The American Founders and the Furnishings of Mind

Hadley Arkes

Just a few weeks ago, at my own college, at a meeting on the curriculum, a colleague of mine in anthropology remarked that, whatever else we may prescribe in a curriculum for the college, he would argue for one requirement: that our students come to understand a "culture" other than their own. This earnest man has been quite far from appreciating the irony of his proposal: for these children, the children of the American regime, there is nothing so alien and unfamiliar as the doctrines of "natural rights" that shaped the understanding of the American Founders. Most of them have been raised in families that have identified themselves as Christian or Jewish, and yet their convictions are quite at odds with the logic of that monotheism in which they have been raised.

Not too long ago I saw a commentary on that story in the First Book of Kings, when Elijah had lodged himself on Mount Horeb, and he was instructed by God to journey to Damascus, to anoint Hazael as King over Aram. The commentator pointed out that this story had been thought to date from the first half of the ninth century, B.C., and it showed just how early the Jews had absorbed the notion of monotheism. The God who could order a local prophet to cross the border, install a new king or cashier an old one, was not one of those local gods so familiar to antiquity. His authority was not confined to the land of Israel; his authority was the same in all places—his "jurisdiction" was understood to be universal. And of course, the God who was the author of the universal laws of physics was also the author of moral laws that were not confined to Damascus or Jersey City.

Most of our students at the most selective colleges and universities have been raised in churches and synagogues, and yet they seem quite remote from this rudimentary point, which is part of the logic of monotheism. Anyone who knows college students knows that they are gripped by the secular religion of cultural relativism. They are persuaded, with the force of an absolute truth, that there are no moral truths that preserve their truth in all places and times, that notions of right and wrong must always be "relative" to the country in which they are held.

The students seem quite distant, too, from the understanding of the nineteen-year-old Alexander Hamilton when he remarked on the root fallacy in Hobbes—namely, that Hobbes "disbelieved in the existence of an intelligent superintending principle, who is the governor, and will be the final judge of the universe," and that God has "constituted an eternal and immutable law, which is . . . obligatory upon all mankind, prior to any human institution whatever"[1]—which is to say, even before the advent of a government. That was not an idle

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observation; it was bound up with the understanding of "natural rights" held by Hamilton and others among the Founders. And years later Hamilton would draw upon this same understanding as he pointed out the serious problems of coherence that afflicted the argument for a Bill of Rights.[2]

For our students to engage in a serious study of the Bible or theology or the understanding of the American Founders would be, for most of them, an exercise in grasping an understanding quite at odds with what they are pleased to call, at this moment, their own "culture." When we begin with these students at Amherst, we have often begun, in the study of politics, by taking something near to them, something familiar—and then we try to show how strange it may be. At times we have started, for example, with Prof. Robert Dahl and his account of politics in New Haven. Prof. Dahl found a diffusion of power in the politics of his city, with different sets of people being dominant in making policy, say, in the domain of education or real estate or public works. A certain political elite commanded a presence in all of these fields, but the dominance of this elite was supposed to be offset by the fact that the leaders turned out to be the most committed to what Dahl and others call "democratic norms." More than any other citizens, the leaders were committed to the "rules of the game" and the conventions of democracy.

But were those "rules" or "norms" like the rules of baseball or chess? Were they like the rules that establish that we get a base on balls after four pitches wide of the strike zone? The rule on balls and strikes, or the number of men in the lineup, are merely "conventions"; we could readily change them without doing anything of moral significance, and that may prompt us to ask just why political rules are good—and just why the political elite respects them. After all, the political elite may support these rules because they are the rules under which they have been successful. And they may continue to support them only as those rules continue to supply them with further successes. There is a notable difference between a willingness to uphold the so-called "rules of the game" for that reason—and a willingness to respect the principles of democracy because one happens to think that they are both good and true; that those rules describe a political regime that is morally superior to a despotism.

And yet that was not the understanding of Prof. Dahl. Dahl thought that the principles of democracy were, in the end, too nebulous to claim much meaning, let alone truth. They were part, rather, of a creed or a belief. That the most educated people seemed to support a democratic regime more fully was explicable to him because education was the source of their "indoctrination" into these beliefs. At this point, we are often moved to ask the students whether they learned in school the Pythagorean theorem (i.e., the square of the hypotenuse of a right triangle is equal to the sum of the squares of its two adjacent sides). And if they did, would they be inclined later to say that they were "indoctrinated" in the Pythagorean theorem? Students find that a curious expression. They are more disposed to say that they learned the Pythagorean theorem, that

they acquired their confidence in the truth of the theorem when they came to understand the premises and the reasoning from which it had been drawn. Would it be possible then that the American Founders understood in the same way the moral truths expressed in the Declaration of Independence, the truths on which the American republic was founded?

But my colleagues at Amherst are quick to insist that no such analogy can be drawn; that political and moral truths cannot rest on the same kinds of axioms that underlay the truths of mathematics. In this respect, of course, they differ radically from Plato, Locke, and the American Founders they purport to explain. There can be no more dramatic example on this point than the passage Alexander Hamilton was content to strike off as the opening paragraph for *Federalist #31*. The subject of that paper was taxation, and in the course of that essay Hamilton would not say anything about taxation that could not be said today by Bob Dole. But any literate observer would be bound to notice something strikingly different in the furnishings of mind and the way in which the problem was framed. Hamilton chose to introduce his subject in this way:

> In disquisitions of every kind there are certain primary truths, or first principles, upon which all subsequent reasonings must depend. They contain an internal evidence which, antecedent to all reflection or combination, commands the assent of the mind. Where it produces not this effect, it must proceed either from some disorder in the organs of perception, or from the influence of some strong interest, or passion, or prejudice. Of this nature are the maxims in geometry that 'the whole is greater than its parts; that things equal to the same are equal to one another; that two straight lines cannot enclose a space; that all right angles are equal to each other.' Of the same nature are these other maxims in ethics and politics, that there cannot be an effect without a cause; that the means ought to be proportioned to the end; that every power ought to be commensurate with its object; that there ought to be no limitation of a power destined to effect a purpose which is itself incapable of limitation.

People tutored in philosophy could see, in this passage, a mind attentive to the teachings of Thomas Reid and what has since been called the Scottish School. One of the finest characters among the Founders, James Wilson, was himself an immigrant from Scotland, and when he took his place as part of the first Supreme Court, he invoked the authority of Thomas Reid in the first case that actually elicited a set of opinions from the judges.

That was *Chisholm v. Georgia*, decided in 1793. Wilson would explain, in an elegant opinion, that there were no cases built up as precedents under this new Constitution. It became ever more necessary then for the Court to speak about "the principles of general jurisprudence" before it would speak about the principles that marked the peculiar character of the American Constitution. Wilson took care to remind the audience of the Court that the principles of legal judgment were merely a *part of the laws of reason* and the principles of moral judgment. Before Wilson would invoke the authority of any case at law or any writer on matters legal, he would invoke the authority of "an original and profound writer . . . in the philosophy of mind." He would appeal to "Dr. Reid,

in his excellent enquiry into the human mind, on the principles of *common sense*, speaking of the skeptical and illiberal philosophy, which under bold, but false pretensions to liberality, prevailed in many parts of Europe before he wrote."[3]

In other words, the Court would ascend to the task of judgment only after it insisted, in the first instance, that it was indeed possible to judge: the Court would reject that "skepticism" in philosophy which denied the possibility of "knowing" moral truths, just as it denied the possibility of "knowing" almost anything else. Wilson would move from "the principles of general jurisprudence" to the principles that defined the distinct character of the American Constitution. But the principles of lawfulness, and the canons of reason, did not spring from anything peculiar to the American scene. The American republic could claim to rest on truths that did not depend, for their truth, on the opinions dominant in America.

As Wilson moved through this train of reasoning to produce his conclusions, he advanced through the force of what he described as "fair and conclusive deduction."[4] Seventeen years later, Chief Justice John Marshall would offer a striking example of how a mind tutored in the same way could derive certain constitutional rights through *deduction*. The case was *Fletcher v. Peck* (1810), and it was the occasion for striking down an act of the legislature in Georgia. The case involved a grant of public lands, the buying of legislators, and an attempt finally to strike at the corruption by rescinding the original grant of land to the speculators. Marshall and his colleagues saw, in this act of rescinding the grant, the subverting or undoing of the obligation of a contract. The "impaired" contract was the contract that conveyed the land to the current buyers, who were presumably innocent of the original wrong.

In understanding the case in this way, Marshall could have rested his judgment on a specific provision in the Constitution: the Contract Clause, the clause that forbade the states from "impairing the obligation of contracts." But he chose to argue in a notably different way. He tried to show that the wrong engaged in this case could be *deduced* from the principle on *ex post facto* laws. Marshall explained that "an *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed." But what was meant by punishment? Many jurists had sought to solve a tricky problem by identifying *ex post facto* laws with those retrospective laws that imposed *criminal* penalties. But Marshall recognized that the problem could not be settled in such a facile way. I won't review here the subtle and searching challenge he raised on this point; let us simply say that Marshall recognized that so-called "civil" penalties—with large awards of damages, the seizure of property, or even confinement in jail—could be quite as emphatic and astounding as penalties meted out through the criminal law. And so Marshall was moved to write:

> This rescinding act [in Georgia] would have the effect of an *ex post facto* law. It forfeits the estate of [the buyer] for a crime not committed by himself, but by those from whom he

> purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?[5]

Marshall evidently shared the assumption held by many of the Founders that the principle on *ex post facto* laws was indeed a principle of law that was not only true, but true of necessity. If Marshall could show, then, that the statute in Georgia was really a species of *ex post facto* laws, he had every reason to be confident that the conclusion he drew about the wrongness of the statute was not merely defensible, but compellingly true. His conclusion would flow with the deductive and necessary force of an argument drawn with the logic of a syllogism. And in that event, the wrongness of the statute would not hinge in any way on the question of whether contracts or grants or rescinding laws had been mentioned in the text of the Constitution.

Marshall drew out the import of this point with a further, and novel, recognition. He remarked that Georgia was "part of a large empire; she is a member of the American Union," and the Union had a Constitution that was supreme over its separate parts. But as a result of the argument that Marshall made in this case, he could point out that the rescinding act passed by the legislature of Georgia "might well be doubted, were Georgia a single sovereign power."[6] That is, even if Georgia had not come under the Constitution and the restrictions of the Contract Clause, the action of the legislature would still have been wrong. For the legislature had violated a principle that did not depend for its validity on the explicit provisions of the Constitution, or on the membership of Georgia in the American Union.

To put it another way, Marshall did not rest his judgment on the authority of the Constitution. What he sought to show, instead, is that the Contract Clause in the Constitution derived its authority from a deeper principle of law that did not depend, for its validity, on the text of the Constitution. And in making that transition, he apparently thought he was explaining, far more decisively, why the passage in the Constitution deserved to be treated with the solemn authority of a fundamental law. The section in the Constitution did not mark off merely a convention or understanding established in this country—an understanding of what we, in this particular tribe of Americans, regarded as a wrong. But rather, Marshall amplified the text, and in his hand the provision on "the Obligation of Contracts" was made to alert us to the uses of law that were in principle wrong in all places.

I had the occasion recently to recall a conversation with a friend who has been teaching at an academy attached to one of our military services. His students were all seasoned veterans in their forties; they had all seen military action; but they were still, twenty years later, the people who had been college students in the 1960s, and they had absorbed much of the secular religion that affected other young people at the time. They were, on the whole, skeptical of moral truths that held across cultures. They were willing to risk their lives for

their country, but they were notably uncertain about the grounds on which their country could claim to have the merit that justified such a risk. They would not claim that the political regime in America was morally superior to that of the Soviet Union, say, or Vietnam. They would settle for the far more modest claim that our political way of life was at least "ours."

Now, I don't deride this prejudice in favor of the things that are ours. But at a certain point, the passion for what is ours cannot provide a justification for the most serious commitments and sacrifices. If the principles of a free regime were the equivalent merely of the conventions of baseball, then it should be as plausible to change the principles of law as to change the rule on balls and strikes or the convention on designated hitters. And yet, are we really free in the same way to alter these axioms of the law: that "people should not be held blameworthy or responsible for acts they were powerless to affect"; that like cases should be treated in like fashion, according to the same rules; that beings who are capable of understanding reasons deserve to be ruled through the rendering of reasons, through a regime of consent? Even the dimmest of us may suspect that these propositions are not merely conventional. They are not ours because we have chosen to adopt them; rather, we have adopted them—we have made them "ours"—for the sovereign reason that they are compellingly true.

Marshall shaped his argument in a rather elegant way, but I would suggest that the man on the street, even in our day, is savvy to the kind of understanding that Marshall had touched. People continue to care about questions of equity and fairness, about questions of reverse discrimination, the burdens of taxation, the tilt, in the courts, between criminals and victims. People persistently care about these questions, which involve nothing less than the terms of principle on which we live together, the terms on which we constitute ourselves as a political community. And when people do show their concern for these questions, I would suggest that they show an awareness of that part of their lives that is not merely local—a part that touches on something of a more enduring and universal significance. For something local we go to Zabar's for the cheesecake; but for the conditions of justice, we are all Athenians.

Notes

1. Alexander Hamilton, "The Farmer Refuted" (February 1775), in vol. 1 of *The Papers of Alexander Hamilton*, ed. Harold C. Syrett (New York: Columbia University Press, 1961), 86–87.
2. For an extended treatment of this question, see chapter 4, "On the Dangers of a Bill of Rights: Restating the Federalist Argument," in Hadley Arkes, *Beyond the Constitution* (Princeton, N.J.: Princeton University Press, 1990).
3. Chisholm v. Georgia, 2 Dallas 419 (1793), 453–54.
4. Ibid., 464, 465.
5. Fletcher v. Peck, 6 Cranch 87 (1810), 138–39.
6. Ibid., 136.