The End of a Four Hundred-Year Boom: The Need for Major Constitutional Change

Arthur S. Miller*
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Abstract

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KEYWORDS: end, change, major
The End of a Four Hundred-Year Boom: The Need for Major Constitutional Change

by Arthur S. Miller*

. . . man, proud man,
Drest in a little brief authority,
Most ignorant of what he's most assured,
His glassy essence, like an angry ape,
Plays such fantastic tricks before high heaven,
As make the angels weep. . . .

Measure for Measure
I.i.33

I.

During the past four hundred years many institutions that Americans consider to be the natural order of human affairs were born: representative democracy, the private enterprise system of capitalism, and individualism, among others. Were one to ask why they appeared at roughly the same time in a quite limited geographical area, what would be the answer? Even if we accept, as we must, the view that there can be no simple and complete explanation of any human phenomenon,¹ let alone a set of them, history possibly provides a principal determinant. The basic premise of this essay in American constitutionalism is that those "natural" institutions and, indeed, the very concept of constitutionalism itself as it has been received and understood by modern constitutional scholars were in large part consequences of the Great Discoveries that began with Columbus. Wealth in theretofore untold

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amounts poured into the "metropolis"—Western Europe—and seemingly endless land became available to the hard-pressed peoples of Europe. They were thus able to escape the ecological trap, with its concomitant authoritarian institutions, that had imprisoned them in a rigid caste system throughout known human history.

With the Great Discoveries, a static society gave way—slowly and haltingly at first—to one of permanent revolution. The ancient and medieval worlds were closed. Space, rather than being infinite, was considered to be a solid sphere in which the stars were embedded. Time, too, was finite: to medieval man the world was four thousand years old and would end in a short time. Learning was limited: people believed that the final truth on all subjects had already been written, if not in the Bible then by Aristotle and Plato and Euclid and other ancients. The Bible as Holy Writ was the ultimate truth for religion and cosmology. Those who thought and wrote did so—with rare exceptions (such as Copernicus)—within a closed body of knowledge; they were confined to refining the accepted wisdom of the day. The universe was anthropocentric: earth was its center and man was the special creature of an all-knowing and all-wise God. It was an authoritarian, even totalitarian, age—in economics and politics and religion.

Then came the Discoveries (and the Copernican Revolution) and following them massive alterations in social institutions. Societal change started slowly, but accelerated; by the nineteenth century it became characteristic of the social order. Today, it is built into human affairs. We live at a time when revolution has been made a perpetual institution—not in the sense of a violent overthrow of government but, rather, as an apparently permanent feature of socio-economic, and thus of political, institutions. The underlying assumptions, the metaphysic, of society have been altered. Human life on earth—I speak here of the Western world—rather than being thought of as a prelude to heaven or hell, became an end in itself. It became possible (at least for a time) "to think of . . . the conquest of the material world in human interest, of providing the conditions for a good life on this planet without reference to any possible hereafter." The idea of progress flowered. Rather than living in the final age, humankind saw itself as participating in a process of progressive improvement of the human lot. People became optimistic, rather than having a "sombre melancholy." No problem was considered to be insoluble, it being the humanistic vision that people

through applied reason could not only know, but could solve, all problems. Faith in an all-wise God was subtly transferred to faith in scientists and technologists, who were considered to be able to create technological "fixes" that would ameliorate the harshness of life. Politics changed: the nation-state replaced feudalism as the characteristic form of political order. Economics developed from mercantilism—a Statist economy—to laissez-faire private enterprise capitalism, although the State was still important as a protector of and stimulant to business. The individual human being was perceived as the basic unit of society, a belief that crept into and dominated law and legal institutions. In short, the "modern age" was born.

My point is not necessarily that a direct causal connection existed between all of those developments and the Great Discoveries, but, rather, that only after the Discoveries did the new institutions and beliefs come into existence. An environment was provided in which new ideas and concepts could flourish. Those who may think that this is an example of post hoc, ergo propter hoc fallacious reasoning should consider what Adam Smith wrote in 1776:


The general advantages which Europe, considered as a great country, has derived from the discovery and colonization of America, consist, first, in the increase of its enjoyments; and secondly, in the augmentation of its industry.

The surplus product of America, imported into Europe, furnishes the inhabitants of the great continent with a variety of commodities which they could not otherwise have possessed.

The discovery and colonization of America...have contributed to augment the industries, first, of all the countries which trade to it directly...and, secondly, of all those which, without trading to it directly, send, through the medium of other countries, goods to it of their own produce.

Without the wealth of the Great Discoveries, modern capitalism could not have flourished. So, too, with its political counterpart: liberal democracy. What would have been abnormal before the Discoveries became normal.

No present need exists to buttress what has been said about the new age, for Walter Prescott Webb in one of the most important, albeit little noticed, books of this century, The Great Frontier, has provided

ample data to show that the modern age is "an abnormal age, and not a progressive orderly development which mankind was destined to make anyway." 4 Building on Turner’s "frontier theory" of American history, 5 Webb saw the Great Frontier as "one of the primary factors of modern history. . . . The sudden acquisition of land and other forms of wealth by the people of Europe precipitated a boom on Western civilization. . . . That boom lasted as long as the frontier was open, a period of four centuries." A four hundred-year boom took place, a boom that was unique in time and space. I would vary that, for the United States at least, to maintain that the boom lasted until about 1970. The world frontier closed during the first part of this century. The bulk of public lands had disappeared. An enormous increase in population has made the density per square mile, both in Europe and in the new world, on average greater than the density was in Europe in 1500. Turner had limited his scope to the American frontier only, but Webb took that analysis to its logical end.

Turner’s perspective was too narrow; he concentrated on the availability of land and solely on the American experience. Webb went further: he saw that resources were as important as land and he envisaged a frontier far larger than Turner’s. David M. Potter, in his study of the American character, criticizes Webb for not recognizing that “advancing technology” 6 went hand in hand with the bounty of nature to create what Potter saw as the distinctive American character.

There can be little question that technology had much to do with the exploitation of the resources of the Great Frontier. Potter correctly chides Webb for according too much attention to what Potter calls “geographical determinism.” 7 That raises the question of whether the means by which humans can order their affairs in a humane way for everyone—by which, that is, they can create a sustainable society—are presently available. Is technology the answer? Rather, can it provide an answer to the problems confronting people everywhere? Can technology be harnessed in ways adequate to effect a transition to such a society? The question asks much. We do not know its answer. But what seems unassailable is this: to harness technology in the quest for a sustainable society will require a continuing cooperative effort, one that can in final

7. Id. at 163.
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analysis only be undertaken by government. Thus, the crucial constitutional question is posed: What changes in present-day politico-economic institutions are in order?

Even though his analysis is incomplete, Webb’s conclusions seem to be irrefutable. Some questions that they present include: (a) do political and economic institutions that matured during the four hundred-year boom, and were adapted to those conditions, require alteration now that the frontier has closed? and (b) is there somewhere, somehow, a modern substitute for that boom? The answers, only adumbrated here, may be simply stated: (a) yes, those institutions—economic and political and philosophical—must be thoroughly examined anew to determine how they should be changed to fit a radically new, indeed unique, environment; and (b) no new frontier of comparable significance is in the offing. Outer space, whether within or without the solar system, cannot under any reasonably foreseeable set of circumstances be a substitute for the Great Discoveries. On the contrary, rather than providing new resources and new lands, space exploration and settlement (even though theoretically possible) would enormously drain existing resources. True it is that science and technology—first in the Industrial Revolution and now in the Microprocessing Revolution—have enabled some of humankind to stave off the imperatives of the end of the four hundred-year boom, mainly because of vastly improved productivity of labor, plus the invention of the art of invention. Some observers, accordingly, look upon science as an endless frontier. To the extent that science and technology can be employed to help develop a new environment, that belief is valid. The rub comes, however, because science, too, is resource-draining. It cannot create matter; that is a physical impossibility. And we have learned in recent years that entropy is a universal law that cannot be repealed. The transition to an “information society” at most means that information can be transferred without loss, without being in a zero-sum game. But information is not an end in itself; ultimately, it must deal with resources. The unavoidable “bottom line” is the humankind-resources ratio. Technology can be used to provide means to transfer information and employ resources so as to adapt the species to a new type of living—if only it will be used. Whether it will be is as yet unanswered.

In sum, then, what has seemed to be normal during most of American history—economic growth, relative peace, immense natural resources, the idea of progress and of the perfectability of man—has in dour fact actually been abnormal—abnormal as compared with how Homo sapiens lived prior to the Great Discoveries and how it has lived
outside of Europe and a few European colonies since the Discoveries. The Golden Age of the Western world commenced about 1600 and lasted until about 1970, at which time time-honored institutions began to become unraveled. Society, ever increasingly and the world over, cannot be called "sustainable." A "sustainable society" is one in which human needs and desires are fulfilled within the constraints of the environment. Immense strains created by burgeoning population and rapid depletion of resources have retrogressed the man-land ratio to a situation worse than it was in 1650. In the West, population density in 1500 was about 26.7 per square mile; by 1940, that figure had become 34.8 per square mile—and it is far worse today. Only, as has been suggested, the advent of technology enabled humans to have a relatively abundant economy—and then often at the expense of the poverty-rows of the Third World. I have already suggested that I do not think that such technological "progress" can long continue, but it need not. Enough is now known to keep the ecological trap from closing. Whether that trap will snap shut or whether it will remain open is one of the great unanswered questions of the day.

This essay suggests the need for institutional change across the board, based on the idea that such alterations, when and if made, could help effect a transition to a sustainable society, a society that is not so much static as in relative equilibrium, a society that has human dignity for all as its sumnum bonum. A preliminary question involves the extent to which law, however and by whomever promulgated and in whatever form, can be useful in that transition. It is conceded that limits to effective legal action do exist; and that law, by itself, is a frail reed upon which to rely. We have had laws and legal institutions for millenia, and constitutionalism in the normative sense of limitations on government is central to the American ethos, but candor compels the admission that they have been relatively impotent—thus far, at least—in achieving a decent society for all. Law, of course, is not irrelevant, but it must take its place with other techniques and mechanisms—those subsumed under the broad rubric of politics—if it is to play an effective role in the time of troubles that lie dead ahead.

II.

As the United States counts down to the 200th anniversary of its only constitutional convention, it is becoming increasingly clear that

8. Webb, supra note 4, at 8 n.18.
major changes are necessary in the oldest written fundamental law. Social institutions—political, economic, legal—are under severe challenge, so much so that it is by no means certain that a smooth transition to a sustainable society can be made. The challenge, in sum, is even greater than the sanguinary strife of the Civil War, the only previous episode in American history at all comparable to today's time of troubles. This essay is an argument for basic constitutional alteration, not only in the Document of 1787 itself but also in the congeries of customs and practices that have grown up extra-constitutionally. Both the formal and the living (or operative) constitutions require thorough study and revamping. My theme comes from a recent statement by Willy Brandt: "... the two decades ahead of us may be fateful for mankind. ... Many global issues will come to a head during the period."9

"We know we are on an unsustainable path," Dr. Lester Brown maintains. "We also know that there are no simple technological fixes."10 That is not really correct: Some, but far from all, know, and indeed many dispute, Brown's conclusion. Among opinion leaders, who should if they thought about it agree with Brown (and Brandt), a pervasive attitude of Micawberism may be detected—the sublime belief, labeled after the character in Dicken's David Copperfield, that something will always turn up to solve human problems and even to rescue humankind from its follies. That confidence, that faith, is, as has been suggested, the consequence of two factors—the Great Discoveries of the past four hundred years, a part of which were the seemingly inexhaustible resources of the United States; and a blind, unthinking belief that scientists and technologists can willy-nilly create technological solutions for specific problems. The age of discoveries has run its course, and the species, which exists in massive numbers today (and many more in the future—from the present 4.6 billion world population to about 6.5 billion in the year 2000), is now entering an ecological trap similar to that which existed in pre-Columbian times. Unregulated technology, furthermore, can be both boon and bane, in the sense that "second-order" consequences of new developments can have harmful side effects. Only if technology is approached systemically or holistically can there be hope that it will be an overall boon. And that, as has been suggested, can only come from government—which points up the

constitutional challenge.

Can familiar societal institutions—capitalism, representative government, constitutionalism—that were developed in the four hundred-year boom perform adequately in the emergent age? Can they harness technology? The answer suggested here is a flat negative: They cannot. And that, I suggest, is so even though they have undergone and continue to undergo considerable alteration since first they appeared—as has been said, quite recently as time is reckoned, and in a limited geographical area. Each was and is a reflection of the environment in which it has existed. Those institutions were not a priori; rather, they were a posteriori. They grew, not by design but by reaction to circumstances. As such, they do not represent eternal truths about the human condition. Quite the contrary: they represent, to update Thucydides's famous comment, human situations where the strong continue to do what they can and the weak still suffer what they must.

That, it seems to me, is the way that matters have always been. To be realistic, perhaps it is the way they will always be. The argument in this essay suggests that it is not an either-or proposition. Knowledge is available by which a sustainable society can be built. I do not say that it will be realized, the capacity of humans to order their affairs with minimal decency for all is by no means certain. Creating that society will not only require foresight and planning to a degree not before known, it will also require the strong to perceive what they have seldom done in the past—that they and the weak are in the same boat and will sink or float together. The ultimate aim is for a dynamic equilibrium between population and resources—worldwide.

Lester Brown asserts quite correctly: “Creating a sustainable society will require fundamental economic and social changes, a wholesale alteration of economic priorities and population policies.” Well and good, but only so far as it goes: Brown does not say how to get there from here. He does not tackle the immensely difficult problem of institutional change; nor does he face up to the indispensable requirement that any discussion of political theory—what he is talking about—must be based upon an accurate cognizance of the nature of human nature. In final analysis, Brown is speaking about constitutional matters; the changes he calls for are those that concern what constitutions are all about: the governing institutions of society, who benefits from governmental decisions, the relationships with other governments.

I have suggested that a sustainable society is one in which humans everywhere have their basic needs and deserts fulfilled insofar as the environment permits. That brief definition, of course, raises more questions than it answers. Such a society, at the very least, will require that an equilibrating balance be struck between *Homo sapiens* and the planet it occupies and dominates (I do not say subdued, because evidence is growing that nature is rebelling). Humankind must, contrary to the Judeo-Christian tradition and ethic, perceive that it is an integral part of nature, at one with it and not superior to it. To be contemptuous of nature is to invite disaster. The great and enduring task of modern constitutionalism is to help create such an equilibrium. Since 1787, American constitutionalism has been largely concerned with principles of balance—but only within the political order: in the separation of powers in the national government, in the federal system, in the relationship of persons to government. That limited conception is no longer sufficient to the growing need; the notion of balance, of equilibrium, must now be taken to the entire social order, and, indeed, to the entire planet. The balance is between *Homo sapiens* and nature. That poses the need for a fundamental reordering of the very concept of constitutionalism.

In politics, however, balance must give way to a concept of process, to recognition that the political, the constitutional, order follows Darwinian and Einsteinian rather than Newtonian principles. Within principles of the balance between humankind and the rest of nature, process rules. Isaac Newton likened the universe to a great clock, with interacting parts, and with the laws of cause-and-effect playing a primary role. Darwin and Einstein changed that permanently. The political order is a process; it follows the laws of evolution, not “the mechanistic world view of Cartesian-Newtonian science,” which is “outdated.” And the Constitution has always been relative to circumstances. It is, therefore, both Darwinian and Einsteinian. As Carolyn Merchant, historian of science at the University of California, Berkeley, has put it:

In investigating the roots of our current environmental dilemma and its connections to science, technology and the economy, we must re-examine the formation of a world-view and a science which, by reconceptualizing reality as a machine rather than a liv-

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ing organism, sanctioned the domination of both nature and women. The contributions of such founding “fathers” of modern science as Francis Bacon, William Harvey, Rene Descartes, Thomas Hobbes and Issac Newton must be re-evaluated.\(^{13}\)

That is a relatively new insight, one that is far from totally recognized and accepted by those who study the Constitution. Indeed, it is fair to say that many constitutional scholars reject constitutional Darwinism and that most of them have not thought of constitutional Einsteinism. Throughout American history the Constitution has been viewed mainly through the eyes of lawyers as a legal document, to be treated as any other legal instrument. That simply is not adequate to the need.

American constitutionalism has been concerned mainly with the powers of government to organize itself and its relationships to the individuals and groups of society—with, that is, a combination of limitations on official power and a tacit expression of the affirmative powers of government. As lawyers and political scientists know it, constitutional law tended to be interdictory, principally exegeses on a theme of what government could not do. Until quite recent times, little was recognized about the affirmative powers of the State. (That lack of theory of the positive aspect of government was changed in the 1930s and 1940s.) Constitutional theory since the beginnings considered the natural person to be free-standing, autonomous, answerable chiefly to himself and to his God. Insofar as possible the person was to be loosed from constraints from the State, which was to assist rather than regulate. Formal constitutional law, the law of the books, was viewed as one of limitations or of rights. The law in action, the operative constitutional law, differed. It was one of powers.

Formal constitutional law took a significant turn about a half-century ago. It merged with the operative Constitution so as to add a layer of governmental permissiveness to the palimpsest that is the Document of 1787. At the same time, some of the limitations on government finally got judicial recognition. Not always, to be sure, but often. (The relationship between judicial cognizance of civil rights and civil liberties to constitutional Keynesianism has never been explored.) The new latitude permitted government was not the same \textit{on specifics} as it was in the nineteenth and early twentieth centuries. Quite the contrary. For

150 years the operative Constitution permitted massive governmental aid to business, to the exploitation of the resources of well-nigh virgin continent, to suppressing internal discontent (large and small), to the expansion of the American empire. Since the 1930s government has become “positive” in nature, in the sense that it has undertaken, with Supreme Court approval, affirmative obligations to the entire populace.\textsuperscript{14} Those duties are expressed in congressional statutes, which when enacted were given the imprimatur of the Supreme Court. Thus on a general level government assumed a new posture. Formal law was still apparently limitative—I say “apparently” because the Constitution has always been relative to circumstances—but in fact a Constitution of powers in a secular state came into existence. The Supreme Court, as the nation’s authoritative faculty of political theory, redefined the nature of freedom from autonomous man individualistically standing alone to liberty in a social organization. Formal law, that is, acknowledged the group basis of politics and of economics; and the operative law made the individual person important only as a member of a group or groups. More recently, yet another layer is being added to the ancient parchment, one that expressly validates increasing controls upon individual behavior. Those controls emanate from both public and private governments—from, that is, the organs of the Political and of the Economic Constitutions.\textsuperscript{15}

A contemporaneous development involves the judiciary. At times, but far from always, judges issue commands to other governmental officers, telling them what they \textit{must} do (as compared with historically telling them what they could not do). In some respects, the question in some constitutional cases has become: If the natural person owes duties and obligations to the groups of the political and economic orders (which he does, principally to the nation-state), to what extent does the group owe correlative duties and obligations to the person? This small shift in judicial constitution-making should be openly recognized, assimilated into constitutional theory, and extended into a fundamental law of basic human needs and deserts. Not that the judges can do the job alone. They cannot. Such an argument, of course, entails advocacy of an exponential jump in the theory and practice of American constitutionalism. Hence the requirement, both for cooperative actions

\begin{itemize}
  \item \textsuperscript{14} See A. Miller, \textit{The Supreme Court and American Capitalism} (1968).
  \item \textsuperscript{15} See A. Miller, \textit{Toward Increased Judicial Activism: The Political Role of the Supreme Court} (1982); Miller, \textit{Toward A Definition of “The” Constitution}, 8 U. Dayton L. Rev. 633 (1983).
\end{itemize}
among all three branches of government (as well as cooperation between the nation and the states and, of even greater significance, the nation and the governments elsewhere on the planet) and for a constitutional convention.

Law historically was based upon an assumption about the nature of man and the environment. Briefly, that assumption was the political version of Adam Smith economics—the belief that there is a "marketplace" of politics in which the individual actions of persons and the groups they form result, as by "an invisible hand," in the overall common good. Nature (the environment) was perceived through John Locke's eyes as beneficent, not as the harsh and forbidding world of Thomas Hobbes. It has now become all too clear that humans everywhere, including Americans, are now in a Hobbesian world, in a slowly closing ecological trap thoroughly familiar to those who lived in medieval Europe but only little known in the United States. This is the "climacteric" of humankind. We live, not in a period of crisis, but at a time when a number of crises are coalescing.¹⁶

The formal Constitution, the Constitution of the books, is obsolescent, even obsolete, in substantial part, and therefore in need of substantial revision. The operative fundamental law is becoming corporatist in a fact, through a process of unannounced but portentous constitutional alteration. Tensions produced by new environmental constraints make it clear that the process of progressive updating of the Constitution by the Supreme Court and other authoritative decision-makers is no longer sufficient to the need. The resulting problem is systemic, not aberrational, and cannot be cured by a constitutional Band-Aid or quick fix. From that it follows that radical constitutional change is required. Alterations, some quite drastic, in the formal and operative constitutions are necessary, predicated on the bedrock proposition that humankind must attain a "oneness" with nature.

Enormous difficulties must be surmounted to get "there" from "here" by means of institutional change, "there" being a sustainable society and "here" being the climacteric. There are limits to effective legal action. Moreover, since "[p]olitical theory which does not start from a theory of man . . . is quite worthless,"¹⁷ the question of human nature must be faced. No alteration in the nature of the species is sug-


gested; rather, I maintain that the irreducible necessity is for those in positions of power and influence to recognize where their long-term interests lie (it being assumed that they readily perceive their short-term interests). Finally, it is recommended that a constitutional convention be convened to consider radical change in the fundamental law.

III.

That much of what is said in this essay is controversial goes without saying. When speaking of constitutions, and particularly of the American Constitution, one deals with political theory and social ethics, and perhaps of greatest importance, with an aspect of religion—a civil or secular religion. The Document of 1787 is the basic instrument of America's civil religion, which in its totality is far more important than orthodox theological institutions and dogmas. Americans revere an ancient piece of parchment as much or more than the Bible of the Talmud. To argue that the Constitution requires rewriting cuts as close to the nerve as asking that the Bible be redrafted. The time, however, is long past for Americans to confront the demonstrable fact that Woodrow Wilson was correct when he said in 1885 that “[t]he Constitution in operation is manifestly a very different thing from the Constitution of the books”, 18 and therefore that today's fundamental law is only metaphorically connected to the Document of 1787. A harsh reality must be faced: that the ancient Document solidifies societal institutions, both public and private, that are positive barriers to fair, decent and efficient government. I do not suggest that a new Bible be written, although surely a persuasive case can be made for rethinking humankind's relationship to the cosmos—which is what the Bible is all about. A constitution—any constitution, written or unwritten—is concerned with how humans relate to each other, how their affairs are ordered, and how they organize themselves into collectivities. At times, those collectivities are called government, public government, but quite often they are at least nominally private. The mundane, yet immensely important, level of juristic theories of politics is the concern of this essay.

Several assumptions underlie what is said here, including the following:

1. A distinction must be made between society (the aggregate of essentially atomistic individuals and groups in the nation), the State (a

metaphysical concept in the name of which society is governed; although it cannot be seen or touched, it is as real as any natural person—and perhaps more so), and government (the visible apparatus of the State). This differentiation is seldom made in the literature of constitutional law; judges and commentators alike being content to use the terms as if they are synonymous. They are not.

2. So far as political economy is concerned, however, the atomistic individual does not exist as such. A person gathers constitutional significance only in his relationship with others; he is important both politically and economically only when he combines his personal strength with members of a group. Politics, in other words, considers the group to be the basic social unit. In economics, this is the age of collective action.

3. Government is both public and private. Public governance consists of those visible organs, legislative and executive and judicial, that are usually solely considered to be government. The other dimension of private governance consists of the major pluralistic groups in the nation, of which the giant corporations are the principal exemplar. In other words, Americans are governed by both a political and an economic Constitution, which combine in an emergent corporatist Constitution.

4. The State (sometimes called the public or the national interest) is more than the arithmetical sum of the private interests of the nation. It has its own claims, as President John F. Kennedy acknowledged in a burst of candor in 1962. Answering a question about a “public interest” in collective bargaining negotiations, he said: “These companies are free and the unions are free. All we [the Executive] can try to do is to indicate . . . the public interest which is there. After all, the public interest is the sum of the private interests, or perhaps it’s even sometimes a little more. In fact, it is a little more.” 19 That was iterated by President Jimmy Carter in his farewell address: “the national interest is not always the sum of all our single or special interests,” 20 From time to time the Supreme Court has echoed that sentiment, as, for example, in Justice John M. Harlan’s 1959 opinion for the Court in Barenblatt v. United States.21 “In the last analysis,” said Harlan, Congress’s power to investigate possible subversions rests “on the right of self-

preservation, 'the ultimate value of any society.' 22 Wittingly or not (probably not), Kennedy, Carter and Harlan adopted, at least implicitly, an important Machiavellian principle: "It is not the well-being of individuals that makes cities great. . . . The common good can be realized in spite of those who suffer in consequence." 23

5. The United States, the theory to the contrary notwithstanding, has always followed Machiavellian principles. That is particularly seen in the operative Constitution, but at times may also be seen in the formal Constitution as interpreted by the Supreme Court. Machiavelli, moreover, was one of the most wrongfully maligned political theorists in history. Far from the murderous Machiavel that so many have painted him, a careful reading of his best work, *The Discourses*, and even of his best-known book, *The Prince*, reveals that he preferred a republic over a prince—if it could be obtained. To assert that the United States has followed Machiavellian principles is simply to say that throughout its history it has been far more tough-minded than the myth system would have it.

6. There is what Professor David Ehrenfeld has labeled "the arrogance of humanism" 24—the idea, widely held, that humans have the capacity to order their affairs with a measure of decency for all; that, in other words, man can plan and thus control the future. Although it is doubtless true that the technological future can and will be invented (with wholly unpredictable consequences), that by no means is proof that *Homo sapiens* can guide the course of social events in a reasonable adequate manner. "Every inventor," Daniel Boorstin maintains, "is a Pandora"; 25 the first-order consequences, those which are obvious, may be easily forecast, but the problem lies in the second-order consequences. Scientists and technologists, Alvin Weinberg has said, have made a "Faustian bargain" with society. That is dangerous (how much we know not) because it involves "the mounting complexity of technology along with the staggering problems of managing the response to ecological scarcity. . . . These will require us to depend on a special class of experts in charge of our survival and well-being—a 'priesthood of responsible technologists'." 26

22. *Id.* at 117-18 (quoting *Dennis v. United States*, 341 U.S. 494, 509 (1951)).
7. If Weinberg is accurate, that implies the emergence of an overt class, even caste, society. The beginnings of such a stratified society are already evident.

8. Ehrenfeld may be correct; but even so, the effort to create a sustainable society should be made. As with most of man's efforts to determine his destiny, the quest may in final analysis be futile, even absurd. We must, however, learn to live with absurdity—"or what's a heaven for?"

9. Government will remain an active—indeed, a necessary—participant in societal affairs. It will not fade away, despite the wishes of such deep-thinkers as Milton Friedman. Even if the views of Friedman and his followers were to prevail, that would merely mean that the American people would trade visible public governance for the equally and perhaps greater onerous constraints and restraints of invisible private governments.

10. Law, including constitutional law, will become more and more outwardly instrumental, rather than interdictory. It will be overtly teleological-purposive, goal-seeking.

11. The American Constitution, a politico-legal palimpsest, is always in a state of "becoming," updated by several means to meet the exigencies faced by succeeding generations of Americans. This means that government is and has always been precisely as strong as conditions required. The State has a "reserve power" that enables it, operating through government, to meet every challenge that historically confronted it.

12. That the State will do so in the future seems sure. The question is how, not if it will do so. As I have argued in Democratic Dictatorship,²⁷ authoritarian government seems likely. Can constitutional change stave that off? In some respects, the basic problem that constitutionalism faces is how to avoid Arnold Toynbee's doleful forecast: "In all developed countries, a new way of life—a severely regimented way—will have to be imposed by a ruthless authoritarian government."²⁸ That is an even greater constitutional challenge than the Civil War. There is no neat formula by which the shoals to a humane steady-state society can be navigated.

13. Simply because of its enormous economic and military power, the United States will continue to be a major force in world affairs.

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²³ BIOSCIENCE 41, 43 (1973).
²⁷. Miller, supra note 16 passim.
²⁸. Id. at 151.
Anything that happens anywhere on the planet, and indeed in outer space, is of interest and importance to the American political order.

14. There is no such thing as totally unbiased knowledge. "Every major human activity, including the search for pure and disinterested knowledge, is norm-governed and value-oriented." The need, therefore, is to heed Gunnar Myrdal's advice: social commentators should "face their valuations," setting them out for all to see. Only then can there be a semblance of objectivity.

15. Burly sinners rule the world, often, to be sure, in well-pressed clothes and outwardly pleasant demeanor, but sinners nonetheless. People of thought are not nearly as important as they think or so Keynes, in a famous passage, asserted "the ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually slaves of some defunct economist." The word, not the gun, may be the symbol of authority; but word mechanics, the people of thought, are in large part thrall to those who exercise real power in society.

16. One way to control the populace is to use religion, not only as an opiate, as Marx in a famous passage said, but in its "civil" sense. He spoke about organized religion. The civil or secular religion of nationalism or patriotism or Americanism is one of the means by which people en masse are organized and controlled.

IV.

The two hundred-year odyssey of the American people has come to a crossroads. Is it the end of the beginning? Or is it the beginning of the end? Which direction will the United States take? Which should it take? Of one thing we can be sure: the future that looms dead ahead will not be a mere unilinear extension of the past. "The past is but prologue." But prologue to what? The American past, as we have seen, has been based on a unique set of environmental circumstances. Machiavelli viewed history as neither determined progression nor an ineluctable cycle of recurring forms. To him, history was constant

29. Rhinelander, supra note 17, at 93.
change, to which forms of government must adapt, and uncertainty to which any type of government must be adaptable. In his words:

Since . . . all human affairs are ever in a state of flux, and cannot stand still, either there will be improvement or decline, and necessity will lead you to do many things which reason does not recommend. Hence if a commonwealth be constituted with a view to its maintaining the status quo, but not with a view to expansion, and by necessity it be led to expand, its basic principles will be subverted and it will soon be faced with ruin. So, too, should heaven, on the other hand, be so kind to it that it has no need to go to war, it will then come about that idleness will either render it effeminate or give rise to factions; and these two things, either in conjunction or separately, will bring about its downfall.  

We may morally object to Machiavelli’s implied view that war and territorial expansion are to be sought for the good of the commonwealth; but if we change the notion of war to one of economic expansion—to continued economic growth—would those same moral objections be proffered? All governments today, whether capitalist or Marxist or with mixed economies, are devoted to continual economic growth. As Professor Bernard Crick has said, “Most of his [Machiavelli’s] arguments in terms of military technology are now directly translatable in terms of economic technology. Even when we stay in the same place, we have to run pretty fast to do it.” All governments claim the ability not only to maintain but to raise the scale of living, or at least the total economic product (the gross national product) of their inhabitants. Whether they can do it is at best an unanswered question; at worst, it is highly unlikely. But try governments will, as try they must, if political officers wish to remain in power.

This essay, in sum, is a preliminary foray both into posing some of the correct questions about the human condition, without which correct answers will never be forthcoming, and suggesting some possible answers. In fine, I seek to establish a framework for thinking about major constitutional change—planned change, that is, not the change that comes about routinely as each generation of Americans rewrites the Document of 1787. Mine is a radical approach—nothing less than a complete overhaul of ancient ideas of how to govern the United States. Not that the past wisdom, if that it is, can or will be discarded. Adher-

33. Id. at 53.
ence to it, however, is neither a duty nor a necessity. We cannot escape the past but what the constitutional framers said is not revealed truth, not like Moses coming down from Mt. Sinai; but merely as one datum among a number of others that must be considered in evaluating American constitutionalism.

Those who wrote the Constitution of 1787 could not have failed. Everything favored the success of the new nation: an untapped continent replete with seemingly inexhaustible natural resources, protected by two oceans and the British navy, was given the unique opportunity to create something new and lasting. That very success, however, should be traced to the favorable environment in which American political institutions operated, rather than to any sort of special wisdom in the constitutional framers or in what they wrought. The United States has waxed large and strong not because of the Constitution but in spite of it. Or, as Rufus E. Miles, Jr., put it, "[t]he extraordinary affluence of the United States has been produced by a set of fortuitous, nonreplicable, and nonsustainable factors."34 We now confront a totally different social milieu, and the Constitution must be changed to deal with it.

What, then, are the constitutional changes that should be given serious attention? Time and space permit only a listing of some of the more obvious.

1. Altering the separation of powers in the national government to adopt a parliamentary system, based upon but not necessarily a direct copy of the British system.

2. This would require a new way of electing the president. The electoral college should be abolished. The president would truly be head of party, subject to removal on a vote of confidence.

3. Furthermore, the presidency should be divided into one person being head of government (like a prime minister) and another being chief of state (like the King of Spain or Queen of England). It is worth special mention that the United States is the only important nation in the world that allows one person to wear both of those hats.

4. Congress should be unicameral, with not more than one hundred members.

5. The fifty states should be consolidated into not more than ten or twelve geographically contiguous regions.

6. The "private" governing power of important social groups, such as the giant corporations and the two major political parties, should be

recognized and made a part of the formal constitutional structure.

7. Provisions should be made for cooperation in a constitutional sense of the fact that the United States exists in an interdependent world—a "global village"—and has many and growing relationships with other nations.

8. The idea of a "council of revision," considered in the Constitutional Convention of 1787 but rejected, should be resurrected and made into a "council of state" that would be advisory to the president and Congress before important decisions are made.35

9. A "planning" function should be incorporated into the duties of government.

10. Means should be established for controlling technology, including nuclear weapons.

Time and space do not permit more than listing these possible—in my judgment, necessary—changes in the constitutional mechanism.36 The fundamental idea is that the Constitution of the United States should be one of human needs and human rights, as well as one that sets forth the powers of government. In short, I propose a Constitution that, by making responsible government possible through streamlining and updating the present obsolescent mechanism, will enable the United States to meet the challenges of a zero-sum society. The four hundred-year boom has ended. The Cartesian-Newtonian paradigm, reflected in the writings of the "father" of the American Constitution, John Locke, is outdated. It is being replaced, all too slowly, by a new vision of reality: "an awareness of the essential interrelatedness and interdependence of all phenomena—physical, biological, psychological, social, and cultural."37 As Americans approach the 200th anniversary of the constitutional convention of 1787, there is no more important question confronting them than modernizing the ancient document, so as to adapt it to the new reality.

35. See A. Miller, Toward Increased Judicial Activism: The Political Role of the Supreme Court (1982).
36. The details and reasons for these, and other changes, will be set forth in the author's proposed book, supra note *.
37. Capra, supra note 12, at 265.