UIC Law Review

Volume 51 | Issue 1 Article 1

2017

Navigating the Rubicon: Constitutionalism and the Inevitability of the Social Contract, 51 J. Marshall L. Rev. 1 (2017)

Lillian M. Spiess

Follow this and additional works at: https://repository.law.uic.edu/lawreview

 Part of the Constitutional Law Commons, Law and Society Commons, Public Law and Legal Theory Commons, and the Supreme Court of the United States Commons

Recommended Citation

Lillian M. Spiess, Navigating the Rubicon: Constitutionalism and the Inevitability of the Social Contract, 51 J. Marshall L. Rev. 1 (2017)

https://repository.law.uic.edu/lawreview/vol51/iss1/1

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

NAVIGATING THE RUBICON: CONSTITUTIONALISM AND THE INEVITABILITY OF THE SOCIAL CONTRACT

BY LILLIAN M. SPIESS, MA, JD, LLM*

I. INTRODUCTION

Proponents advocating the theory of founding moments in American constitutional development advocate, "[T]he real Constitution is a set of principles adopted by 'We, the People' at extraordinary 'moments' of intense constitutional participation and deliberation, with or without changes in the constitutional text." [1]

Although a compelling position, I would propose a contrary one: there are no real founding moments; rather any "constitutional"

---

* Professor Spiess is currently in private practice focusing on the areas of employment, trust and estates, tax, and commercial matters. She is also an adjunct professor at Touro Law Center. She is formerly the Assistant Director of Academic Development and Bar Programs at Touro Law Center. She has also taught at Hofstra University School of Law and St. John's University (Dept. of Gov't & Politics). Her practice experience includes her association with Willkie Farr & Gallagher LLP (Employee Benefits/Executive Compensation) and Weil Gotshal & Manges LLP (Tax). Professor Spiess represented corporate clients in both public and private mergers, including cross-border acquisitions and investments while regularly advising clients on employment, compensation, employee benefit, pension, and insurance matters. Additionally, she served as a court attorney for the N.Y.S. Supreme Court, Appellate Division (First Department). Professor Spiess also has extensive training in mediating commercial/employment disputes. Notably, she successfully mediated disputes between Storm Sandy claimants and commercial insurers on behalf of New York State Department of Financial Services and the United States District Court, Eastern District.

Professor Spiess received her LL.M. (Taxation), New York University School of Law; her J.D., *magna cum laude*, from Touro Law Center; and earned her MA and BA, *summa cum laude,* (Government & Politics), at St. John's University. Professor Spiess wishes to thank the editors of the John Marshall Law Review for their invaluable assistance in bringing this article to publication. She also wishes to thank her colleagues here at Touro Law Center, Professors Dan Subotnik and Peter Zablotsky, and Irene Crisci, Interim Director and Head of Public Service, Gould Law Library, for their insight, candor and support in the preparation of this paper. Finally, this paper was first presented at the Midwest Political Science Conference, Chicago IL, on April 8, 2017 as part of the panel discussion, "Theories of Law and Jurisprudence Over Time".

1. *See* Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMM. 115 (1994) (commenting on the theory as espoused by BRUCE ACKERMAN, WE THE PEOPLE, FOUNDATIONS (1991)).

change occurring in the United States is a reflection of the anticipated development of the social contract between the government and its people. These changes ultimately start at a more fundamental level – with the individual - and then coalesce on the broader societal plane. But, because each individual has a totally unique view of any given set of facts or situation at a particular moment in time, to say that founding moments are triggered by intense constitutional participation and deliberation by the "People" would assume pure singularity of purpose by the same "People" which is probably, at best, elusive and unattainable.

The power for constitutional change is imbued in the document itself. It is broadly written so as to foster and support those anticipated societal changes that must ultimately evolve in time. The language of the document does not become irrelevant. Judicial decisions and legislative acts are the touchstones of this societal evolution. For example, the period between the 1930s and 1960s, culminating in the Civil Rights Act of 1964, clearly demonstrates the easing, although not the elimination, of racial intolerance and inequality here in the United States. [2] This was not a founding moment - but, rather, the expected pragmatic result to an existing untenable legal and social position, with *Brown v. Board of Education* as a mere part of that evolution.[3] Further, some theorists postulate that constitutional shifts are not linked to any one moment, that such shifts are merely part of a "conversation" between the government and its people.[4] Although attractive, this is not a wholly satisfying position as any conversation, however brief and fleeting, must have some initial basis for coming into existence – even if it is violent in nature and purpose. Thus, it follows that violence perpetrated by certain members of society is precipitated by the inevitable need for identity arising out of the social contract itself. However, total success of any group over time is deceptive due to the fractured nature of any "cohesive" position

2. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (enacted July 2, 1964, as amended).

3. Brown v. Board of Edu., 347 U.S. 483 (1954).

4. *See* Simone Chambers, *Contract or Conversation, Theoretical Lessons from the Canadian Constitutional Crisis*, 26 POLITICS AND SOCIETY 143 (1998); *see, e.g.*, Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution"*, 76 N.Y.U. L. REV. 1456 (2001) (claiming that women suffragists were important innovators of modern constitutional thought); Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657 (1997) (discussing the contribution of feminist legal theory to constitutional interpretation); *see also* Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1 (1999) (survey of judicial decisions integrating specific and explicit use of social contract theory). *But see* Jaren Wilkerson, *Disappearing Together? American Federalism and Social Contract Theory*, 17 U. PA. J. CONST. L. 569 (2014) (advocating for social change on the local rather the federal level in order to protect the principles of American federalism and social contact).

held by a group of individuals who each think and process in a singular way. As one theorist stated, "Governments may fall, societies will persist…A new Caesar will cross the Rubicon, Italy will remain."[5]

To say that these are founding moments or extra-Constitutional events, undercuts accountability and relevance for those members of society who may see themselves as outside the fray resulting in disenfranchisement and disconnection. Thus – the legitimacy crises and power struggles here in the United States are really just part of "business as usual" and are to be expected and, in most cases, probably desired.

A. Social Contract Theory and the American Constitution: Hobbes and Locke

Social contract theory can be defined as one which "grounds the legitimacy of political authority and the obligations of rulers and subjects on a premised contract or contracts relating to these matters."[6] It is without argument that the compelling philosophical perspective of both Thomas Hobbes and John Locke regarding this social contract between the government and the governed held substantial sway over the drafters of the United States Constitution. Specifically, "We the People" give up our natural liberty and "put on the bonds of civil society…to join and unite into a community for [the] comfortable, safe and peaceable living amongst another in a secure enjoyment of [our] properties, and a greater security against any that are not of it."[7]

In Hobbes' seminal work, *The Leviathan*, written during England's civil war as a commentary for peace in which the passions of the individual are subordinated to civil authority which, in turn, provides for the greater good, he writes:

> A Common-wealth is said to be *Instituted*, when a *Multitude* of men do Agree and *Covenant, every one*, *with every one*, that to whatsoever *Men,* or *Assembly of Men*, shall be given by the major part, the Right to Present the Person of them all, that is to say, to be their *Representative*); every one as well as be that *Voted for it*, as he that *Voted against it*, shall *Authorize* all the Actions and Judgments of

5. ROBERT ARDREY, THE SOCIAL CONTRACT, A PERSONAL INQUIRY INTO THE EVOLUTIONARY SOURCES OF ORDER AND DISORDER 294 (1970).

6. *See* MICHAEL LESSNOFF, SOCIAL CONTRACT THEORY 3 (Michael Lessnoff, ed., New York University Press 1990) (noting that political theorist John Rawls has revived social contract theory to include the non-traditional approach of incorporating social justice); ARDREY, *supra* note 5, at 294.

7. John Locke, *Second Treatise of Government*, *in* SOCIAL CONTRACT THEORY 97 (Michael Lessnoff, ed., New York University Press 1990).

> that Man, or Assembly of men, in the same manner, as if they were his own, to the end, to live peaceably amongst themselves, and be protected against other men.[8]

For Hobbes, even the dissenters – who voluntarily entered into the Common-wealth with the rest - have tacitly agreed to be bound and stand together with the majority.[9] Anything short of such agreement cuts against the core understanding that initially brought the Common-wealth into existence. Specifically, Hobbes states, "what the major part ordayne:

and if refuse to stand thereto, or make Protestation against any of their Decrees, he does contrary to his Covenant, and therefore unjustly."[10]

Hobbes, however, notably observes that at those times in a Common-wealth when a false doctrine has been "negligently" or "unskillfully" decreed by those "Governours" and "Teachers", such a doctrine generally received and found to be offensive, and "for those men remissely governed, that they dare take up Armes, to defend or introduce an Opinion…[i]t belongeth to him that hath the Sovereign Power, to be Judge, or constitute all Judges of Opinions and Doctrines, as a thing necessary for Peace; thereby to prevent Discord and Civill Warre." [11]

John Locke, in his *Second Treatise of Government*, continues the Hobbesian theme and explains the deliberate undertaking by individuals to come together as one unified whole, subject to the transcendent governmental authority. Locke states:

> Wherever, therefore, any number of men are so united into one society, as to quit every one of his executive power of the law of nature, and to resign it to the public, there, and only there is a political, or civil society. And this is done wherever any number of men in the state of nature, enter into society to make one people, one body politic, under one supreme government, or else any one joins himself to, and incorporates with, any government already made.[12]

For Locke, the driving force for leaving the state of nature where the individual is his absolute monarch and entering into a community is for the "mutual preservation of their lives, liberties

---

8. *Id.*; THOMAS HOBBES, THE LEVIATHAN 90 (Promethus Books 1988) (1651); *see also* RICHARD ASHCRAFT, REVOLUTIONARY POLITICS & LOCKE'S TWO TREATISE OF GOVERNMENT 570-71 (1986) (opining that Hobbesian concepts of "social contract" and the "state of nature" were associated with particular socioeconomic groups and were successful weapons to be employed against radicalism in the latter half of the seventeen century).

9. HOBBES, *supra* note 8, at 89.

10. *Id.* at 92.

11. *Id.* at 93.

12. Locke, *supra* note 7, at 96.

and estates" which Locke calls "property." [13]

Locke notes that consent makes one a member of any commonwealth. Like Hobbes, tacit consent or agreement is possible if the individual possesses property or reaps the benefit of any government and in exchange for the obligation to obey the law.[14]

Locke also provides that in the commonwealth when controversies arise and redress is to be made, such authority to decide such controversies will vest in a judge – either in the form of the legislature or in magistrates appointed by it.[15] But – when the controversy exists between the government and the people, Lock provides:

> [when the] law is silent or doubtful, or of great consequence, …the proper umpire in such a case should be the body of the people, for in cases where the [government] hath a trust reposed in [it] and is dispensed from the common ordinary rules of the law; there, if any men find themselves aggrieved, and think the [government] acts contrary to or beyond that trust, who so proper to just as the body of the people, who first lodged that trust in [it]….[16]

The language of the Preamble of the United States Constitution reflects the Lockean notion of social contract - - that it is the People that move from the state of nature and seek the protection of the community (or Hobbes's commonwealth) in pursuit of order and law that leads to justice and happiness[17] for present and future generations.[18]

The Preamble states:

> We the People, of the United States, in Order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[19]

As Justice Wilson, in *Chisholm v. Georgia,* stated, "With the strictest propriety, therefore, classical and political, our national scene opens with the most magnificent object which the nation could present. 'The PEOPLE of the United States' are the first personages

---

13. *Id.* at 101.

14. *Id*. at 99. "[E]very man that hath any possessions, or enjoyment of any part of the dominions of any government, doth thereby give his tacit consent, and is a far forth obliged to obedience to the law of that government during such enjoyment as any one under it . . . " *Id.*

15. *Id.* at 96.

16. *Id.* at 107.

17. *See id.* at 101 (illustrating for Locke that would be the preservation of "property").

18. *See* JOSHUA B. STEIN, COMMENTARY ON THE CONSTITUTION FROM PLATO TO ROUSSEAU 236 (2011).

19. U.S. CONST., pmbl.

introduced."[20]

In addition, of particular note, is the use of word "ordain."[21] The deliberate use of this word by the drafters seems to suggest that the People of the United States decree as their destiny their exit from the state of nature (and their divestiture from the unsatisfactory Articles of Confederation) to create a new contract with the government until such time that the government acts contrary to the People's trust. It is then that the People may rightfully dissolve the very government which they established.[22]

B. Consent, Consensus and Legitimacy: The People

Social contract theory posits that individuals, *i.e.*, the People, enter into a community, either by express consent or tacit agreement, in exchange for the protections and security offered by same so that the individuals within that community can achieve happiness and peacefulness.

Locke was clear that such participation in society is an affirmative choice: "Nothing can make any man so, but his actually entering into [society] by positive engagement, and express promise and compact. This is that which I think concerning the beginning of political societies, and their consent which makes a member of any commonwealth."[23]

But – what are the implications of express consent or tacit agreement; specifically, as a collective unit – to what have the governed consented?

As Justice Wilson, in *Chisholm*, stated, "[I]n my judgment, the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the CONSENT of those whose obedience they require. The sovereign, when traced to his source, must be found in the man." [24]

---

20. Chisholm v. Georgia, 2 U.S.419, 463 (1793).

21. *Id.*; *see* Dan Himmelfarb, *The Preamble in Constitutional Interpretation*, 2 SETON HALL CONST. L.J. 127, 132 (1991-92); *see also* Craig M. Lawson, *The Literary Force of the Preamble*, 39 MERCER L. REV. 879 (1987-88) (describing the dynamic tension arising from the artful placement of phrasing); *see also* Robert J. Peaslee, *Our National Constitution: The Preamble*, 9 B.U. L. REV. 2, 18 (1929) (discussing historical underpinnings of the Preamble and responsibility of individuals under the Constitution, "Divided though responsibility is among myriads of individuals, no one's share is greater or less than that of any other. To each an equal portion is given. Accept it then not only willingly, but proudly.").

22. Locke, *supra* note 7, at 105-06. Theoretically, the federal government and its social contract with the governed could be dissolved by constitutional amendment; U.S. CONST. art. V.

23. Locke, *supra* note 7, at 100; *see also* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, THAT AMERICANS COMBAT INDIVIDUALISM BY FREE INSTITUTIONS 194 (Richard D. Heffner, ed., Penguin Putnam Inc. 1984).

24. *Chisholm*, 2 U.S. at 458. (emphasis in the original); *see also* West

If the pure source of equality and justice is founded on the consent of those whose obedience they require, there is a pronounced difficulty in determining what is consensus and the difficulty of achieving same. Specifically, individual realities as to what is desired or needed are as varied as the individuals themselves. So – how is the social contract established and, then amended, if the needs and wants of the governed change? When is change desired? How is that desire measured? How is that desire legitimized?

Modern consensus building theory and practice may be instructive in serving as a paradigm for measuring social contract legitimacy under our Constitution. The major premises for examination include:

- Interdependence among the stakeholders is critical; individual success is diminished when compared to collaborative success and, thus, serves as an incentive for collaboration and cooperation among group members. If satisfaction of individual interests can be attained without the group, then individual interests will prevail.
- Participants must constructively deal with their differences; differences in values, needs, and interests must be recognized, worked with and respected. "Good-faith" participation by stakeholders is required because destructive attempts to undermine a party's differing interests will likely cause the process to break down.
- Decisions must be jointly owned by the group. Participants in the consensus-building process must agree on the final decisions and be willing to implement those decisions themselves.
- Consensus building or collaboration is a process; to be successful, the group must be allowed time and flexibility to solve a problem. If the collaborative process is successful, new solutions emerge that no single party could have envisioned or implemented on their own. [25]

Virginia State Bd. Of Educ. v. Barnette, 319 U.S 624, 641 (1943).

> There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

West Virginia State Bd. Of Educ., 319 U.S. at 641.

25. BARBARA GRAY, COLLABORATING: FINDING COMMON GROUND FOR MULTIPARTY PROBLEMS 11-16 (1989); *see also* ARTHUR SELWYN MILLER, SOCIAL CHANGE AND FUNDAMENTAL LAW 30 (1979)(stating, "[T]he group enables the individual to enjoy a higher degree of freedom and liberty…through collective

As Jeffrey Reiman observes in his essay, "The Constitution, Rights and the Conditions of Legitimacy":

> [Stakeholders] are shaped by existing moral beliefs and therefore may agree to arrangements which in fact do subjugate them. What remains then is to look for nonsubjugating governance by asking what it would be rational for people to agree with.... The social contract is a way of determining what form of government is nonsubjugating among people who have (or may have) differing moral visions.[26]

Notably, two differing moral visions clashed head-on in *Brown v. Board of Education*.[27] The case is often cited as an instance where the Supreme Court essentially overreached to arrive at its landmark decision: student access to state-provided educational facilities is not to be denied based on race – that the doctrine of "separate but equal" was unconstitutional and that the Equal Protection Clause of the 14th Amendment supported such a reading. Strict constructionists and extra-constitutional theorists, although supportive of the outcome, take the position that legitimacy of the decision (and others like it) may be suspect as the text of the Constitution does not support such a reading and that a proper remedy should have been found by other constitutional means, *i.e.*, amendment or legislation.[28]

---

union, persons may accomplish ends which they would be unable to achieve as individuals, and they may join in opposing the coercive tactics of other stronger individuals and associations.").

26. Jeffrey Reiman, *The Constitution, Rights and the Conditions of Legitimacy*, *in* CONSTITUTIONALISM, A PHILOSOPHICAL PERSPECTIVE 141 (Alan S. Rosenbaum, ed., 1998); *see also* Pamela A. Mason, *Rhetorics of 'the People', the Social Contract, and the Constitution*, 61 THE REVIEW OF POLITICS 275 (1999) (an interpretative study of *United States v. Verdago-Urquidez*, 484 U.S. 259 (1990), a Fourth Amendment case, "regarding the constitutional rhetoric of 'the People' and with exclusionary and inclusionary understandings of the national community").

27. Brown v. Board of Edu., 347 U.S. 483 (1954).

28. *See, e.g.*, John Valery White, *Brown v. Board of Education and the Origins of the Activist Insecurity in Civil Rights Law,* 28 OHIO N.U.L.R. 303 (2002) (a discussion of the *Brown* decision and the judiciary's "activist insecurity" causing it to fail in its task of producing social change.); *see* Hon. Charles B. Blackmar, *Judicial Activism*, 42 ST. LOUIS U.L.J. 753 (1997-98) (discussion of the meaning and significance of activism in courts of last resort); *see* Michael J.Perry, *Judicial Activism*, 7 HARV. J. L. & PUB. POL'Y 69 (1984) (discussion of legitimacy and enforcement of contraconstitutional and extraconstitutinal judicial review); *see* Hon. William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1 (1992-93) (describing judicial activism as manifesting in two different forms: jurisprudential activism and remedial activism). *But see* Luther M. Swygert, *In Defense of Judicial Activism*, 16 VAL. U. L. REV. 439 (1981-82) (responding to the criticism that courts are undemocratic and inconsistent with our form of government); *see* Hon. Frank M. Johnson, Jr. *In Defense of Judicial Activism*, 28 EMORY L. J. 901

Not surprisingly, southern political leaders were outraged with the *Brown* decision and viewed it as an unconstitutional infringement on the rights of the States and of those governed. On March 12, 1956, in the "Declaration of Constitutional Principles," introduced on the floor of the Senate by Walter F. George, D-Ga., the *Brown* decision was characterized as one "where men substitute naked power for established law."[29] Members of Congress warned against the "trend in the federal judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people."[30]

However, attacking constitutional decisions on legitimacy grounds has the dangerous potential to disenfranchise segments of society.[31] Disenfranchisement could include a large cohort of stakeholders who have agreed to state protection of certain moral values that encompassing commensurate basic rights, and such disenfranchisement could effectively undercut the efficacy and stability of the state.[32] Expounding on Reiman, social contract can be the protection against such attacks.[33]

For example, in *West Virginia State Bd. Of Educ. v. Barnette*, which preceded *Brown* by eleven years, the Supreme Court finding that the West Virginia State Board of Education, as a state actor, was subject to the requirements of the 14th Amendment, stated that "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted."[34] In the *Barnette* decision, the majority determined, ultimately on First Amendment grounds, that a school board could not expel high school students for no other reason but for refusing to say the "Pledge of Allegiance" due to religious beliefs.[35] Thus, the inference here is that although a state is not

(1979) (examining the legacy of the Warren court and concluding that judicial activism in defense of constitutional liberty is no threat).

29. 102 CONG. REC. 4459-4460 (March 12, 1956). Nineteen senators and seventy-seven members of the House supported this declaration. *Id.*

30. *Id.*

31. *See* JAMES J. KIRKPATRICK, THE SOUTHERN CASE FOR SCHOOL SEGREGATION 188 (1962) ("I believe the South will maintain what I have termed essential separation of the races for years to come.").

32. *See* Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017); *see also* David A.J. Richards, *Revolution and Constitutionalism in America*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY 104 (Michel Rosenfeld, ed., Duke University Press 1994) (discussing the American revolutionary principle of natural rights as the impetus for the Reconstruction Amendments).

33. Reiman, *supra* note 26, at 141.

34. West Virginia State Bd. Of Educ. v. Barnette, 319 U.S. 624, 637 (1943); *see also* Goss v. Lopez, 419 U.S. 565 (1975) (citing *Barnette*, court holding high school students have a property interest in public education and cannot be expelled without due process as guaranteed under the 14th Amendment).

35. *Barnette*, 319 U.S. at 642.

obligated to provide public education, once a state does so, it cannot infringe on such a right by denying a student access to education without due process subject to First Amendment guarantees.[36]

In reading *Brown*, along with *Barnette*, the right to a desegregated education as a property right can be found. Specifically, the *Brown* Court compares the value of receiving a desegregated education with a segregated education and concludes that there are measurable benefits in receiving an education in a desegregated school.[37] Traditionally, only property can be measured or valued and once valued, then compared to other like property. Therefore, it follows that if the Court has determined that the value of a desegregated education outweighs a segregated education and since property can be valued and compared, then there is a strong argument that the right to a desegregated education is a property right and cannot be denied without due process of law.

By viewing desegregated education as a property right, then the Constitutional social contract which preserves individuals' "lives, liberties and estates," collectively "property,"[38] is inviolable and the limits of government must be held in check.

Further, in *Griswold v. Connecticut*, the Supreme Court examined a Connecticut statute which made it a criminal offence for anyone to provide counseling or assistance to another in regard to the use of contraceptives. [39]The Supreme Court, in a 7 to 2 decision, held that the state has no right to invade the privacy of the marital relationship, along with the physician's role in that relationship, as this relationship is the oldest and most sacred of associations.[40] Justice Douglas, writing for the majority, refers to this right of privacy as a penumbra emanating from the Bill of Rights that help give constitutional guarantees "life and substance."[41]

Of particular note, however, is Justice Goldberg's concurring opinion where he traces the right to privacy directly to the Ninth Amendment which states:, "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."[42] Justice Goldberg explores the history of the Ninth Amendment citing Madison's fear that any bill of rights

---

36. *Id.*

37. *Brown*, 347 U.S. at 494-95.

38. Locke, *supra* note 7, at 101.

39. Griswold v. Connecticut, 381 U.S. 479 (1965). Appellant Griswold was the Executive Director of Planned Parenthood League of Connecticut and Appellant Baxton was a physician and professor at Yale Medical College and Director of the League. They were both arrested, convicted and fined for providing medical advice and information to married persons regarding contraception devices and materials. *Id.*

40. *Id.* at 493.

41. *Id.* at 484.

42. U.S CONST. amend. IX.

was not sufficiently broad to cover all essential rights and that such enumerated rights would be interpreted as a denial of others not so enumerated.[43] He goes on to say that, "In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.'"[44]

For Locke, the Constitution's silence on the guarantee of equal protection as it applies to education as established in *Brown* or one's right to privacy found in *Griswold*, finds firm ground on the notion that the trust of the People is not being compromised by charges of illegitimacy when the judiciary acts to preserves those rights.[45] By entering into a body politic, Locke maintained those individuals' rights do not diminish – otherwise there would be no basis for forming a state. [46] In modern parlance, collaboration among stakeholders leads to a net gain – more can be achieved as a group, than by acting as an individual.[47] Further, although stakeholders, acting in good faith, must recognize differences among the group's interests, needs, and values in order to achieve consensus in successfully solving a problem, [a majority of] rational people would agree that basic rights would include a right to privacy in one's bedroom and a right to public education, and the state, through its judicial decisions, must protect these rights as part of the social contract between it and the People.

Clearly, early support for upholding the American social contract through judicial actions can be found in Alexander Hamilton's Federalist 78:

> A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, *the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents*.
>
> Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that *the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the*

---

43. *Griswold*, 381 U.S. at 490.

44. *Id.* at 493. (further citations omitted); *see also* DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 256-61 (1986) (discussing American jurisprudence and "constitutional" privacy).

45. *See* Locke*, supra* note 7, at 102.

46. *Id.* at 97.

47. *See* MILLER*, supra* note 25, at 30.

> *people, declared in the Constitution, the judges ought to be governed by the latter rather than the former*. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.[48]

But – what are the intentions of the People? Locke understood that unanimity in society was rarely achievable and, therefore:

> By the consent of every individual, made a *Community* one Body, with a Power to Act as one Body, which is only by the will and determination of the *majority*…it is necessary the Body should move that way whither the greater force that carries it, which is the *consent of the majority*.[49]

Collaborative decision-making and consensus building requires that differences in values, interests and needs must be recognized or the process breaks down. Locke recognized this and cautioned "For where the majority cannot conclude the rest, there cannot act as one Body and consequently will be immediately dissolved…."[50]

Here, again, Reiman is instructive as he posits that "A constitution that limits government in ways that ensure sufficient protection of everyone's rights keeps the moral promise…[G]overnment is legitimate to the extent that it protects people's basic rights sufficiently to defeat the suspicion that those who dissent from governmental actions are subjugated by those actions."[51]

Perhaps it is precisely this point that caused the seismic shift of the 2016 electorate against Hillary Clinton and the Democratic Party and, thus, elevated Donald Trump to the Presidency.[52] What followed, however, is the visceral response as to the legitimacy of Trump as President by the now seemingly disenfranchised minority who believe that this President subjugates (or appears to subjugate)

---

48. THE FEDERALIST NO. 78 (Alexander Hamilton) (emphasis added).

49. Locke, *supra* note 7, at 96 (emphasis added).

50. *Id.* at 97. As Justice Jackson noted in *Barnette*, "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." West Virginia State Bd. Of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

51. Reiman, *supra* note 26, at 137.

52. *See, e.g.*, *7 Reasons on How Donald Trump Won the Presidential Election*, NPR (Nov. 12, 2016), www.npr.org/2016/11/12/501848636/7-reasons-donald-trump-won-the-presidential-election; *How Did Donald Trump Win?*, CNN (Nov. 10, 2016), www.cnn.com/2016/11/10/politics/why-donald-trump-won/; *Why Did Donald Trump Win? Just Visit Luzerne County, PA*, NEWSWEEK (Dec. 16, 2016), www.newsweek.com/2016/12/16/donald-trump-pennsylvania-win-luzerne-county-527861.html; *The Real Reason Why Donald Trump Won: Trend Away from Incumbents*, NATIONAL REVIEW (Jan. 17, 2017), www.nationalreview.com/2017/01/real-reason-trump-won-trend-away-incumbents-strongest-factor/; *How Trump Won*, REAL CLEAR POLITICS (Jan. 20, 2017), www.realclearpolitics.com/articles/2017/01/20/how_trump_won_--_conclusions_132846.html.

the basic rights of the dissenters to the actions of the government[53] – the very government that is entrusted with the protection of these rights.

As a cautionary tale, Joshua Stein, in his *Commentary on the Constitution*, uses the resignation of Richard Nixon as an example of government violating the spirit of the social contract – where no person is above the agreed upon law.[54] Stein cites Locke who wrote, "whoever has the Legislative or Supreme Power of any Commonwealth is bound to govern by established standing laws, promulgated and known to the People, and not by Extemporary Decrees." [55] Although noting that America did not replicate England's Glorious Revolution of 1688 that ousted James II, Stein remarks that Locke would probably have cheered Nixon's resignation in August 1974 as he had placed himself above the common compact [moral promise] which is the Constitution of the United States.[56]

Further, the Constitution as moral promise remains static while who comprises the majority and minority shifts. For example, when the Thirteenth Amendment was introduced to the House of Representatives on March 19, 1864 by Representative James Wilson, he commented on the dramatic change in public opinion on the slavery issue as a result of the Civil War, stating, "[a] public opinion now existing in the country in opposition to this power is the result of slavery overleaping itself, rather than of the determination of freemen to form it."[57]

Thus, what is once the majority becomes the minority and vice-a versa, how does the State relate to such shifts and, consequently, what is the effect on the social contract? According to Robert A. Dahl, "A central guiding thread of American constitutional development has been the evolution of a political system in which all the active and legitimate groups in the population can make themselves heard at some crucial stage in the process of decision."[58]

---

53. *Supra* note 52; *see* Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (banning for 90 days, among other changes to immigration policies and procedures, entry into the United States of individuals from seven countries); *see also Barnette*, 319 U.S. at 642 (stating, "But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.").

54. JOSHUA STEIN, COMMENTARY ON THE CONSTITUTION – FROM PLATO TO ROUSSEAU 246 (2011).

55. Locke, *supra* note 7, at 102.

56. STEIN, *supra* note 54, at 246.

57. Cong. Globe, 38th Cong. 1st Sess. 1199-1206 (1864) (Rep. Wilson) (further citations omitted); *see also* Locke, *supra* note 7, at 89. Locke states that "For a man not having the power of his own life cannot by compact, or his consent, enslave himself to anyone, nor put himself under the absolute, arbitrary power of another to take his life when he pleases." *Id.*

58. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 137 (1956)

Constitutional theorist, Arthur Selwyn Miller, who agrees with Dahl, opined that it was only those policies that strike a balance between pleasing the most people and offending the least number are eventually formed and established here in the United States.[59] Miller continues, "Put in another way, this means that the State is not all-powerful; it cannot operate as it wishes, it cannot fail to take into serious consideration the demands or wishes of units of our organizational society."[60]

Miller points out that there is a crisis in American constitutionalism which centers on the "problem of getting true national-interest decisions in a system in which decisions are the result of the interaction of the group interests and tend to reflect the lowest common denominator among affected groups."[61]

Therefore, it follows that within each of these units or groups there can only be a fractured unity of the group's demands or wishes as each member's take on any particular issue is always skewed by that member's own unique view as to the reality of the particular problem and the forthcoming solution. Although the consensus of the group emerges out of a process among stakeholders – the body politic – the coming together to exchange individual rights for the protections offered by the state, the potential for violence simmers below the surface. This stasis among members arguably maintains the status quo within the group (and among other groups), but should the State fail the People in its performance under the social contract by creating policies that seem to cater to one group at the expense of another (which ultimately trickles down and disenfranchises the individual), a reaction, even a violent one, is to be expected, along with any constitutional shift. For as John Ardrey in *The Social Contract* explains a minority [sub-group] never sheds the need to be recognized: "The violent sub-group, whatever its just demands or righteous protestations, seeks as a primary satisfaction the innate need for identity."[62]

For example, *Roe v. Wade,* decided in 1973 by a 7-2 majority, relying on *Griswold*, expanded the constitutionally protected right to privacy to include a woman's right to have an abortion, but such a right is qualified and the state could regulate the procedure in order to protect a woman's health.[63] The Court stated, "We,

---

(further citations omitted).

59. ARTHUR SELWYN MILLER, SOCIAL CHANGE AND FUNDAMENTAL LAW 70 (1979).

60. *Id.*

61. *Id.* at 91.

62. ARDREY, *supra* note 5, at 294.

63. Roe v. Wade, 410 U.S. 113, 154 (1973); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992):

> [T]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity

therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified, and must be considered against important state interests in regulation."[64]

The *Roe* case, although decided almost forty-five years ago, still ignites a firestorm of controversy, occasionally marked by extreme violence. At the time the decision was rendered, the *Nation*, in an editorial noted:

> As nearly as ten years ago, it was inconceivable that such a decision could have been handed down. What are the prerequisites for such a reversal of attitude at the highest judicial level? For one thing, there must be *a special constituency, imbued with zeal, packing the force of reason, and pushing hard for a change in the law*. Without an active vanguard, the ancient concepts will not be questioned, much less critically examined.[65]

However, commenting on the *Roe* decision and the abortion controversy that still rages, Lawrence Tribe noted that the debate has become a "clash of absolutes" between Roe's defenders and detractors with little room for compromise.[66] That said, for now the decision still stands, but – if it is eventually overturned, then it follows that those disenfranchised by such a decision would ultimately exercise those rights guaranteed through the social contract to bring about change through some other political or governmental means.

Disenfranchisement of those who constitute the fractured parts of the whole, and the destructive inertia that could result, was foreseen by James Madison as he developed his theory of factionalism.[67] Notably, Madison, in writing to Thomas Jefferson in 1788, warned against such a threat:

> Wherever the real power in a Government lies, there is the danger of oppression. In our Governments, the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government

---

> and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Planned Parenthood, 505 U.S. 833 at 851; *see also* Brown v. Board of Edu., 347 U.S. 483, 494-95 (1954).

64. *Roe*, U.S. 410 at 154.

65. *Roe v. Wade*, THE NATION (Feb. 5, 1973), www.thenation.com/article/roe-v-wade/ (further citations omitted) (emphasis added).

66. LAWRENCE TRIBE, ABORTION: THE CLASH OF THE ABSOLUTES (1982).

67. *See infra* notes 68, 75 (Madison's "factionalism" defined).

is the mere instrument of the major number of the Constituents.[68]

For Locke, oppression of rights (*i.e.*, confiscation of property [which includes lives, liberties and estates]) by the government or by special interests within the government (or the failure of the government to guard against such special interests) provides the impetus for reclamation of such rights which could include the very destruction of the government.[69] Recognition of the tension between the Lockean theory of social contract and majority rule with Madison's astute observations of the destructive effect of factionalism within the Republic (which can result in a breach of the social contract), finds its genesis in Madison's critique of the Articles of Confederation, *Vices of the Political Systems of the United States,* written in May 1787. Madison asks when an "apparent interest or common passion unites a majority, what is to restrain them from unjust violations of the rights and interests of the minority, or of individuals?"[70] Madison, in answering this question points to three motives: "prudent regard to [the majority]'s own good as involved in the general and permanent good of the community"; "respect for character"; and, religion.[71]

Madison, next examines each motive in turn, and dismisses each one as a proper restraint against the majority's suppression of the minority.[72] Madison ultimately concludes since it is the primary objective of the Government to be "sufficiently neutral between the different interests and factions, to controul one part of the society from invading the rights of another, and at the same time sufficiently controuled itself, from setting up an interest adverse to that of the whole Society."[73] Here, Madison is articulating the nature of social contract and the clear duty of the Government to mitigate the self-serving interests of groups by recognizing this duty and to perform as the social contract [moral promise] demands. Anything less is a breach of and a failure by the Government to uphold the trust instilled in it by the People for which they gave up their natural liberty.

Finally, Madison sees that it will only be through a large

---

68. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) *in* THE JAMES MADISON PAPERS AT THE LIBRARY OF CONGRESS (Gaillard Hunt ed., New York: G.P. Putnam's Sons 1900-1910).

69. *See* Locke, *supra* note 7; *see also* ARDREY, *supra* note 5, at 296 ("The immense industrial and agricultural complex which has banished or can banish economic insecurity from our lives rests, a much as any other social institution, on the web of interdependence. Without a high degree of order…it cannot function.").

70. James Madison, Vices of the Political System of the U. States (May 7, 1787), *in* THE JAMES MADISON PAPERS AT THE LIBRARY OF CONGRESS (Gaillard Hunt ed., New York: G.P. Putnam's Sons 1900-1910).

71. *Id.*

72. *Id.*

73. *Id.*

republic whereby the pool of candidates is exponentially increased that "such a process of elections as will most certainly extract from the mass of the society the purest and noblest characters which it contains; such as will at once feel most strongly the proper motives to pursue the end of their appointment, and be most capable to devise the proper means of attaining it."[74] It is the elected officials, as representative of the People – the body politic- reflecting these constituencies [and the range of opinions and issues] from whence they come, that are the agents for keeping the moral promise as imbued in the Constitution.

Madison was clearly fearful of the destructive nature of factions in a purely democratic system and understood the oft self-serving nature of human beings. [75] In his famous Federalist 10, he campaigned for a republican form of government as a means of tempering such tendencies and guaranteeing the moral promise. [76] He wrote:

> A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good... *[t]he regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government*.[77]

Here, Madison understood the value of consensus building among stakeholders which is critical to the success of any undertaking and inextricably linked to the Lockean principles of social contract. He recognized that Government is charged with mediating those positions that will often be at odds with each other; however, successful resolution of any problem mandates that these competing interests must be taken into consideration without the subversive undercutting of a differing party's position and by

---

74. *Id.*

75. *Id.* Madison defined "factions" as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *Id.*; *see also* TOCQUEVELLE, *supra* note 23, at 121; *see also* MORTON WHITE, PHILOSPHY, *THE FEDERALIST*, AND THE CONSTITUTION 77-78 (1989) (discussing Madison's view of factionalism as being caused by the various and unequal distributions of property).

76. THE FEDERALIST No. 10 (James Madison).

77. *Id.* (emphasis added).

rewarding collaboration over individual gain. Short of this - the process will break down, perhaps irretrievably and any "resolution" emanating from such a flawed process, will be suspect, but such suspicion and reaction thereto will not be unexpected.

As previously noted, Locke wrote that if the People "find themselves aggrieved, and think the [government] acts contrary to or beyond that trust, who so proper to just as the body of the people, who first lodged that trust in [it]."[78] Given the present national milieu, the sensitivity to the Constitution as moral promise is heightened. As in our past, today's judicial scrutiny of executive and legislative decisions is commensurate with the evolving social contract between the People and the Government along with the ongoing consent of the governed to submit to the protections of the Government. However, as Justice Wilson wrote in *Chisholm v. Georgia,* implicating Lockean social contract, "As a citizen, I know the government of that state to be republican; and my short definition of such a government is one constructed on this principle -- that the supreme power resides in the body of the people."[79]

Although the "body of the people" conjures up a vision of a whole with many parts each clamoring for recognition, identity, and validation, Reiman's observations are helpful:

> [O]ur disagreements over the Constitution are shaped by and contained within thee moral vocabulary of the Constitution and are thus those things on which we have agreed to disagree…The Constitution projects a moral culture, and this itself, even if it doesn't constrain us to one single outcome, constrains us nevertheless and does the work of limiting government power – even the Supreme Court's power as it reinterprets the Constitution[80]

It is precisely this moral culture – founded on the principles of preserving life, liberty and property through our social contract – although constrains us, sustains us as well.

78. *See* Locke, *supra* note 7, at 107.
79. Chisholm v. Georgia, 2 U.S. 419, 457 (1793).
80. Reiman, *supra* note 26, at 146-47.