public reasonableness coincide with the aims and conditions of the LCR. To some extent these two regimes are the same. Both exhibit fallibilism (albeit more in science than economics and politics), secularism in government,

[106] *See generally* C.E.M. JOAD, A CRITIQUE OF LOGICAL POSITIVISM (1950).

[107] One might try to answer by conceiving political debate not as a truth-seeking process but as a rhetorical process – a process designed not to demonstrate, but to persuade. But this answer will not work, for when we persuade someone that "x," we bring her from denying or doubting to believing that "x is true or probably true." Belief presupposes truth; rhetoric presupposes science; and persuading presupposes demonstrating. If we could imagine anyone who really believed there was no truth about anything, there would be nothing to persuade that person to.

[108] *See supra* Part II.

[109] Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 28 and 42 U.S.C.).

[110] *See* David Cay Johnston, *Income Gap is Widening, Data Shows*, N.Y. TIMES, Mar. 29, 2007, at C1.

inquisitiveness, and a prevailing belief that the capacity for reasoned exchange is the decisive human quality. Yet these regimes may also differ. Though voluntary exchange of goods parallels voluntary exchange of reasons, unlimited economic growth can be suicidal for both environmental and social-psychological reasons. It can increase distrust among classes separated by a widening income gap and enhance the vulnerabilities that come with technological progress and economic globalization. Congressional leaders responsible for pursuing the common good would take an active interest in these problems both by debating alternative responses to them in a grown-up fashion and attending to the debates that are now underway in the academy and elsewhere. In sum, Congress acts responsibly when it does what it can to maintain a regime of public reasonableness – when it displays a capacity for grown-up debate and a self-critical concern for doing the right thing, and when it earns the public's trust in the process.

This conclusion indicates that responsible critics of Congress's performance must answer some initial questions concerning the meaning of public reasonableness for the nation's organic public policies and basic institutions. The first question might be whether friends of responsible government would do better by de-emphasizing Congress, conceding the case for presidential government, and then seeking ways to improve presidential performance and the federal bureaucracy. This prospect recalls the *New York Times* editorial suggestion that a responsible Congress has to await a responsible President.[111] Herbert Storing pointed out a generation ago that Publius's theory of responsible government is mainly a theory of presidential government.[112] One reason for this view is that the Constitution does not permit Congress to be held accountable as an institution; Americans vote for the individuals who represent their districts and states, not for Congress as a whole.[113] However, the main reason is that responsible government cannot follow the public; it must lead the public, and Congress normally lacks the sustained unity essential to lead.[114] I would say Congress plays a role in responsible government because the great bulk of presidential initiatives eventually require legislative support, and in a republic, expression in statutory law. But Publius describes a role for Congress that is mostly preservative of the status quo: Congress acts

[111] Editorial, *supra* note 1.

[112] *Cf.* Herbert J. Storing, *Political Parties and the Bureaucracy*, *in* POLITICAL PARTIES, U.S.A. 137, 143 (Robert A. Goldwin ed., 1964).

[113] *See* U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members . . . apportioned among the several States . . . according to their respective Numbers . . . ."); *Id.* § 3 ("The Senate of the United States shall be composed of two Senators from each State . . . .").

[114] To be fair, Congress lacks the sustained unity even to be held accountable as an institution. Why blame Congress as a whole for failing to control greenhouse gas emissions? Was this not due to a mere faction in Congress or, as the *New York Times* editorial suggests, a failure of presidential leadership? *See* Editorial, *supra* note 1.

responsibly when it erects obstacles to ill-considered public demands.[115] More precisely, the Senate, built to be an ally of the executive, acts responsibly when it stops bad ideas that originate in the more popular House.[116] At its best, Congress refines executive initiatives when its legislator-experts review proposals from the executive branch and the regulatory agencies.[117] All these activities normally require presidential leadership.

Storing died more than twenty years before the election of George W. Bush, and no one can be certain whether he would have amended his argument in view of the Bush presidency. We do know Storing did not claim that presidential government *guarantees* responsible government.[118] One "decider" acting with all but complete congressional support and no serious congressional oversight – the pattern of President Bush's first six years in office[119] – does satisfy one condition of responsible government by making it easy for the public to identify whom to credit for government's successes and failures. This satisfies a condition of responsibility *to*; but responsibility is also responsibility *for* – that is, *for* certain results. Responsible government must first secure public approval for results and second, those results must objectively approximate the public's true interests. By one or both of these measures President Bush fell short. Either the results of his actions have hurt the country, or he failed to demonstrate otherwise to the general public.[120] Though history may eventually see a change in the public's opinion of the Bush years, no one can deny that the public's present assessment of the Bush presidency may prove permanent. This possibility is enough to prove that presidential government can be no more than a necessary condition, rather than a sufficient condition, of responsible government. President Bush's performance aside, the supine performance of Congress during Bush's first six years in office takes nothing away from Storing's theory that strong presidential government is normally a necessary condition for responsible government.

A different set of questions relates to the root causes of the nation's present constitutional difficulties. A system of checks and balances was the Framers' substitute for virtue; connecting the personal interests of the office holder with the duties of her office and arranging the offices artfully was meant to supply

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[115] THE FEDERALIST NO. 63 (James Madison), *supra* note 12, at 425.

[116] *Id.* at 424.

[117] *See, e.g.*, THE FEDERALIST NO. 36 (Alexander Hamilton), *supra* note 12, at 224 (commenting on national taxation, and finding that "[i]nquisitive and enlightened Statesmen are . . . best qualified to make a judicious selection of the objects proper for revenue").

[118] Storing, *supra* note 112, at 151.

[119] THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 151-62 (2006).

[120] Megan Thee-Brenan, *Poll Finds Disapproval of Bush Unwavering*, N.Y. TIMES, Jan. 17, 2009, at A11 (stating that only "22 percent of respondents [to a poll] said they approved" of "Mr. Bush's performance over the last eight years").

"the defect of better motives."[121] However, that strategy was not effective for Congress. Thomas Mann and Norman Ornstein place "a lack of institutional identity" at the root of Congress's failures to investigate the numerous problems of the Bush years, from the inception and conduct of the Iraq war to the management problems of the Department of Homeland Security during and long after FEMA's breakdown in the aftermath of Hurricane Katrina.[122] During Bush's first six years, "party trumped institution."[123] Republican leaders in Congress saw themselves "as field lieutenants in the president's army far more than . . . members of a separate and independent branch of government."[124] Nor has party-above-institution seemed the norm only among Republicans. In an essay for this symposium, Douglas Kriner finds that over the last forty years, "[t]he most important predictor of congressional oversight is clearly whether the opposition party controls the legislature and its committee chairmanships or whether the President's party holds the reins of power on Capitol Hill."[125] Kriner sees this pattern as indicating a failure of the Framers' checks and balances system, which assumed that personal ambition "would lead [congressional] politicians to be institutional partisans, first and foremost."[126]

When checks and balances do not work, constitutional thought might shift back to a strategy of cultivating better motives, and this shift raises many questions. At the most general level we might ask whether a liberal regime is possible in practice. We might ask, in other words, whether the commercial and consumer societies of modern liberal regimes can produce and support a leadership stratum whose members possess competence, courage, and a self-critical concern for doing the right thing, if need be against the public's immediate preferences. More concrete and easier to answer are questions about whether the social conditions for a regime of public reasonableness require public benefits like education, health care, and jobs, and the social engineering that might be necessary to ameliorate racism, sexism, and homophobia.[127] Friends of responsibility in both government and the academy should also ask about its prospects in an era of resurgent anti-liberalism, as witnessed by the rise of the Religious Right at home and Islamic fundamentalism abroad. Are there workable and principled ways to employ religious institutions for secular purposes like fighting recidivism and

[121] THE FEDERALIST NO. 51 (James Madison), *supra* note 12, at 349.

[122] MANN & ORNSTEIN, *supra* note 119, at 151-53.

[123] *Id.* at 161.

[124] *Id.* at 153-55.

[125] Douglas Kriner, *Can Enhanced Oversight Repair "the Broken Branch"?*, 89 B.U. L. REV. 765, 782 (2009).

[126] *Id.* at 783.

[127] *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 137-41 (1993) (supporting political equality, which, while rejecting egalitarianism, urges "freedom from desperate conditions," "an opposition to caste systems," and "rough equality of opportunity").

combating intellectual and psychological nihilism?[128] And how should defenders of a secular and elitist notion like "responsible government" respond to the faith-based populism launched in the 1980s by the Republican Party?[129]

CONCLUSION: WHY RESPONSIBLE GOVERNMENT?

These last questions revive a threshold question and a suggestion repeated throughout this Essay. I mention both at once because I will discuss them together. The question is whether assessments of responsible conduct can rise above partisanship. The suggestion is that ideological certitude and responsible government do not mix.

The virtue of exchanging reasons for what to do and believe makes sense only if one concedes that it is possible to be wrong about what to do and believe. People who *know* they are right may want allies, but they do not need interlocutors. A recent expression of this attitude occurred when Representatives Tom DeLay and Dennis Hastert established an informal rule in the 108th Congress. The "Hastert Rule," as I will call it, required that a bill could not go to the House floor without the approval of a majority of the Republican members.[130] This rule all but excluded the then-minority Democrats from the House's deliberations, ensuring what Alan Wolfe calls "the kind of politics more associated with one-party states than two-party systems."[131] This was not the politics of responsible government, for a responsible government tries to lead all parts of the community toward the right choices; it tries to act on what all parts of the community can recognize as a reasonable approximation of the common good.

On the other hand, responsible politics are impossible in a legislature that is divided about what counts as evidence of truth. The options for what constitutes evidence seem to be two different kinds of experience, one associated with the sciences (including philosophy and the moral sciences) and the other associated mostly with religion and ideology. A key difference between these ways of knowing is that one reaches tentative conclusions from propositions that it recognizes as fallible and the other is sure about its foundations. Deciding between these options is difficult because every answer seems to beg the question of what counts as evidence of truth. Though each side begs the question, there remains a difference between the two sides. The difference is that only one side would prefer not to beg the question. The side

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[128] For an argument that religion can rescue reason from nihilism, see ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS 303-16 (2001). I pose this question on the assumption that nihilism flows from a false metaethics. *See* BARBER, WELFARE, *supra* note 29, at 77-91. Whether it does is crucial to questions about the meaning and possibility of responsible government. For this reason, metaethical issues should be seen as part of the political debate.

[129] *See* ALAN WOLFE, DOES AMERICAN DEMOCRACY STILL WORK? 1-23 (2006).

[130] *Id.* at 60.

[131] *Id.*

that would avoid begging the question is the scientific side. It sees the other side as part of the community it is obligated to address, and it would address it with reasons backed ultimately by universally-shared experiences. The religious branch of the non-scientific side (taken here as a paradigm for all of the non-scientific side) starts with a beginning experience and proceeds through hearsay that is confirmed by subsequent experiences. The experience "in the beginning" is a grand cosmogonic event that only one observer, namely, God, could have witnessed. Knowledge of this first event is then transmitted by hearsay to future generations and confirmed as true through God's decision to touch selected persons, who then tell their stories to others.

I see no way to dismiss the possibility that both the creation event and the subsequent "touchings" were actual experiences or empirical facts. The question for believers is how to communicate these facts to non-believers. Because of the nature of the events (the creation and the touchings), believers have to tell others about them; they cannot lead others to see for themselves. Believers cannot replicate the creation event because there can be only one comprehensive beginning; and the touching event is replicated only selectively, as God wills. Therefore, believers have reason to conclude that some people are simply incorrigible and will remain so until God wills otherwise. For this reason, supporters of Hastert's Rule may have acted as responsibly as they could have under the circumstances. (I assume here that supporters of the Hastert Rule were on the non-scientific side.[132]) They may have tried to meet their obligation *for* the right thing and *to* the public. Even though being responsible to others involves giving them reasons that they can recognize as good-faith and reasonably competent versions of the truth, one cannot give reasons to people who do not agree on the test of truth. Hastert and DeLay acted as if they saw the House Democrats as members of an incorrigibly different public. They would have no duty to talk to this other public because one cannot exchange reasons with people who have a different view of what counts as a valid reason.

If, as I believe, there is no non-circular way to decide between these forms of evidence, then there is no way to prove that the Hastert Rule was a breach of responsibility. This would make reservations about science unavoidable, and to the scientific mind, these reservations would justify treating true believers and scientifically-minded people as parts of the same community. The scientific side cannot be true to itself by adopting its own version of the Hastert Rule. A second reason for the scientific side to include the non-scientific side in the same community emerges with the prospect that, down deep, both sides may have a common test of truth after all. Though the creation story comes to us by hearsay, the Book of Genesis tells it as a straight-forward eyewitness account.[133] The same holds for all other events subsequent to the creation

[132] For the influence of fundamentalist views on House Republican leadership in 2001, see Peter Perl, *Absolute Truth*, WASH. POST, May 13, 2001, at W12.

[133] *Genesis* 1:1-1:31.

story; they also take the form of eye-witness accounts. From this it would seem that as apparent goods presuppose real goods and rhetoric presupposes truth, hearsay presupposes eyewitness. This entitles one to ask whether the basic test of truth for all sides is some form of seeing or direct sensory experience, and whether really seeing something "out there" (not just in one's imagination) is seeing something that all with healthy eyes and brains can see.[134]

The Religious Right might say that the rationalism I have sketched is peculiar to liberalism and the paradox about reason (i.e., the scientific reservations about science) is evidence of liberal blindness and hypocrisy: blindness to liberalism's reliance on faith (i.e., unproved assumptions and unproved propositions accepted as axioms) and hypocrisy in what amounts to a religion of secularism (i.e., subordination of religion to scientific stories and practices that serve the functions of religious stories and practices).[135] I would concede that liberalism is an expression of the rationalism I have described. But that I have described a uniquely liberal rationalism must be proved. It cannot just be asserted without begging the question against liberals like Publius who claim that humankind aspires to rise above "accident and force" and live by "reflection and choice."[136] That some cultures manifest no such aspiration is not enough to prove that it is not part of their makeup or that it would not control other parts in a fair contest. Only persons who have achieved consistency among all of their beliefs could even begin to claim to be infallible judges of what they really believe.

Though instances of liberal bigotry support charges of liberal blindness and hypocrisy, such instances prove only that liberal rationalists can abandon their principles, not that the principles themselves justify indefensible actions and beliefs. It is true that human thought has to begin with undefended assumptions, but this fact does not bestow axiomatic status on any assumption; it simply means that one cannot question all assumptions at the same time. Therefore, rationalism need not rest on blind faith. Nor are rationalists compelled to put blind faith in reason. Doubts about reason are common among liberal rationalists, and aspiring to a life of reflection and choice is compatible with doubting the wisdom of such a life for some people in some situations. Liberal rationalists can also accommodate those who try to live differently – as long as the differences mean no harm to others as liberal rationalists conceive harm. Thus, if liberal rationalism is a religion, it is not the same kind of religion as that displayed by the Religious Right. The former would institutionalize self-criticism; the latter would not. Witness the Hastert Rule.

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[134] To this one might say that there are no incorrigible perceptions. I would agree because I have seen that perceptions that seem incorrigible (stick in a bucket) later seem not to be so.

[135] *See* GEORGE, *supra* note 128, at 7-8.

[136] THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 12, at 3.

In the end, we liberals (I speak now as a member of DeLay and Hastert's other community, the community whose representatives were excluded by the Hastert Rule) may have no knock-down argument for a policy of exchanging reasons with others about how to live. Yet this would hardly mean we could abandon the policy, for one cannot reject the policy – one cannot choose to live without reason. Nor should one try to, for the attempt would be both futile and paradoxical. Trying to abandon reason simply *because* there is no compelling argument not to, would imply that we should act only when a compelling reason directs. One can wonder whether such a rule would abandon reason or enthrone it. But whatever else might be said about such a rule, it would be unfit (and therefore unreasonable) for fallible creatures like ourselves.