

nal, in his relations with others—in his friendships—and in his relation to his culture. It is the aim of Burke's text to engage its readers deeply in this activity in all its forms.

But is all of this, for the modern reader, only to define an impossible hope, to revive a lost dream of an organic and coherent world, a culture that unites art and friendship? That is the question that carries us to our own Constitution and our own laws and to the possibilities for life and action that they define.

Constituting a Culture of Argument

The Possibilities of American Law

Moved in part by what Burke would call our prejudices, and perhaps also as a way of subjecting those prejudices to examination, we now turn to a different kind of attempt to create a national community: the constitution of our own nation. In separating from Great Britain and setting up their own government, Americans claimed the freedom and the power to remake their world. That claim was of course not absolute, and a constant question at the time was how much of the old to change, how much to save. Nevertheless, what was proposed, and perhaps achieved, in America was nothing less than the self-conscious reconstruction of language and community to achieve new possibilities for life. The attempt is like Burke's in its scope but very different in its method: for it was a collective, not an individual attempt, and it sought to establish what he disclaims: a system of legal authority.

In this chapter we shall bring our familiar questions, and our experience of what they have meant in other contexts—our way of reading—to three texts: The Declaration of Independence, the Constitution of the United States, and Chief Justice Marshall's opinion in *McCulloch v. Maryland*. Of each we shall ask what kind of community and culture it seeks to establish and how it does so. We shall then consider what it can mean for an individual to participate as an actor in this legal culture.

THE DECLARATION OF INDEPENDENCE: AN UNSTABLE CONSTITUTION

We begin with the first sentence of the familiar document headed "The unanimous Declaration of the thirteen united States of America":

When in the Course of human events, it becomes necessary for one people to dissolve the political bands

which have connected them with another, and to assure among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

What is perhaps most striking about this sentence is its voice. It is not a person's voice, not even that of a committee, but the "unanimous" voice of "thirteen united States" and of their "people." It addresses a universal audience—nothing less than "mankind" itself, located neither in space nor in time—and the voice is universal too, for it purports to know about the "Course of human events" (all human events?) and to be able to discern what "becomes necessary" as a result of changing circumstances. This voice operates on eighteenth-century assumptions about the universal character of human nature and experience. As Samuel Johnson expressed it, "We are all prompted by the same motives, all deceived by the same fallacies."¹

This voice functions so securely on the plane of generality and is so totally removed, it seems, from the passions and difficulties of particular realities that it can speak with a remarkable mildness. As Stuart Faye has remarked, the "diction is as little violent as it can be. Dissolve the hands—not burst asunder the hoops of steel."² No throwing off the chains of tyranny, no shattering the manacles of slavery, but a reassuring statement of simple fact. The implicit claim that the "separation" was not chosen but made "necessary," "impelled" by certain "causes"—as the Declaration itself is not chosen but "required"—seems to lower the temperature of the sentence nearly to zero. This voice is not justifying a choice proudly made. It simply "declares" that certain "causes" have produced certain effects, and it does so with no more passionate motive than a "decent respect to the opinions of mankind."

Of its reader the text seems to ask very little. Our function is, apparently, simply to learn what the "causes" of the separation are and then, on that basis, to maintain a good "opinion" of the authors and those for whom they speak. Not that our "opinions" are unimportant to the voice speaking here, for it seeks the favorable judgment of posterity—the children of the nation of which this voice is the founding father.³ But even the approval this text seeks is mild. Nothing could be more high-minded and genteel.

In fact, of course, the audience is not and cannot be a distant and undifferentiated "mankind," for whoever reads the Declaration will be English or American or French as well as a member of the human species, but this mild and civilized tone has an important rhetorical effect for each

of these particular audiences. To the foreigner it operates as a claim of maturity and as a submission to the conventions of the international community. To the Englishman it is a performance of reasonableness that undermines the view of the American as an uncivilized fanatic. To the American royalist, it makes a switch of sides more possible; to the American patriot it offers something with which to reassure his critics; and to the undecided American—perhaps its most important audience—it is an appeal to join a community that is serene and reasonable and secure in its sense of self and place. Nothing to fear, says this voice: we are gentlemen of manners and reason. Even those predisposed against it will read on. For all audiences, the effect is reassurance. This is a declaration not of independence, it seems, but of dependence.

There is a sense in which these implications of tone are deeply misleading, as further examination of even the first sentence will show. Before we get to its main clause, which we have been discussing, there is a long subordinate clause. Under ordinary principles of composition it would be natural to treat this as of secondary importance. The reader slides through it, waiting for the emphasis of the subject and verb of the main clause; but when he gets there, he finds, without quite knowing how, that he has acquiesced in an astonishing set of propositions—in fact the central propositions that the Declaration is intended to establish: that America is "one people" (whatever that might mean); that "necessity" can justify a unilateral separation; and that, once separated, this people is "entitled"—by law, by nature, and by God—to an equal station among nations. In the cadence of this language—"the Laws of Nature and of Nature's God"—there is a hint of the fervor to which the text will later carry us, but it is instantly checked by the very next words: "a decent respect." The Declaration thus assumes in its subordinate clause the very heart of its case—that we are a nation and that all nations are created equal—and so does any reader who makes it as far as the main clause without a rebellion of his own. Despite the implications of its title, this document does not frankly address the questions central to its case but instead assumes them away.

Or so it seems at the end of the first sentence. The next paragraph upsets these expectations by explicitly affirming, and thus bringing to the center of attention, the central tenets on which the text and its authors claim to rest:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among

Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

This paragraph seems an odd way to “declare causes” (which is what the first sentence has promised us), for it is neither a description nor an explanation but a statement of abstract principles of political theory. There is also a somewhat puzzling shift in tone, marked by the direct entry into the text of the voice that had earlier seemed so far removed: “We hold these truths to be self-evident.” Who is this “we” and what does this change of voice mean? And what of the “truths” themselves? Are these the principles that justify the earlier assumptions, which are now held out for examination and criticism? Are they reassuring, as the tone has thus far been? Are they proud statements of radical politics? or what?

They are many things, perhaps all of the above; but what is most significant about this paragraph is a movement within it, in which I think lies much of the force and character of the Declaration itself, a movement from reassurance to threat. The first class of “self-evident truths” is perhaps not so very disturbing to the conservative American or English reader, at least in this context and coming from such a Congress. To say that “all men are created equal” is to state an impossible and harmless ideal and one to which the Americans cannot have been committed in any very extreme form. Not to mention slavery, no one at the time seems to have argued seriously for universal manhood suffrage, and property qualifications were an accepted part of life. And to declare rights to “Life” and “Liberty”—especially if liberty is defined as a civil status regulated by law—is to say nothing that Burke would have disapproved of, at least for Englishmen; and there is a sense in which the “pursuit of Happiness” is a

far less threatening ending to the clause than the Lockean “property,” to which it is perhaps an allusion.⁴ In any event, statements cast at such a level of generality often do not lead to much in practical terms, and the reader may thus be inclined to discount them.

But by the end of the paragraph it has been asserted that they lead to very much indeed, and much that does not by any process of reasoning follow from them. For example, to say that certain things are one’s “unalienable Rights” is not the equivalent of saying that it is the chief aim of government “to secure” them; and to say that, in turn, is not to say or imply that governments derive their legitimacy from the “consent of the governed”; and that proposition, even if accepted, does not entail the next, which is that “consent” may be withdrawn when the government is—or seems to be—“destructive of these ends”; and this in turn is not to say what follows next, that the people may then properly form such a government “as to them may seem most likely” to lead to their safety and happiness. At each transition there is a slide from the less to the more revolutionary, a slide not justified or explained by what has preceded but expressive of the disposition, the mind and feeling, of the author. It is the kind of slide, in fact, that it is one purpose of Swift’s *Tale* to teach his reader to catch, in himself or in another.

This paragraph is not a chain of reasoning, as its form may suggest, nor is it a frank statement of a coherent set of complementary principles; it is a movement from one state of consciousness to another, a movement large with threat and passion. What is more (as we saw also in the first sentence), the form and tone to some degree conceal this movement. The reader may be willing to grant “self-evident” status to the first proposition, for example, but not to the last. Imagine, for example, how the paragraph would read if the order of the statements were reversed.

Now comes a momentary check, a seeming retreat to different grounds: “Prudence, indeed, will dictate. . . .” But this turns out not to be an expression of caution or self-doubt, as it seems, but a kind of circular proof of the rightness of rebellion itself: since “mankind are disposed to suffer” evils as long as they are tolerable, the very fact that mankind will no longer suffer them shows that the evils have become intolerable. What seems to start off as an invocation of the ethic of prudence thus becomes an argument for the rightness of rebellion whenever it occurs, and the circular character of the argument repudiates reason and demonstrates exactly the sort of unbending and rebellious resolve the tone has thus far been at pains to deny.

At the end of this sentence the right of revolution is reiterated, but with a significant intensification of diction. No longer is it the people’s “right” to act; it is their “duty.” No longer do they “dissolve the bands”; they “throw off such Government,” and the occasion for doing so is not

when government is “destructive of these ends” but “when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism.” The document no longer states a general principle of action; it declares war.

In the next three sentences the form of the paragraph as a whole becomes clear:

Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

We now see that the sentence that declared the “duty” of the people “to throw off such Government” is to be the governing rule of the document, setting forth the conditions justifying rebellion; the next two sentences—about the sufferance of the colonies and the tyrannical ambitions of the king—assert the real existence of those conditions, which the third tells us it will be the function of the rest of the document “to prove” by submitting the “Facts” to a “candid world.” The text in this way states what lawyers call a cause of action against the king, justifying the rebellion. We now discover that what the first sentence meant by a “declaration of causes” was not an explanation but an indictment.⁵

In what follows, the voice is no longer that of mild and dispassionate eighteenth-century reason, speaking universal truths to a universal audience in a universal language, but the fervid and hating voice, speaking in terms of final conclusion, of one who indicts a criminal. In stating the particulars of the case against the king with lawyerly completeness, this text defines him in unqualified and violent terms as a monster of humanity, an enemy of every American. Here are just two counts (out of dozens):

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

How is one to respond to such a monster, who has behaved and is behaving in such ways toward one’s own people? One must destroy him. The role of the reader of this text is not, after all, to modify his “opinions” about the rebellion but to join it; the “action” of which this document ultimately declares (or creates) the “causes” is not a legal action but a military one.

It is thus one achievement of the Declaration to carry the reader, without his quite knowing how it happens, from the reassuring reasonableness and mildness of the opening sentences to the white-hot violence of this call to battle. In the process the ideal reader will be moved from one state of consciousness to another, becoming, in the text and in his life, a kind of firebrand for liberty. At its heart the document is not reassuring or reasonable but incendiary.*

AT THE END of the long series of indicting clauses there is a marked shift in tone from attack to defense: “Nor have We been wanting in attentions to our British brethren.” What is the function of the paragraph that begins this way, and why does it occupy this place of prominence? The paragraph continues:

We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

*The very form of the indictment leads the reader—even the reader who prudently reserves judgment on the merits of the charges—to acquiesce in the Declaration’s central proposition, that the Americans are one people; for in describing the injuries, the text necessarily implies an identity in the injured. In a sense, indeed, it is the king who makes us one. Notice, also, that the charges of bad government by the king define by negation a conception of good government, and this constitutes a promise: we shall give ourselves the opposite of these things.

This paragraph is like the first one in the character it creates for its speaker. No longer the voice of accusation and war, this is the voice of one who acknowledges his ties to his "brethren" and engages in a complex set of social activities to maintain them: warning, reminding, appealing, and "conjuring by the ties of common kindred." This is not the voice of destruction but construction. It is not we but they who are less than wholly human, "deaf" to the "voice of justice and of consanguinity."

The final paragraph shifts the tone again. The text, no longer engaged in argument and appeal, announces that it is time to act:

WE, THEREFORE, the Representatives of the UNITED STATES OF AMERICA, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be FREE and INDEPENDENT STATES; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.

This paragraph contains the act of declaration that the title announces, and in one sense it would be complete without anything that has preceded it. But it announces a dependence on its prior argument in the word "therefore," which incorporates, by reference, the preceding declaration, not of independence, but of "causes." This sentence thus draws a kind of inner force or resolution from the words of the indictment section and from its tone.

At the very end, the voice of the Declaration becomes wholly personal. No longer that of eighteenth-century reason or that of indictment or explanation, it is the voice of the individual heroic patriot, joining with other men of wealth and honor in a community of soldiers. "And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor." The community the reader is asked by this text to join is a community of identical heroes. The "one people" the Declaration seeks to create is not a diverse people, different in talents and interests, in mode of life, in character and manners—not a nation as Burke has

taught us to conceive it. It is a single whole, a single person, as it were, with a single set of sentiments and determinations, a people united by a fictional merger behind the single aim of the national war. "We" are blended into a single "one"; the stated ideal of equality among people becomes an ideal of a very different sort, of merger into a common identity.

IT SHOULD NOW BE apparent why I speak of the "unstable constitution" of this text. It has proved to be not a statement of the fundamental truths on which the nation is founded, nor does it establish a functioning social and rhetorical world, with parts and relations, roles and procedures, offering a basis on which to found a collective life more complex than that of national self-defense. Rather, it is meant to work a change of feeling in the reader: to move him from his ordinary state of consciousness, in which his ordinary senses of value and civilization operate, into a willingness to pledge his all in a battle to save the country it has defined as his. It creates in its ideal reader a resolve based on a sense of common identity, on the justice of the cause, and on necessity, and it does this enormously well. One can imagine that a soldier—in the Revolutionary War, perhaps even in a later one—wondering what he is doing as he freezes at night in a rainy orchard behind a wall, might remember it and feel restored. The Declaration is in fact not an intellectual but an inspirational text, and that is how it has ever after been used. Its effects are repetitive and cumulative; the reader is moved not once and for all but again and again into the state of feeling it defines. It reminds us of our own motives by recreating them.

There is of course a sense in which the great "truths" of the Declaration are important truths for us, statements of what Burke would call our "prejudices." Lincoln, for example, made the Declaration's statement of equality the central principle of the Union he was seeking to defend and reconstitute, and the Civil War amendments might be taken as giving this principle its formal constitutional standing.⁶ But considered at the moment of their composition, these truths are slogans of simplicity that must derive their real meaning from later experience. To constitute a community that is able to do more than fight to assert its existence, that can flourish over time, must be the work of other times and other instruments.

Of the nature of those instruments there is in fact a hint in the declaring clause itself, when the "one people" of the Declaration is resolved not only into heroic individuals but into "Free and Independent States." What relation can possibly exist between the "one people" of colonial America—the people that "declare the causes" and claim "separate and equal station among the nations of the earth"—and these separate states, no one of which contains more than a small portion of that people? And what

relation can exist between the "people" in that sense and the individual human beings, once their roles as heroes have come to an end? What relation can exist among these states? These are questions to which the Constitution is addressed.

THE CONSTITUTION OF THE UNITED STATES: STABLE BUT INERT

It is the purpose of the instrument known as the "Constitution of the United States of America" to do what the Declaration neither attempted nor achieved: to establish and organize a national community not merely at a transcendent moment of crisis but in its ordinary existence and over time. It is not a battle-cry but a charter for collective life—for the life we have earned when the Declaration has done its work—and our questions accordingly are: What kind of life does it make possible? What roles does it establish? What relations does it define among them? What opportunities for speech and thought does it create? This Constitution means to establish the conditions on which, and many of the materials with which, life will actually be led by a people no longer claiming to be united in a splendid moment of common sentiment but now engaged in, and divided by, their ordinary activities and moved by their ordinary motives. How does it attempt to do these things? How well does it succeed?

The Preamble: A United, Active, and Constituted "WE"

We begin with the Preamble,⁷ where the text, perhaps surprisingly, does purport to speak in a single voice for the people as a whole: "WE THE PEOPLE of the United States . . . do ordain and establish this Constitution for the United States of America." This is a claim to speak for an entire and united nation and to do so directly and personally, not in the third person or by merely delegated authority (Think how differently the sentence would read if it said: "WE THE UNITED STATES OF AMERICA," or "THE PEOPLE of the United States," or "WE, the Representatives of the People of the United States.") The instrument thus appears to issue from a single imaginary author, consisting of all the people of the United States, including the reader, merged into a single identity in this act of self-constitution. "The People" are at once the author and the audience of this instrument.

The Preamble makes additional claims for "The People" who are its author and its audience. The diction tells us, for example, that they are engaged in an act that is sacred as well as secular in character and authority, for we know that ministers are "ordained" and that churches as well as constitutions are "established." The people are given further definition by the long subordinate clause placed between the subject and the

verbs, which marks them as purposive and energetic. "WE" do this, the sentence says, "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." This clause is not necessary to the sentence, which would make exactly the same performative claims without it; but it adds a great deal: it defines its author not as a people at rest, acquiescing in what is, but as a people moving toward what should be, shaping their lives by intention, action, and hope. And the better things that define their hope are not marginal improvements in life but the essence of collective happiness: union, justice, tranquility, defense, welfare, and all the "Blessings of Liberty." Indeed the series of verbs marks this people as almost excessively active, full of all the energy and eagerness of youth, for the "WE" that is the subject of this sentence does not merely identify these things—justice, union, and the rest—as desiderata, to be obtained if possible; it intends to "form," "establish," "insure," "provide for," "promote," and "secure" them.

This sentence creates a sense of perfect unity of a kind that can be maintained only in an emergency or for a moment. In time, differences and oppositions and conflicts will surely force themselves upon us. To pretend a unity we cannot achieve is to make a constitution that is unstable at its center.

Accordingly, in the body of the Constitution this "one people" is immediately divided up into parts: the separate states, the branches of the federal government, the individual persons who fill various offices, and the citizens (who are protected against *ex post facto* laws, are guaranteed the writ of habeas corpus, and so on). The only respect in which the Constitution makes the claim that its people are "one" is in the establishment of the Constitution itself; once that is done, they are free to engage in the ordinary competitions of trade and politics, to pursue their conflicting interests, to form clubs and factions, and to seek and exercise power, so long as they do all this on the conditions, and, where relevant, in the ways, that the Constitution establishes.

The Two Voices of Authority and of Silence: Separating Powers and Establishing a Trust

In the body of the Constitution the voice changes. What we hear now is the self-certain voice of authority, brooking no opposition:

ARTICLE I

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

tudes, of institutions and expectations—the language, the culture—that we have made, that has made us, and that we respect deeply. It would put at risk our very constitution. Here our prejudices are very much like Burke's own.

CHAPTER NINE: AMERICAN LAW

Bibliography and Background

For a recent discussion of the Declaration of Independence and its background, see Garry Wills, *Inventing America: Jefferson's Declaration of Independence* (New York: Doubleday, 1978). (This otherwise good book overargues its case that the primary intellectual tradition of Thomas Jefferson, the draftsman of the Declaration, was the Scottish Enlightenment, and it somewhat underrepresents the role of Locke in Jefferson's thought. For more extensive criticism, see Ronald Hamowy, "Jefferson and the Scottish Enlightenment: A Critique of Garry Wills's *Inventing America: Jefferson's Declaration of Independence*," *William and Mary Quarterly* 3d ser. 36 [1979]: 503–23.) Earlier well-known works are Carl Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (New York: Knopf, 1942), and Edmund S. Morgan, *The Birth of the Republic 1765–1789* (Chicago: University of Chicago Press, 1956). An excellent literary analysis of the Declaration, from which I have borrowed in the text, is Stuart M. Tave, "The Creative Teacher—Who Needs Him?" *Illinois English Bulletin* 53 (1966): 6–13. The text used is that of the parchment copy signed by the members of Congress and reprinted in *The United States Code*, vol. 1, pp. xxv–xxvi (1953 ed.).

The best recent book on the period between the Declaration and the Constitution is Gordon S. Wood, *The Creation of the American Republic* (Chapel Hill: University of North Carolina Press, 1969). See also Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1967). The best accounts of the Constitution itself are Madison's *Notes of Debates in the Federal Convention of 1787*, ed. Adrienne Koch (Athens: Ohio University Press, 1966) and *The Federalist*, written by Hamilton, Madison, and Jay in support of its ratification. See also Max Farrand, *The Framing of the Constitution* (New Haven: Yale University Press, 1913).

General histories of the Supreme Court, which include some discussion of McCulloch, are: Charles Warren, *The Supreme Court in United States History* (Boston: Little, Brown, 1924); Andrew C. McLaughlin, *A Constitutional History of the United States* (New York: D. Appleton-Century, 1935); and Arthur E. Sutherland, *Constitutionalism in Amer-*

ica: Origin and Evolution of Its Fundamental Ideas (New York: Blaisdel, 1965). For more of Marshall's writings, see John P. Roche, *John Marshall: Major Opinions and Other Writings* (Indianapolis: Bobbs-Merrill, 1967). I owe the felicitous phrase, "declaration of dependence" to Wills Buck.

Other recent works setting forth a humanistic conception of law include Joseph Vinig, *Legal Identity: The Coming of Age of Public Law* (New Haven: Yale University Press, 1978) and Milner S. Ball, *The Promise of American Law: A Theological, Humanistic View of Legal Process* (Athens, Ga.: The University of Georgia Press, 1981).

Notes

1. See *Rambler* No. 60, quoted above, p. 328. And cf. Gibbon's famous sentence: "If a man were called to fix the period in the history of the world during which the human race was most happy and prosperous, he would, without hesitation, name that which elapsed from the death of Domitian to the accession of Commodus" (*The Decline and Fall of the Roman Empire* [1776], chap. 3).

2. Stuart M. Tave, "The Creative Teacher—Who Needs Him?" *Illinois English Bulletin* 53 (1966): 6–13.

3. On fame as a motive of the founding fathers see Douglass Adair, *Fame and the Founding Fathers* (New York: Norton, 1974), 3–26.

4. Locke said that the uncertainty of the state of nature makes a man "willing to quit this condition which, however free, is full of fears and continual dangers; and it is not without reason that he seeks out and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties, and estates, which I call by the general name—property" (John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government*, § 123 [1690]). Despite the claims of Garry Wills to the contrary (*Inventing America: Jefferson's Declaration of Independence* [New York: Doubleday, 1978], 172–74), Jefferson was to some degree familiar with this language of Locke's, which indeed seems reflected in the Declaration itself (see Arthur E. Sutherland, *Constitutionalism in America: Origin and Evolution of Its Fundamental Ideas* [New York: Blaisdel, 1965], 143).

5. See the analysis of this section in Wills, *Inventing America*, 69–70. The indictment form is to some degree traditional. The English Bill of Rights of 1688, for example, contained a set of charges defining the occasion, perhaps the "necessity," for the provisions of the Bill itself. See Sutherland, *Constitutionalism in America*, 91.

6. For a discussion of Lincoln's use of the Declaration, see, e.g., H. Jaffa, *The Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates* (Garden City, N.Y.: Doubleday, 1959).

7. In my reading of the Preamble I have, with his kind permission, borrowed extensively from Professor Craig Lawson's unpublished paper "The Literary Force of the Preamble."

8. The elaborate and explicit design of the Constitution in itself embodies a principle of order that has deeply affected our thinking about it. The quality of this order is not as organic as that of Burke's garden. Characterized by straight lines and bold strokes, it is more akin to French city planning.

9. Presidents have on certain occasions asked their attorneys general for formal opinions, and these have been collected and published. George Washington asked Jefferson and Hamilton to furnish opinions on the constitutionality of legislation, then being proposed, to establish the Bank of the United States. See the text, p. 247.

10. George Washington in fact went to the Senate to consult with the members of a committee about a treaty with certain Indians. He was treated so rudely that he left and never went back (see Andrew C. McLaughlin, *The Constitutional History of the United States* [New York: D. Appleton—Century, 1935], 249 ff.).

11. The Jefferson and Hamilton documents are easily accessible in Richard Hofstadter, ed., *Great Issues in American History: From the Revolution to the Civil War, 1765—1865* (New York: Vintage Books, 1958), 160, 164. In *McCulloch* Marshall drew heavily on Hamilton's text. *McCulloch* was not the end of the story, for in 1832 President Jackson vetoed another Bank bill, making a famous statement in explanation of his decision (see Hofstadter, pp. 291—95).

12. *Marbury* involved a federal statute purporting to expand the Court's jurisdiction beyond constitutional limits, and this presents the easiest kind of case in which to justify judicial invalidation of a legislative act. The power of judicial review established by *Marbury* might easily be limited to legislation that improperly expanded the jurisdiction of the Supreme Court or, more generally, to legislation that interfered in any way with the operations of the judicial branch.

13. Prior to Marshall's chief justiceship, the justices followed the English practice of routinely issuing separate opinions. Marshall initiated the practice of an opinion that spoke for the Court as a whole.

14. A similar case can be made for the rhetorical effect of *The Federalist*. These papers establish a quality of analysis and argument that promises to become the standard for constitutional discourse if, but only if, the Constitution is ratified. If it is not, the occasion for this kind of reasoning and speech will disappear.

15. Remarkable as they are, Marshall's claims so accord with our present expectations of a judicial opinion that it is worth pausing to say that this is not the only way the Court might have proceeded to claim and ex-

ercise the power of judicial review, nor is it the most modest or unassuming. For example, the Court might have said merely that the Constitution "requires us to decide this question in favor of the Bank," perhaps adding by way of explanation that the power to incorporate a Bank is necessarily implicit in the congressional powers enumerated in the Constitution and that the Supremacy Clause invalidates the Maryland tax. A document that has something of this character is the early *Correspondence of the Justices* (1793), in which the Court refused to advise Congress on the constitutionality of legislation under its consideration. (This letter is reprinted in *Hart and Wechsler's The Federal Courts and the Federal System*, 2d ed., edited by Paul Bator et al. [Mineola, N. Y.: Foundation Press, 1973], 65—66.) The entire explanation and justification of the Court were contained in the adverb "extrajudicially," which it employed to characterize the way it would be acting if it complied with the request. There are, of course, many reasons that could be advanced for the correctness of their judgment, and some that could be advanced against it, but the Court did not engage in public reasoning of any kind.

The modern lawyer might criticize this kind of opinion for failing to meet our standards of reasoned justification, saying that in thus resting on its bare authority the Court was being rather high-handed, both with the reader and with the other branches of government. But there is a sense in which the kind of opinion Marshall promises to write, which rests not merely on a claim of authority but on its own persuasive reasoning, is even more high-handed than that; for to claim to be guided by reasoning, is to claim the right to go where reason leads. It is of course true that such an opinion will be subjected to criticism of a kind from which an "authoritative declaration" would be effectively insulated, and this involves a submission to communal judgment. But not merely submission: such a writer also necessarily expresses great confidence that his reasoning will withstand such criticism and that the community by which he will be judged will therefore be partly of his own creation.

16. Compare, for example, Marshall's treatment of Maryland's power to tax the Bank, in the second half of the opinion:

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. that a power to create implies a power to preserve. 2d. That a

JAMES BOYD WHITE

**WHEN WORDS LOSE
THEIR MEANING**

Constitutions and Reconstitutions of
Language, Character, and Community

1984

THE UNIVERSITY OF CHICAGO PRESS
CHICAGO AND LONDON