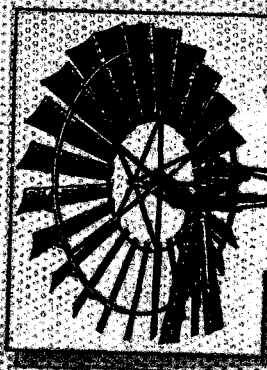
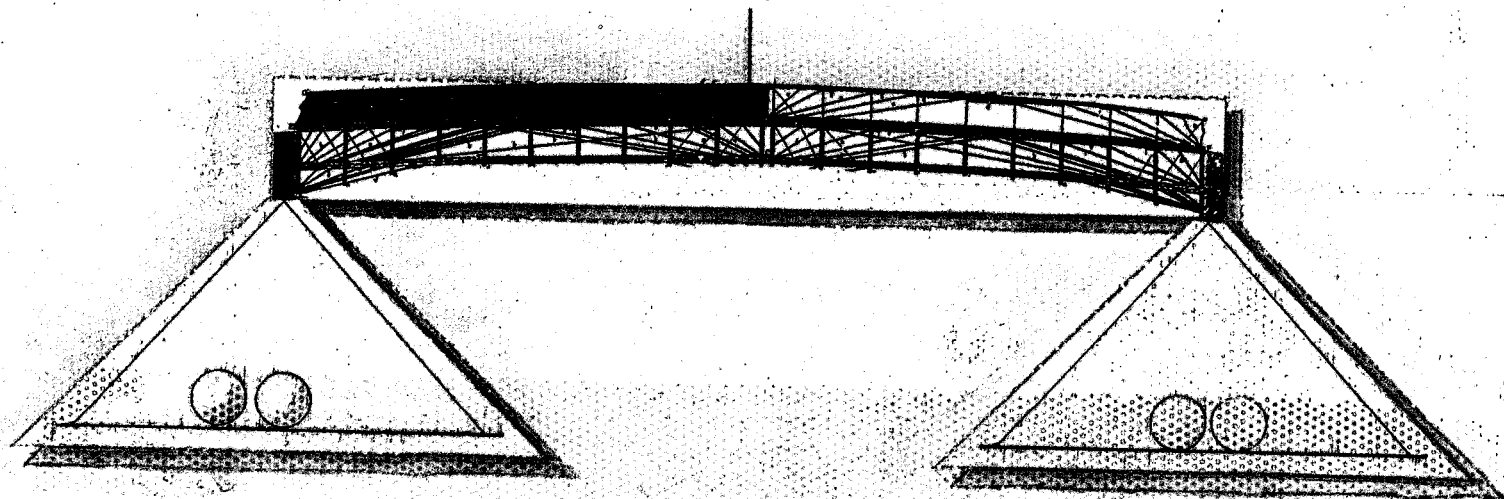


RICHARD DOWNS



WE THE PEOPLE

Thoughts on liberty
in the Preamble's
light

ILLUSTRATIONS • RICHARD DOWNS

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A MORE PERFECT UNION

b y W A L T E R E. W I L L I A M S

The ethnic, racial, and religious mosaic of our country carried all the potential for conflict. Yet while we as a country have made mistakes, the most notable of which is our heritage of slavery, there is nothing in our history that compares to the conflict resulting in the massive extermination of Armenians in Turkey, massacres of Chinese in Southeast Asia, Stalinization in Russia, Nazi extermination of Jews, the Protestant and Catholic conflict in Ireland, or more modern versions of the same story in Uganda, Cambodia, and Ethiopia.

Groups that readily kill one another in other parts of the world have found that they can live in relative harmony in the United States. Protestant and Catholic Irishmen battle one another in Ireland but live in peace here. The same is true of Jews and Germans, French Huguenots and French Catholics, and the Chinese and Japanese.

These various groups have lived together in relative harmony in America because for the most part it did not pay, politically, to be a Catholic or Protestant; it did not pay to be a German, a Turk, a Pole, a Japanese, or anybody else. Not that we were innocent of racism and intolerance—but there was very little political power to be distributed by race. For this we can thank the Founding Fathers.

When the Framers set out to “form a more perfect union,” it is apparent they assumed that by their very nature humans are incapable of perfection and capable of doing great injustice. Were this not their vision of man, they might have spared themselves considerable controversy and debate by leaving us the Constitution’s Preamble as the law of the land, perhaps amended by a commandment to the effect: “Congress and the President shall have all the necessary powers to accom-



plish these objectives.”

Instead, the Framers had abundant evidence that humans cannot be trusted to govern wisely and justly. History has shown, and continues to show, that tyrants use constitutions as a means to further despotism and collective oppression of minorities. The specific enumeration of the duties of federal government laid out in the Articles of the Constitution thus reflected the Framers’ idea that liberty requires limited government. Their immense distrust of government is apparent also in the tone of the language found in the Bill of Rights: “Congress shall make no law, . . . shall not be infringed, . . . the right of the people . . . nor shall be compelled . . . nor be deprived, . . . nor shall property be taken, . . . shall not be construed to deny or disparage.”

Imagine a mortal dying and leaving this earth and, at his next destination, encountering a set of restraints bearing any resemblance to the U.S. Constitution. He would know for sure that he was in hell, for to find such a set of restraints on authority in heaven would be a gross affront to God. It would be the same as insinuating that God is not perfect and could not be trusted to do justice. That

men and government cannot be so trusted was a realization uppermost in the Framers’ minds as they set about their work.

Backed by English political tradition dating back to the Magna Carta of 1215, the Founding Fathers sought to promote the idea proclaimed in the Declaration of Independence that “all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” In short, the Constitution tries to perfect the union and establish justice by laying out a set of rights and responsibilities held *simultaneously* by all citizens—the rules of the game. Questions of justice were to be answered constitutionally by determining whether a government or private party encroached on a constitutionally protected right, privilege, or immunity of another.

To “form a more perfect union” and “establish justice” calls for a simultaneous solution; in order to have the one we must have the other. A social compact providing for Americans to live in peace with one another requires fundamental constitutional law that is flexible enough to meet technical, political, economic, and social changes yet permanent, rigid, and unyielding in its goal of protecting individual liberty.

The Framers saw justice in the game of life, as in any other game, as determined by the presence and enforcement of neutral rules. Government’s job was to referee, to detect violations and enforce the social compact laid out in the Constitution (game rules). Clearly, it is illegitimate for government to actually play the game or to choose a side. Therefore, in the eyes of the Framers, justice

must be evaluated as a *process* and not as a *result*. At the minimum justice requires rule by *legis* (Latin for "law"), not rule by *privilegium* (Latin for "privileges," or "private law") where a person's status determines how he is treated before the law.

The government as referee, until recently, has worked out fairly well. Some evidence is the kind of wealth we have generated as a free people pursuing our private interests. But just as important is the internal conflict that we have avoided but that has plagued so much of the world.

Not only did the Framers' rules of the game leave little to be gained through racial and ethnic grouping, but the significant role of the market in the allocation of resources eliminated the need for consensus among diverse peoples and cultures. When there is government allocation of resources, a political majority must reach some sort of consensus, which always comes at the expense of the political minority.

When schooling is publicly produced, for example, a political decision must be made whether prayers will be allowed or not. Whatever the decision, it generates

losers—some people, *who are forced to pay for the service*, will not have their preferences fulfilled. If those preferences differ systematically by race, ethnicity, or religion, the grounds for conflict are then laid along racial, ethnic, or religious lines.

By contrast, market allocation of resources accommodates diversity because each participant can get *some* of what he wants and does not have to pay for what he does not want. Moreover, market allocation reduces the need for a consensus. For example, people have a broad and diverse set of preferences for clothing—but this diversity produces little conflict. The person who prefers three-piece suits simply purchases what he wants, while the person who prefers jeans does the same. Consider the conflict that could arise if, in our diverse society, choice of clothing were to require a collective decision like that in education. Market allocation permits people with diverse preferences to live in peace with one another.

Government allocation of resources raises the potential for conflict because it is a zero-sum (possibly even negative-sum) game where one person's or group's preferences can be realized only at the expense of another's. Market allocation

of resources is a positive-sum game: both parties to transactions consider themselves better off.

Limited government, and thus a greater potential for market allocation of resources, not only helps to realize the Framers' dream of "a more perfect union," it also helps "establish justice." The Framers recognized that, as Thomas Paine eloquently stated, "Society in every state is a blessing, but government even in its best state is but a necessary evil; in its worst state an intolerable one; for when we suffer, or are exposed to the same miseries by a government, which we might expect in a country *without* government, our calamities are heightened by reflecting that we furnish the means by which we suffer."

Unfortunately, today's political leadership, consisting for the most part of quacks, charlatans, and hustlers, lack the wisdom and moral courage of our Founding Fathers. They are thus diligently providing us the means for suffering. □

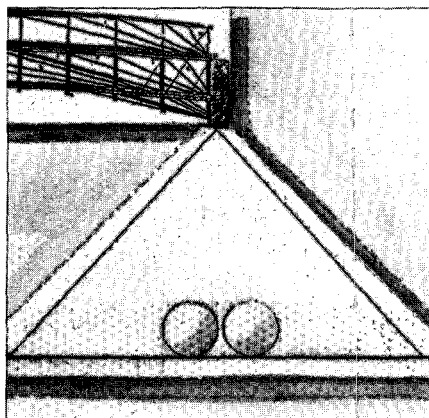
Contributing Editor Walter E. Williams is the John M. Olin Distinguished Professor of Economics at George Mason University. His new book is All It Takes Is Guts.

ESTABLISH JUSTICE

b y R I C H A R D A. E P S T E I N

The Preamble of our Constitution is perhaps the greatest single sentence of political rhetoric ever written. Its first three words, "We the people," projects a confident vision of unanimous and solemn purpose that helped lift up a divided and fledgling nation by its bootstraps. The remainder of the Preamble then lists a set of objects to which our national energies should be directed.

It is at this point that the Preamble speaks with two voices. Some of its great ends anticipate explicit provisions contained in the body of the Constitution. The reference to the common defense; for example, is made good by the grants of power to Congress to raise armies, maintain a navy, and call the state militia into federal service to repel external inva-



sions, suppress insurrections, and enforce the laws of the union.

At other places, however, the Preamble works by indirection. To "establish jus-

tice" is one of the loftiest aims to which any nation can aspire, so one should expect to find in the Constitution a detailed blueprint of what justice itself demands. Yet the word *justice* is not found in the text of the original Constitution nor in the various substantive and procedural provisions contained in the Bill of Rights and subsequent constitutional amendments.

Suppose, however, that the Framers had decided to attack the question of justice head on. What should they have done? A general provision demanding that the Congress pass only just laws would have been worse than useless; it would imply some conception of justice limiting the power of Congress but would give no discernible account of how it might be applied by the Congress or president or en-