One of the main topics of reflection in constitutional thought grew directly out of the practical business at hand: making a new government. Two questions attracted attention: First, what is the best or recommended way to go about forming a government? And second, how does a government, once formed, shape thereafter the public’s epistemological premises? By this last term I mean the way in which people conceive of and process the political world about them—whether, for example, people lay claim to being able to figure everything out by the use of their reason or whether they allow themselves space for revering things past and things noble.

—James W. Ceaser

The idea of a plan of government being contained in a written document is so taken for granted that it is rarely noted and seldom seen as an innovation. Yet, during the founding era, the development of a written constitution was counted as a major innovation of great theoretical import. However, the attitude with which the people regard the Constitution is just as important as the idea of a written constitution. For Americans, the Constitution ought to be regarded with reverence and veneration because the respect for government this engendered helped give birth to a community and to supply a bond of attachment that helped bind the nation together.

In honor of the 226th anniversary of the signing of the US Constitution on September 17, 1787, AEI’s Program on American Citizenship marked Constitution Day with a lecture by James W. Ceaser (University of Virginia). Ceaser’s lecture was the third in a series named for distinguished AEI scholar Walter Berns.
The Constitution as Political Theory
Between Rationalism and Reverence

2014 Walter Berns Constitution Day Lecture

Remarks by
James W. Ceaser

American Enterprise Institute
The Walter Berns Constitution Day Lecture Series

A scholar of political philosophy and constitutional law, Walter Berns has written extensively on issues of American government and its founding principles. He is the author of 10 volumes and has published widely in professional and popular journals and America’s leading newspapers. He is the John M. Olin University Professor Emeritus at Georgetown University and served as a resident scholar at AEI. He has taught at Louisiana State University, Yale University, Cornell University, Colgate University, and the University of Toronto. He earned his master’s and doctorate degrees in political science at the University of Chicago. Berns served on the National Council on the Humanities from 1982 to 1988 and on the Council of Scholars in the Library of Congress from 1981 to 1985. He was also a delegate to the United Nations Commission on Human Rights. He was awarded the National Humanities Medal in 2005.

In September 2011, AEI President Arthur Brooks announced that henceforth the Program on American Citizenship’s annual Constitution Day celebration would be named in honor of Walter Berns in appreciation of his scholarly legacy in this field and his many years of contributing to the work of AEI.
The Constitution as Political Theory: Between Rationalism and Reverence

James W. Ceaser
September 16, 2014

The Constitution of the United States of America is first and foremost a legal document. It serves as the supreme law of the land, establishing the basic structure or framework of the federal government, determining the powers of the federal government as well as certain powers of the states, and delineating a set of basic rights.

Yet, the Constitution has played another important, far less remarked upon role that is unrelated either to its status as law or to any connection it has to the United States. The body of thought that went into developing the Constitution, and then into explaining and defending it during the debate over ratification, comprises a notable contribution to political theory. The Americans who took the lead in this task engaged fundamental questions of political life, challenged a number of well-known philosophical positions, and offered new theoretical insights. The best of their work, which found its expression in The Federalist, merits a place alongside such classics in political theory as Locke’s Second Treatise, Rousseau’s Second Discourse, and Burke’s Reflections on the Revolution in France.

One of the main topics of reflection in constitutional thought grew directly out of the practical business at hand: making a new government. Two questions attracted attention: First, what is the best or recommended way to go about forming a government? And second, how does a government, once formed, shape thereafter the public’s epistemological premises? By this last term I mean the way in which people conceive of and process the political world about
them—whether, for example, people lay claim to being able to figure everything out by the use of their reason or whether they allow themselves space for revering things past and things noble.

These questions are admittedly far removed from current concerns relating to the Constitution, such as the proper scope of the president’s power or the degree of protection that should be afforded to businesses claiming a right of free exercise of religion. With the usual academic pride I can therefore proclaim the irrelevance of the remarks to follow. Pushing perversity further, I can, in the Constitution’s own language, solemnly swear (or affirm) to avoid mention this afternoon of any of the major constitutional principles commonly referenced in public discussions, whether it be separation of powers, judicial review, federalism, or checks and balances.

Beyond that, I pledge never to refer to the text of the Constitution—neither to an amendment nor to an article or a clause nor even to a single phrase or word. I include here the now-famous-term “capitation,” which Chief Justice Roberts plucked from somewhere in Article I to salvage the Affordable Care Act. Needless to say, you will not hear a citation from any Supreme Court decision, current or past.

Perhaps, then, it would be appropriate at this time to pause in order to allow the law professors and policy experts in the audience to make a discreet exit. For those who have chosen to remain, who must be persons of a more theoretical disposition, I should offer a preliminary point of clarification about the meaning of political theory.

Political theory has been defined in a strict sense as the quest for truth or knowledge about political things. It has been distinguished from political thought, which is the exposition of political ideas, usually to support a given view or position. For example, most books and articles that appear on the subjects of liberalism and conservatism fall into the category of political thought, not political theory. Political thought may borrow arguments from political theory, but its goal is less the search for truth or knowledge than the furtherance of a political objective.

It turns out that by the exacting definition of political theory, many texts widely considered to be works of political theory are in fact works of political thought. Burke’s *Reflections*, which derived
from a speech meant to awaken people to the dangers of the French Revolution, is a case in point. *The Federalist*, which sought first and foremost to secure ratification of the Constitution, is also a work of political thought. Yet, it has also been recognized that it relied greatly on arguments deriving from political theory and that it introduced many important theoretical ideas. In a preface to one of the earliest collected volumes of these papers, Alexander Hamilton concluded as follows: “The great wish is that it may promote the cause of truth and lead to a right judgment of the true interests of the community.”

*The Federalist*, to which I will be referring mostly today, has two other features to commend it from the perspective of those interested in political theory. First, because it addressed a real-life political event, it was compelled to treat many interesting issues that theoretical writers, who have full control of the content of their work, have ignored. Consent by the new instrumentality of ratification of a written document is an example. Second, because *The Federalist* hazards propositions of what will or will not take place depending on the decision of ratification, it allows us, looking back on the work, to assess the merits of some of the arguments. What we have is a kind of controlled experiment for analyzing certain ideas.

**Government by Accident or Reflection?**

The first question to be considered revolves around the preferred way to form governments. It is raised at the outset of *The Federalist*, in the opening paragraph of the book, in a long and complex sentence, a part of which reads, “it 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.”

Setting aside for now some of the difficulties in this passage, the basic issue posed seems clear enough. There are two possibilities: either government can come into being by “reflection and choice”—that is, by some individuals consciously making a plan to which the
people consent—or government can come into being by “accident and force”—that is, by chance and without consent.

The authors of *The Federalist* leave no doubt about which of these alternatives they hoped to see confirmed. If the experiment in ratifying and implementing the proposed constitution succeeded, it would lend support to the position that human beings—using their reason—can make good government, and that this is the preferred, perhaps even the only, way of doing so. Let us notice, too, that the issue to be determined here goes beyond the local matter of government in America to a general question of political theory.

I confess that for many years, I read this passage without ever entertaining the possibility of the superiority of the alternative position. The option favoring reflection seemed to me so obvious as not to require further consideration. Nor, in fact, does *The Federalist* at this early point offer any argument on its behalf.

Obviously, I missed something crucial. Far from being universally accepted, the position supported by *The Federalist* had been questioned or rejected by many political thinkers. Just a few years later, in the aftermath of the French Revolution, a debate about the merits of the two positions became one of the central points of controversy within political theory.

I will dispense for the moment with the dimension of whether choice is better than force, and focus on the dimension of whether reflection is to be preferred to accident in the formation of governments.

On the side favoring reflection, the works of many of the theorists who constructed models of government on the basis of philosophical or scientific reasoning come immediately to mind. This tradition stretches all the way back to Plato’s *Republic*, where Socrates builds a whole city in speech on the basis of such an analysis. Of course, some of these “imaginary republics and principalities,” as Machiavelli refers to them, were never intended as realistic plans so much as intellectual exercises to teach about the possibilities and limits of political life.³

However this may be, the idea of making government on the basis of reason—ideally, from scratch—captured the theoretical imagination. By the time one gets to many modern philosophers, the plans
offered to build political systems wholesale were often meant to be taken in earnest. Machiavelli himself dwelled on the best methods for new princes in a new territory to establish solid orders, although perhaps not by consent. A century later, we find Rene Descartes, the first great modern philosopher, contemplating the construction of cities in a manner akin to an engineer designing a great project. For modern rationalist thinkers, the point was to employ reflection—not to imagine a world, but to change it.

On the other side, there is a whole school of thought, whose roots are found in the political theory of Montesquieu and Hume, that challenges the wisdom of encouraging the making or remaking of governments. It does so not just on the prudential grounds that if a government is to be made, the project should be carried out with great care and perhaps only when absolutely necessary. No, the school I am referring to affirmed the alternative theoretical proposition that good government is more apt to result from growth and accretion, which is to say, from something akin to accident.

To be sure, most proponents of this position left room for the exercise of human agency at the margins, where political actors might inflect the development of government by making reforms. But it was a grave error, they insisted, to proclaim the superiority of the idea of wholesale making (or, in the terminology of the day, new-modeling) government.

The best-known spokesperson of this position is Edmund Burke. In characterizing his beloved constitution of England—which of course has no written constitution—Burke observed that the English system was not

\[\text{formed upon a regular plan or with any unity of design. . . . [It developed] in a great length of time and by a great variety of accidents. . . . [Its parts] gradually, and almost insensibly accommodated themselves to each other. . . . The very idea of the fabrication of a new government is enough to fill us with disgust and horror.}\]^{4}

By this standard, a day that marks the formation of government by a plan, like Constitution Day, should be an occasion for mourning,
not celebration. A law should be enacted to require that all flags be flown at half-mast as a sign of national repentance, not only for having dared to make a new government but also for having boasted about doing so.

Consider three of the arguments advanced in favor of what many today no doubt regard as a strange position.

First, the very act of conceiving of new-modeling government contains something fearful about it. It presupposes a central authority with power to make and remake a government. It thereby endorses, at least conceptually, the existence of a power without limits. Once acknowledged and accepted, what is there to prevent such a power from being invoked again?

Second, human reason is unequal to the task of erecting a plan of this magnitude. It is too big and complex a job. To cite David Hume, “no human genius, however comprehensive, is able, by mere dint of reason and reflection, to effect” a project of this magnitude. If, as some say today, you cannot remake one-sixth of the economy, what makes you think that you can remake nine-tenths of a political system?

Third, a public position in favor of creating a new model of government is destabilizing. New-modeling government sets a dangerous precedent. If a government is new-modeled once, why not new-model it again, just as those of a progressive temperament are inclined to tear down a house deemed old or obsolete and replace it with something new and modern?

The almost natural process of growth and accommodation that Burke described for the formation of government is often referred to in political theory textbooks as the organic model. The model is based on what is said to be the manner of development in biology as seen, for example, in the slow growth of a stately oak tree, its branches spreading out unsymmetrically in improbable directions. Nothing is planned, yet the result fits.

Applying this idea by analogy to the formation of government, a political system is said to evolve slowly by accidents and incremental adjustments, with customs and habits developing to support it. The people come to appreciate the resulting heritage or tradition, which adds another prop to preserve the system.
The organic theory in the historical version articulated by Burke provides the premises for what many subsequently called conservatism or traditionalism. In a more analytic account of this process, some thinkers posited the existence of a general principle of spontaneous order at work in human affairs (and, by some accounts, in the physical world as well).

The principle of spontaneous order is nothing less than the idea that accident inevitably, over a certain period of time, assures a good result. The economist Friedrich Hayek based his whole social theory—as do many libertarians today—on this benign principle, the origin of which Hayek traced back to the thought of the 18th-century Scottish philosopher Adam Ferguson. “Nations,” wrote Ferguson, “stumble upon establishments, which are indeed the result of human action, but not the execution of any human design.”

The organic model stands in stark opposition to the idea of rational making, which has no similarly accepted name. To call it the inorganic model would probably be greeted as a provocation. Better to label it the synthetic or the rationalist model and, in its predominant modern form, label it the Enlightenment rationalist model. Proponents of this model also appeal to nature, but in a very different sense than that posited in the organic conception, with its tender picture of the growth of its beloved oak tree. Nature under the synthetic model refers instead to necessary relationships—abstract laws of nature—that are grasped by reason. This is not your garden variety of nature.

I am almost compelled at the American Enterprise Institute to digress a moment here to respond to a different provocation. If, as many continental thinkers and a few Americans hold, the organic position is taken to be the definitive criterion for defining conservatism, then America, insofar as it accepts The Federalist’s preference for forming government by reflection and choice, cannot give birth to a genuine form of conservatism.

For American conservatives to accede without resistance to this European argument would be to allow others to determine the meaning of words and to govern us without our consent. We would do better to object to this long train of abuse and seek to teach our
assuming brothers and sisters in Europe that there is an American form of conservatism that is no less worthy than the variant they espouse.

One fact, though, is undeniable. By underscoring the claim that good government is made by reflection, constitutional thought in America has promoted a rationalist mode of thought within the American mind. Some today, like Professor Sandy Levinson from the University of Texas, pursue this strand to its end and call for redoing the Constitution. Levinson rarely misses an occasion to quote approvingly from *Federalist* 1, adding for good measure a stirring passage from *Federalist* 14: “is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity [or] for custom?”

It is also fair to conclude that the American claim of having made a government has had a profound effect on subsequent history. For better or worse, the American example has worked throughout much of the world to encourage efforts to write constitutions and new-model governments.

Political thought, as distinct from political theory, often abstracts from reality and simplifies in order to promote a given position. There may therefore be less theory and more rhetoric than meets the eye in the organic and rationalist positions. Many who claim that good government is made by reflection would no doubt concede that it sometimes comes about by accident, and many who argue that good government results from accident might allow that it sometimes can be produced by reflection.

What is at issue here is a dispute about doctrines. A doctrine is a firm conclusion put forward publicly as a general rule that is intended to influence the course of events. It is a political instrument. The organic model probably rests on the logic that because so much destruction and fanaticism have resulted from attempts to remake government, it is best to promote the doctrine that good government results from accident. The synthetic or rationalist model counters with the logic that because so much folly, ignorance, and superstition are embedded in tradition, it is best to support the
doctrine that good government is established by reflection. Political theory is rarely rule bound, which is to say it is not doctrinaire.

To this point, I have presented only the beginning of constitutional thought on forming government. While *The Federalist* comes down on the side of remaking, its authors were nevertheless deeply sensible of some of the practical concerns raised by organic objectors. But they go further than that. In a way that I hope will become clear, they seek to qualify the synthetic view, not on the basic point of the possibility of making good government by reflection but on its possible derivative idea of encouraging the popular epistemological premise in favor of new-modeling government.

American constitutional thought aims in a certain way to combine—I refrain from saying synthesize—rationalism and traditionalism. It does so in part by reaching beyond the modern expressions of these positions and drawing on classical expressions of both positions. The forging of this combination marks the most important contribution of American constitutional thought to political theory.

**Founders on Founding**

I turn now to *The Federalist*’s treatment of another facet of the question of how governments are made: the theme referred to in the 18th century as the lawgiver, which we today usually call the founder. The two terms are not perfect synonyms, but they are close enough to proceed here as if they are largely the same.

The process of founding involves setting in motion the idea for a fundamental change, devising a plan for the new order of society (this is the lawgiving activity strictly understood), and then acting to put the plan into effect. The founder—it could be founders—performs some or all of these tasks. The one—or ones—subsequently credited with having performed the most essential work wins the acclaim of being called a founder and joins a very exclusive club.

Before looking at the political thought on this subject, it is important to remind ourselves how often we Americans today speak about founding and founders. It is a huge theme in American discourse, both academic and popular, and is far more prevalent here than is the
case in most other nations. For all of the attention given to the topic, however, the word is used with a certain imprecision. Are the founders the leaders of the Revolution or the makers of the Constitution?

For the most part, at public ceremonies and in speeches, the two are grouped together to form one august body of founders. The names of some of the revolutionary figures, like Jefferson and Adams, often receive greater attention than Madison or Morris. Yet if pressed, most who write about this era consider the making of the Constitution as being more at the core of the general idea of the founding.

The founders overall enjoy a favorable reputation, although as anyone in the field of education knows, they encounter no shortage of criticism. The founders are often charged, sometimes with an unseemly glee, with being defenders of wealth and privilege, or misogynists, racists, or any combination of the three. However this may be, America does celebrate its founders by building monuments in their honor and by naming buildings and streets after them. What, after all, could be more iconic of America than Madison Avenue?

What accounts for the prominence that is accorded in America to the founders? One answer is that it is a simple result of the facts of history objectively considered. It is a reflection, no more and no less, of how things took place. Americans speak so much of the founding and founders because we had a founding and founders.

But there is another possibility: Americans pay so much attention to the founders because of a theoretical treatment of this theme in constitutional thought. This treatment sets out the centrality of the concept of founding, ascribes to it a positive value, and attaches it to the act of making the Constitution.

The idea of founding derives directly from the aforementioned doctrine in favor of governments being made. If governments are made, then there must be a maker or founder. The elaboration of this concept encourages people to look for a founding and for founders. Absent this theoretical position, Americans might not view the founders in the way that we have. Indeed, we might not call them founders at all.

It is easy to understand why a strand of traditionalist thought resists the use of the word “founder.” If good government results
from growth and accident, then it is unwise to speak of founders in an exalted sense. Some traditionalists, moreover, insist not only that it is unwise but also that it is untrue. The American Revolution was never anything more than an effort to restore old English rights, and the Constitution represented an effort to preserve the objectives of the Revolution, which arguably were endangered by flaws in the first constitutions. What we had in 1787, then, was not a founding or founders but a reform and reformers.

The full view of founding runs throughout *The Federalist*. It is treated most extensively in *Federalist* 38, which is the sequel to *Federalist* 1. It begins by picking up on its main theme, promising an analysis of cases “in which government has been established with deliberation and consent” (the equivalent of reflection and choice). This theme is also now presented in more detail and with greater complexity.

America, we learn, is not the first example of a government formed by deliberation and consent. More importantly, the pair of deliberation and consent, far from being a unity or a whole, consists of two distinct and separable elements. There are, accordingly, four possibilities in establishing government, not two. Governments can be formed not only, as *Federalist* 1 implied, by reflection and choice or by accident and force, but also by reflection, force, and, though this option is not discussed, accident and consent.

*Federalist* 38 provides one of the more complete treatments of the topic of the lawgiver in modern political thought. It merits study alongside of the surprisingly few other modern considerations of this theme, the most important of which are found in the writings of Machiavelli and Rousseau. These two authors also elevate the function, or office, of founding, discussing, among others, such notable figures as Moses and Romulus.

*The Federalist* likewise surveys some of the great lawgivers of antiquity, some 14 in all, including Lycurgus, the founder of Sparta, and Solon, who established the democratic constitution in Athens. America’s founding is placed into the context of these other monumental foundings, with a comparison among them invited. Since the founding had not yet been achieved in America when *The Federalist*
was written, it was premature to pronounce a final verdict. A judgment, in any case, would have been indelicate given that the authors of *The Federalist* would qualify as being among the founders.

The late-18th century was still an age, unlike today, in which leaders might have felt some reluctance at beginning every sentence with “I.” Yet there is no doubt that *The Federalist* sought to place in the reader’s mind the possibility that America’s founders should be considered the rivals of, if not indeed the replacements for, the founders of antiquity as the most esteemed models.

It is difficult to choose between the two possibilities mentioned: that we have founders because we had founders and that we have founders because of a theoretical argument that favored the idea of founding. As much as academics today prefer to wave around the little metaphysical talisman known as the social construction of reality, I cannot help but think that there is something to the notion that there is a real history. At the same time, it would be foolish to deny that theoretical doctrines greatly influence how we see and interpret events.

If it can be surmised that American constitutional thought had the effect of building up founding, it is even more evident that alternative modern theoretical accounts about forming government have had the effect—at least they have tried—of diminishing the idea of founding. Under the organic theory, the function or office of founder all but disappears. Because governments are said to grow and not to be made, there is no maker. History is interpreted so that accident or an inevitable process replaces founders. If there ever were founders, they came in some ancient and heroic time no longer applicable to modern politics. Individuals today who aspire to the office of founder, far from meriting praise, are presented as fanatics bound to bring disaster.

Nor is it just the organic model that downplays founding. In the political thought from which Americans otherwise borrowed so much—I am referring to the work of John Locke—the theme of founding is also largely absent. It is replaced by a theoretical construct: the idea that societies originate in a compact or contract. To be sure, this idea is presented as a theoretical supposition. Yet it is
meant to have an effect on how we think about origins. It is meant to replace the historical efforts of a founder or founders—which is contingent or accidental—with a theory of contract, which is certain and universal. Liberal-contract political theory has little place for founding and it has all but banished the figure of the founder from political analysis.

It is interesting to speculate about why The Federalist diverges from most modern thought on the question of founding. Since founders and founding are so conspicuous in classical political theory—featured, for example, in the works of Xenophon, Aristotle and Plutarch—it seems that American constitutional thought, along with the thought of Machiavelli and Rousseau, draws more from classical political philosophy.

In addition, since American constitutional thought arises from and is enmeshed in actual political events, it stays much closer to the phenomena of politics than does organic theory or compact theory, both of which abstract from political life. American thought in this respect is less doctrinal than the other modern approaches and more inclined to recognize the role of accident in human affairs, like the chance appearance of capable founders at a given place and at a given time. Such, after all, was the reality that these American leaders were experiencing.

**Greatness and the Founding**

Quitting such speculations, it is more important to ask why American constitutional thought embraced this view of founding and what effect it was intended to have. The Federalist’s account of founding and founders was above all meant to lend support to the idea of political greatness. It was meant to keep this idea alive inside of modern political life, not only, as the professional critics might say, for the self-interested reason that the American leaders themselves might be its beneficiaries—though there is nothing dishonorable in that—but also for the good that it would contribute to political life.

Some of the alternative modern theories, in their doctrinal bids to control the course of political life, sought to squeeze out the idea of
greatness. *The Federalist* does just the opposite, denying that politics can ever be controlled by a science or doctrine. It has been remarked that the American system of government was so constructed that institutional mechanisms might reduce the reliance on individual talent and that “enlightened statesmen will not always be at the helm.”9 This is true enough, but it does not obviate the fact that politics needed and would always need the contribution of great persons. *The Federalist* emphasizes—it certainly does not seek to obscure or hide—the fact that political talents and virtues are unequal.

The insistence on individuals of high rank in America is something of a paradox. The Constitution abolishes formal titles and establishes popular government. Yet those who took the lead in creating it showed no hesitancy in recognizing and underwriting the idea of hierarchy in the realm of political action. Far from being embarrassed by greatness, the authors of *The Federalist* expand the scope of hierarchy. Greatness is an idea that bids us to look up to something that stands out as beyond the normal or the average. The idea of founding keeps alive an aristocratic idea.

As for the qualities that comprise greatness, it is impossible to supply an exhaustive checklist. Political greatness is distinct and particular, analogous to the genius of the most celebrated poets or musicians. The most that can be sketched are proximate qualities or models. *The Federalist* celebrates the courage, both military and intellectual, of the leaders of the Revolution. Their willingness to risk so much for what promised to be of benefit, not only for America but also “for the whole human race,” is to be lauded.

*The Federalist* also, however, quietly emphasizes another model, which is found in the figure of a certain kind of lawgiver. This figure possesses sagacity, which in modern times includes an in-depth knowledge of the science of politics; judgment and flexibility, which consists in the ability to take cognizance of the situation in which one acts and the capacity to fit scientific knowledge to the particular circumstances; and a combination of persistence and boldness, which is demonstrated in the account interspersed throughout *The Federalist* of how those who undertook the project to create a new constitution did so with such commitment to the limits of the law
and even a little bit beyond. The Federalist, while it is a book about the Constitution, is also a work of a different genre. It is a modern mirror of princes, in which the qualities of the lawgiver become a model of virtue.

Looking back, it is interesting to consider how well America’s founders achieved the renown that The Federalist sought for them. The American founding is widely considered today as the seminal event of modern constitutionalism, and America’s founders, including the leaders of the Revolution, are among the few in the world honored as great successes, sharing the stage with perhaps only Gandhi and Mandela.

The founders of antiquity have largely been forgotten, eclipsed by the Americans. Among the moderns, many who have vied for fame, and who acquired it for a moment, have fallen by the wayside. In the former Soviet Union, the outsized statues of Lenin have mostly been torn down, their mighty stone ground to dust. In Russia, the anticipated monuments to Vladimir Putin, on horseback with shirt off and abs bulging, have yet to appear. Mao, though still formally credited as founder in China, is no longer considered to supply the model for the system. Even in the case of Ataturk, the modern lawgiver who did so much to transform the habits and mores of the Turkish people, it would appear now that his project is under threat and at risk of being dismantled.

**Why a Written Constitution?**

I would like to turn now to The Federalist’s view of the way to go about forming a government. On this point, the authors go so far as to claim openly that America’s lawgivers made improvements on “the ancient mode of preparing and establishing regular plans of government.” The Federalist discusses three differences between the Americans and the ancients in their approaches to founding.

The first difference concerns the number of founders. The ancients always settled on a single person, “one illustrious citizen,” whereas the Americans turned to a group, “an assembly of men.” The ancients, according to The Federalist, rejected a group because
it would more likely fall into discord and fail in the execution of the project. Other writers on the subject of founding, like Machiavelli and Descartes, seem to follow the ancients in adding the point that the most rational of plans emanate from a single mind.

*The Federalist* acknowledges the risk of group discord, which may be more dangerous for successful founding than the possible perfidy of a single person. Where the Americans break with the ancients is on the question of whether the one or the few will produce the better plan. There can be more wisdom, they argue, deriving from discussions among a “select body” than from the work of a single mind. It is perhaps for this reason that *The Federalist* refines its own position by changing the word “reflection,” found in *Federalist* 1, to “deliberation,” found in *Federalist* 38. The Americans introduce the concept of deliberation into the idea of founding and replace the founder with the founders.

It could be that *The Federalist* was only justifying the fact that the task of remaking American government, from a legal standpoint, had been carried out by the Constitutional Convention. Yet, it seems clear that the real work of deliberation being referred to was that carried out by the prime movers involved in planning, writing, and explaining the Constitution—individuals such as Madison, Washington, Hamilton, Wilson, and Morris. It is this “select body” that comprises the persons we generally regard as the founders, not all the delegates who attended the convention in Philadelphia.

The second difference between the ancient and the American mode of establishing government involves the issue of consent. This difference was not absolute, since a number of the ancient founders proceeded by seeking consent. But the most famous among the ancient lawgivers—including Lycurgus, the founder of Sparta—relied on a measure of compulsion, whether by physical arms or by the manipulation of superstition.

Founding by the method of reflection and force has its obvious advantage. The perfection of the plan will not need to be sacrificed to the limitations of popular views. (The most vociferous advocates today of the idea of founding by reflection and force, though they do not seem to recognize this fact themselves, are the legions of critics of
the founders, who berate them for failing to rid the nation of slavery in 1787.)

Acceptance by consent means that the lawgiver must settle for something less than perfect. Wisdom must bend to consent. *The Federalist* here cites Solon, the lawgiver of democracy in Athens, who “confessed that he had not given his countrymen the government best suited to their happiness, but most tolerable to their prejudices.”12 The American founding in this respect appears to be closer to the methods of Solon than to those of Lycurgus. Founding by force was out of the question, not least because the American lawgivers in 1787 did not have physical arms at their disposal.

It was not the necessity of the case, however, that guided their decision. They chose choice because it was the supreme test of the viability of republican government. The ratification of the Constitution by consent arguably stands as the most important event in the establishment of modern republican government. In all human affairs, the initial act tends to be the most important one, setting the precedent for all that comes after.

Compare the American case in 1787 to the European one today, where various versions of the European Union (EU) have been submitted to referenda in a number of countries—including Denmark, France, Ireland, and the Netherlands—and where the EU has routinely been rejected. Never mind! The elites continue to build Europe and even to pass a constitution by other means. Does that not reveal something about the spirit or manner in which governance in Europe takes place?

The third difference between the ancient mode of founding and the American method turned on the use of a written constitution. The Americans set out in one document the basic structure of government and its basic powers and limitations. The ancients, apparently, did not.

The instrument of a written constitution is now so much taken for granted that few even recognize it as a chosen instrument. It is known, of course, that a nation can have an unwritten constitution in the sense of a known set of stable laws, customs, and understandings that structure and limit government. Great Britain is an example. It is
the oldest and arguably the most constitutional of the constitutional
governments in the world. But it is widely regarded as a relic or a
curiosity. It has been all but forgotten that there were once no written
constitutions and that theoretical objections were once advanced in
opposition to the whole idea.

Among these objections, to mention only the most prominent, is
the argument that a written constitution can never be law in a true
sense. Necessity or reason of state will dictate that the most basic
elements of the law may need to be set aside or ignored for the good
or survival of the nation. The highest, or supreme, law will need to
be violated, with the dangerous consequence that respect for law as a
whole will be undermined. Better, then, not to make the fundamen-
tal structure of governance a matter of written law.

In looking back on the original period of American constitu-
tion making, which includes the writing of the state constitutions
immediately after the break from Britain in 1776, it is surprising
to learn that some American leaders counted the idea of a written
constitution as one of their great theoretical innovations. Thomas
Jefferson contended that Virginia was “the first of the nations of the
earth, which assembled its wise men peaceably together to form
a fundamental constitution, to commit it to writing, and place it
among their archives, where every one should be free to appeal
to its text.”13 Jefferson may have been in error in placing Virginia
before South Carolina, but on the main point about the novelty of
written constitutions, I do not know that his claim has ever been
definitively controverted.

Given the commitment to the idea of popular consent, which
had already become accepted in some of the states, a written doc-
ument in 1787 was necessary. The ratifying bodies had to consent
to something, and it was only by referring to a common text that
people assembled in different places at different times could conduct
the exercise. The history of the ratification process bears this out.
The main features of the proposed constitution were discussed and
debated not only in the ratifying conventions but also in pamphlets
and in the popular press, as was the case with most of the essays in
*The Federalist.*
Yet, the significance of a written text went far beyond the requirements demanded by the procedure of consent. Conceived as supreme law, the Constitution marked an innovation in the form of government. It placed a written law above the ordinary government, meaning that no statute passed and no act taken by any official can rightfully claim to stand if it is inconsistent with the Constitution. To fortify this legal hierarchy, the Constitution derives its legitimacy from what is said to be the people.

It was enacted not by the ordinary processes of government but by a distinct process of ratification defined in the Constitution. Subsequent additions to it were to be made through a special process of amendment distinct from the ordinary method of legislation. The Federalist speaks of the novel character of this plan: “The important distinction so well understood in America, between a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country.”

The decisive principle is that the will of governing bodies and government officials is subordinate to a written law that government itself cannot alter.

Ratification was a historical event that has affected subsequent political theory. One of the great inventions of modern political theory, beginning in the 16th century, was the social contract. It is fundamental to the thought of John Locke, and by the 18th century many viewed the contract as the juridical source of legitimate government.

Yet as critics of this idea pointed out, the contract was never more than a hypothesis, written about in theoretical books but rarely or ever to be found in practice. The American innovation of popular ratification of a written constitution gave this theoretical idea a concrete legal-institutional form. It operationalized the social contract. This development has had an enormous impact on the growth of modern constitutionalism, notwithstanding the many abuses of ratification by resorts to outright fraud and threats of force.
Reverencing the Constitution

The idea of a written constitution, if it was indeed an American discovery, is coupled in The Federalist with an equally important contribution that relates to the way in which people are to regard the document. The issue here is fundamental: What kind of thing is a written constitution? From a legal standpoint, as we have seen, a written constitution is higher law. But is it merely law, or does it perform a further function and have a different status? Is the Constitution something to be venerated—something that endows government with respect and contributes to its stability and endurance—and that provides a bond that connects the people to the nation?

Federalist 49 develops the doctrine of attaching the sentiment of reverence to the Constitution. As with the idea of a written constitution, many today can easily overlook the originality of this doctrine, so widely is it accepted today that the Constitution is supposed to be looked up to (a little bit, anyhow).

Yet there is nothing logical that connects veneration with what are, after all, just words on a page. Nor, apparently, was it originally conceived that it should be so regarded. Historians whom I have queried on this point, since I have not found it extensively researched, have confirmed that there likely was no expectation in 1787 that the Constitution would be revered. Further evidence for this contention may be seen in how people look at other constitutions. It is a strange kind of person who professes reverence for, say, the constitution of Illinois or of California. Not only do these constitutions not possess this status, but they also do not, so to speak, seem to ask for it.

The idea of reverence for the Constitution was thus a creation of The Federalist. Once promulgated, it was by no means universally accepted. Thomas Jefferson, among others, strongly resisted it. Though Jefferson fully subscribed to the legal view that a written constitution was higher law, he deplored the slightest movement toward endowing such a code of law with higher status. With disdain he wrote: “Some men look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched. They ascribe to the men of the preceding
age a wisdom more than human, and suppose what they did to be beyond amendment.”

In line with the spirit of this view, Jefferson had earlier proposed that all constitutions should expire after 19 years, roughly a generation by his calculation, and that a new document be prepared and submitted to the people for ratification. Just like any other law, constitutions should change and keep pace with the times. Though Jefferson’s proposal may strike many today as quixotic, it reflected what was no doubt a widespread understanding of the nature of a written constitution.

Even today, some 14 state constitutions include provisions that require a periodic remake. As the political scientist John Dinan has shown, America has developed two distinct views about constitutions: a Jeffersonian view, found in many states, of a charter that is easily changed or rewritten, and a Federalist view, found at the national level, of a permanent document that changes only rarely. The one is regarded in a utilitarian light; the other carries additional symbolic qualities that engage the sentiments.

Why did *The Federalist* create the doctrine of constitutional reverence? One set of arguments rested on practical considerations, though practical in the most expansive sense of the term. The experience of the leading figures in writing and promoting the Constitution led them to appreciate just how difficult it was to secure a happy outcome for this kind of venture. The odds of success, they concluded, would always be slim, and there were always grave risks in trying. Every attempt at remaking government creates instability and threatens to divide the nation.

These leaders were also aware of how favorable, relatively speaking, were the circumstances in their day for accomplishing their objective. The proposed constitution was being considered at a time when the people still had unusual confidence and trust in their leaders, most notably George Washington, and when there was a lingering unity of purpose stemming from the Revolution. A fact of still greater importance was one that *The Federalist* could not openly avow: that the main figures involved were persons of exceptional talents, rare devotion to the public good, and, in the case of a few, extensive knowledge
of the science of politics. Chance or accident, though it did not take the place of reflection in the making of the Constitution, played a critical, perhaps decisive, role in its ratification.

Given these facts, the conclusion drawn was that it would be best to lock in the gain. Veneration of the Constitution was a means to assure its durability and avoid the temptations to engage in experiments of new-modeling the government. Durability would not exclude changes, which the Constitution allows for by the process of amendment. But amendment is not made easy, as this would defeat the objective of durability.

Although *The Federalist* acknowledged that there would be a need for occasional changes, it worried about the quality of amendments. Because each amendment focuses on one object, there was a danger of ignoring the relation between the part and the whole system. Overall, the goal was to ensure the continuing integrity of the general design. Veneration of the Constitution, even more than the high legal threshold for change imposed by the Constitution, was the primary means to this end.

*The Federalist* seconded these practical reasons for creating the doctrine of constitutional veneration with an important theoretical consideration. A main concern in forming any government is its effect on shaping the public’s epistemological premises. The fate of the whole system may rest on identifying and inculcating the premise or combination of premises suited to maintaining it. Premises cannot be enacted directly by law. To the extent that they are chosen, they are put into effect by means of political ideas or doctrines.

American constitutional thought sought to combine elements of rationalist and traditionalist epistemological premises. The rationalist epistemological premise is that the public can and should decide matters by the standard of reason. As Jefferson wrote to John Tyler, “No experiment can be more interesting than that we are now trying, and which we trust will end in establishing the fact, that man may be governed by reason and truth.” ¹⁶ This premise includes not only the idea that individuals are capable of proposing good plans of government, but also the claim that the public can judge and endorse these plans. The age-old problem of securing consent for wisdom is not
so difficult as was once thought. It has begun to be resolved and will prove less and less an obstacle as mankind progresses.

The traditionalist premise calls attention to the limits of reason. In one respect, it may question whether human beings can ever plan a good government; in another, it has doubts about the ease of public acceptance of such a plan. The Federalist rejects the first point of the traditionalist argument but is partly sympathetic to the second. The extreme rationalist view looks to be a prejudice. Governments rest on opinion more than on reason. Popular consent to wisdom is and will always remain a huge problem that no degree of enlightenment, its boast notwithstanding, can overcome. The acceptance of good government inevitably will depend in some measure on chance.

This conclusion opens the door in The Federalist to the need to shape a people who have a capacity to revere. Reverence is an epistemological premise to be valued in its own right. If a disposition to venerate was seen as instrumental for supporting the Constitution, so it can be said that the Constitution was seen as instrumental for promoting a disposition to venerate. Venerating the Constitution becomes a means for promoting other desired ends, chief of which is an appreciation of the founding and the founders. The founders only become founders if they create an enduring fundamental law. If there is no enduring constitution, there are no founders.

The Federalist recommends the doctrine of veneration on the basis of reason or reflection, not on the basis of ancestor worship or piety. It contends that the rationalist epistemological premise is not entirely reasonable, and argues for why it makes good sense to instill a disposition to venerate. That disposition, while it may have natural roots in human psychology, is in danger of being eliminated by the ideology of rationalism. Those with the inclination and ability to consult these arguments will understand the case for the doctrine of veneration. For those who venerate, of course, it will be more the disposition than the reason of the matter that operates.

The combination of rationalism and traditionalism sought in American constitutional thought is not easy to realize. These two public epistemological premises pull the public mind in different directions. They cannot be fully reconciled, certainly not in their
extreme versions. But arguably the best place for the public mind to be is somewhere suspended between them. The system should be so conceived that one premise of public epistemology counteracts another.

To support this combination, I chose upon solemn reflection to place “Fed 49” on my Virginia license plate. By this means I hope to impress on all who venture on our roads the importance of fidelity to the Constitution. I wish especially to remind the willful who tailgate of the need for restraint and of the importance of reverence.

Such, I think, is the proper spirit in which to observe Constitution Day.
Notes

2. Ibid, 27.
11. Ibid.
12. Ibid.
About James W. Ceaser

The American Enterprise Institute

Founded in 1943, AEI is a nonpartisan, nonprofit research and educational organization based in Washington, DC. The Institute sponsors research, conducts seminars and conferences, and publishes books and periodicals.

AEI’s research is carried out under three major programs: Economic Policy Studies, Foreign and Defense Policy Studies, and Social and Political Studies. The resident scholars and fellows listed in these pages are part of a network that also includes adjunct scholars at leading universities throughout the United States and in several foreign countries.

The views expressed in AEI publications are those of the authors and do not necessarily reflect the views of the staff, advisory panels, officers, or trustees.

Board of Trustees

Tully M. Friedman, Chairman
Chairman and CEO
Friedman Fletcher & Lowe, LLC

Daniel A. D’Aniello, Vice Chairman
Chairman and Co-Founder
The Carlyle Group

Clifford S. Asness
Managing and Founding Principal
AQR Capital Management

Gordon M. Binder
Managing Director
Coastview Capital, LLC

Arthur C. Brooks
President and Beth and Ravenel Curry Chair in Free Enterprise
American Enterprise Institute

Peter H. Coors
Vice Chairman of the Board
Molson Coors Brewing Company

Harlan Crow
Chairman and CEO
Crow Holdings

Ravenel B. Curry III
Chief Investment Officer
Eagle Capital Management, LLC

John V. Faraci
Chairman
International Paper Company

Christopher B. Galvin
Chairman
Harrison Street Capital, LLC

Raymond V. Gilmartin
Harvard Business School

Harvey Golub
Chairman and CEO, Retired
American Express Company

Robert F. Greenhill
Founder and Chairman
Greenhill & Co., Inc.

Frank J. Hanna
Hanna Capital, LLC

Seth A. Klaman
President and CEO
The Baupost Group, LLC

Bruce Kovner
Chairman
Caxton Alternative Management, LP

Marc S. Lipschultz
Partner
Kohlberg Kravis Roberts

Chairman and CEO
MeadWestvaco Corporation

George L. Priest
Yale Law School

Kevin B. Rollins
Senior Advisor
TPG Capital

Matthew K. Rose
Chairman and CEO
BNSF Railway Company

Edward B. Rust Jr.
Chairman and CEO
State Farm Insurance Companies

D. Gideon Searle
Managing Partner
The Serafin Group, LLC

Mel Sembler
Founder and Chairman
The Sembler Company

Wilson H. Taylor
Chairman Emeritus
Cigna Corporation

William H. Walton
Managing Member
Rockpoint Group, LLC

Marilyn Ware
Chairman, Retired
American Water Works

Emeritus Trustees

Richard B. Madden

Robert H. Malott

Paul F. Orepince

Henry Wendt

Officers

Arthur C. Brooks
President and Beth and Ravenel Curry Chair in Free Enterprise

David Gerson
Executive Vice President

Jason Bertsch
Senior Vice President, Development

Danielle Pletka
Senior Vice President, Foreign and Defense Policy Studies

Toby Stock
Vice President, Development and Academic Programs

Council of Academic Advisers

George L. Priest, Chairman
Edward J. Phelps Professor of Law and Economics
Yale Law School

Alan J. Auerbach
Robert D. Burch Professor of Economics and Law
University of California, Berkeley

Eliot A. Cohen
Paul H. Nitze School of Advanced International Studies
Johns Hopkins University

Eugene F. Fama
Robert R. McCormick Distinguished Service Professor of Finance
Booth School of Business
University of Chicago

Martin Feldstein
George F. Baker Professor of Economics
Harvard University

Aaron L. Friedman
Professor of Politics and International Affairs
Princeton University

Robert P. George
McCormick Professor of Jurisprudence
Director, James Madison Program in American Ideals and Institutions
Princeton University

Eric A. Hanushek
Paul and Jean Hanna Senior Fellow
Hoover Institution
Stanford University

R. Glenn Hubbard
Dean and Russell L. Carson Professor of Finance and Economics
Columbia Business School

Walter Russell Mead
James Clarke Chace Professor of Foreign Affairs and the Humanities
Bard College

Mark Pauly
Bendheim Professor, Professor of Health Care Management
Wharton School at the University of Pennsylvania

Sam Peltzman
Ralph and Dorothy Keller Distinguished Service Professor of Economics
Booth School of Business
University of Chicago

Jeremy A. Rabkin
Professor of Law
George Mason University

Harvey S. Rosen
Chairman
Harvard University

Harvey S. Rosen
President and CEO
Princeton University

Richard J. Zeckhauser
Frank Plumpton Ramsey Professor of Political Economy
Kennedy School of Government
Harvard University
Research Staff
Joseph Anton
Wilson H. Taylor Scholar in Health Care and Retirement Policy; Resident Scholar
Leon Aron
Director, Russian Studies; Resident Scholar
Paul Atkins
Visiting Scholar
Michael Auslin
Resident Scholar
Claude Barfield
Resident Scholar
Michael Barone
Resident Fellow
Roger Bate
Visiting Scholar
Richard Bennett
Visiting Fellow
Walter Berns
Resident Scholar, Emeritus
Andrew G. Biggs
Resident Scholar
Edward Blum
Visiting Fellow
Dan Blumenthal
Director, Asian Studies; Resident Fellow
John R. Bolton
Senior Fellow
Karlyn Bowman
Research Coordinator; Senior Fellow
Alex Brill
Research Fellow
James C. Capretta
Visiting Fellow
Timothy P. Carney
Visiting Fellow
Lyne V. Cheney
Senior Fellow
Edward Conard
Visiting Scholar
Kevin Corinth
Research Fellow
Mike Daniels
Visiting Fellow
Sadanan Dhume
Resident Fellow
Robert Doar
Morgendige Fellow in Poverty Studies; Resident Fellow
Thomas Donnelly
Codirector, Marilyn Ware Center for Security Studies; Resident Fellow
Mackenzie Eaglen
Resident Fellow
Nicholas Eberstadt
Henry Wendl Scholar in Political Economy
Jeffrey Eisenach
Director, Center for Internet, Communications, and Technology Policy; Visiting Scholar
Jon Entine
Visiting Fellow
R. Richard Geddes
Visiting Scholar
James K. Glassman
Visiting Fellow
Jonah Goldberg
Fellow
Aspen Gorry
Visiting Scholar
Scott Gottlieb, MD
Resident Fellow
Phil Gramm
Visiting Scholar
William C. Greenwald
Visiting Fellow
Mary Habeck
Visiting Scholar
Keivan A. Hassett
Director, Economic Policy Studies; State Farm James Q. Wilson Chair in American Politics and Culture
Robert B. Helms
Resident Scholar
Frederick M. Hess
Director, Education Policy Studies; Resident Scholar
R. Glenn Hubbard
Visiting Scholar
William Inglee
Visiting Fellow
Kevin James
Research Fellow
Matthew H. Jensen
Managing Director, Open Source Policy Center
Frederick W. Kagan
Director, AEI Critical Threats Project; Christopher DeMuth Chair; Resident Scholar
Leon R. Kass, MD
Madden-Jewett Chair; Resident Scholar
Andrew P. Kelly
Director, Center on Higher Education Reform; Jacobs Associate; Resident Scholar
Paul H. Kupiec
Resident Scholar
Jon Kyl
Visiting Fellow
Desmond Lachman
Resident Fellow
Adam Lerrick
Visiting Scholar
Phillip Lohaus
Research Fellow
John H. Makin
Resident Scholar
Aparna Mathur
Jacobs Associate; Research Fellow
J. Matthew McInnis
Resident Fellow
Michael Q. McShane
Research Fellow
Thomas P. Miller
Resident Fellow
Charles Murray
W. H. Brady Scholar
Lindsey R. Neas
Research Fellow
Roger F. Noriega
Fellow
Stephen D. Oliner
Codirector, AEI’s International Center on Housing Finance; Resident Scholar
Norman J. Ornstein
Resident Scholar
Mark J. Perry
Scholar
James Pethokoukis
Editor, AEIdeas Blog; DeWitt Wallace Fellow
Tomas Philipson
Visiting Scholar
Edward Pinto
Codirector, AEI’s International Center on Housing Finance; Resident Fellow
Alex J. Pollock
Resident Fellow
Ramesh Ponnuru
Visiting Fellow
Michael Rubin
Resident Scholar
Sally Satel, MD
Resident Scholar
Gary J. Schmitt
Codirector, Marilyn Ware Center for Security Studies; Program on American Citizenship; Resident Scholar
Mark Schneider
Visiting Scholar
David Schoenbrod
Visiting Scholar
Derek Scissors
Resident Scholar
Sita Slavov
Visiting Scholar
Vincent Smith
Director, Agriculture Studies; Visiting Scholar
Christina Hoff Sommers
Resident Scholar
Katherine B. Stevens
Research Fellow
Thomas P. Stossel
Visiting Scholar
Michael R. Strain
Deputy Director, Economic Policy Studies; Resident Scholar
Phillip Swagel
Visiting Scholar
Jim Talent
Director, Marilyn Ware Center’s National Security 2020 Project; Senior Fellow
Shane Tews
Visiting Fellow
Marc A. Thiessen
Fellow
Stan A. Veuger
Resident Scholar
Alan D. Viard
Resident Scholar
Peter J. Wallison
Arthur F. Burns Fellow in Financial Policy Studies; Resident Fellow
W. Bradford Wilcox
Visiting Scholar
Paul Wolfowitz
Scholar
John Yoo
Visiting Scholar
Roger Zakheim
Visiting Fellow
Katherine Zimmerman
Research Fellow
Benjamin Zycher
John G. Searle Chair; Resident Scholar
Brendan Smith
Resident Scholar
DeWitt Wallace Fellow
One of the main topics of reflection in constitutional thought grew directly out of the practical business at hand: making a new government. Two questions attracted attention: First, what is the best or recommended way to go about forming a government? And second, how does a government, once formed, shape thereafter the public’s epistemological premises? By this last term I mean the way in which people conceive of and process the political world about them — whether, for example, people lay claim to being able to figure everything out by the use of their reason or whether they allow themselves space for revering things past and things noble.”

— James W. Ceaser

The idea of a plan of government being contained in a written document is so taken for granted that it is rarely noted and seldom seen as an innovation. Yet, during the founding era, the development of a written constitution was counted as a major innovation of great theoretical import. However, the attitude with which the people regard the Constitution is just as important as the idea of a written constitution. For Americans, the Constitution ought to be regarded with reverence and veneration because the respect for government this engendered helped give birth to a community and to supply a bond of attachment that helped bind the nation together.

In honor of the 226th anniversary of the signing of the US Constitution on September 17, 1787, AEI’s Program on American Citizenship marked Constitution Day with a lecture by James W. Ceaser (University of Virginia). Ceaser’s lecture was the third in a series named for distinguished AEI scholar Walter Berns.

Remarks by
James W. Ceaser