12

Constitution

INTRODUCTION

THE idea of a constitution as establishing and organizing a political community; the principle of constitutionality as determining a generic form of government having many varieties; and the nature of constitutional government—these three problems are so intimately connected that they must be treated together. We have used the word "constitution" to express the root notion from which all other matters considered in this chapter are derived.

It is impossible to say precisely what a constitution is in a way that will fit the political reality of the Greek city-states, the Roman public and its transformation into the empire, medieval kingdoms and communes and their gradual metamorphosis into the limited monarchies and republics of modern times. No definition can adequately comprehend all the variations of meaning to be found in the great works of political theory and history. But there are a number of related points in the various meanings of "constitution" which indicate what is common to the understanding of such diverse thinkers as Plato and Locke, Aristotle and Rousseau, Kant and Mill, Montesquieu and Hegel, Aquinas, Hobbes, Tocqueville, and the American Federalists.

IT HAS BEEN SAID that the constitution is the form of the state. This can be interpreted to mean that the political, as opposed to the domestic, community requires a constitution in order to exist; just as a work of art has the very principle of its being in the form which the artist imposes upon matter. In the context of his general theory of political association, Aristotle's remark that "the man who first founded the state was the greatest of benefactors," may imply that the idea of a constitution is the creative principle by which the state was originally formed—or at least differentiated from the tribe and family.

Kant gives explicit expression to the notion that the invention of constitutions is coeval with the formation of states. "The act by which a People is represented as constituting itself into a State," he writes, "is termed the Original Contract" and this in turn signifies "the rightfulness of the process of organizing the Constitution."

In this sense, the constitution appears to be identical with the organization of a state. It would then seem to follow that every state, no matter what its form of government, is constitutional in character. But this would leave no basis for the fundamental distinction between constitutional and nonconstitutional—or what is usually called "absolute," "royal," or "despotic"—government.

That basic distinction among forms of government is as old as Plato and Aristotle. It is first made by Plato in the *Statesman* in terms of the role of law in government. It occurs at the very opening of Aristotle's *Politics* with his insistence on the difference between the king and the statesman, and between royal and political government. But Locke seems to go further than the ancients when he says that "absolute monarchy . . . is inconsistent with civil society, and so can be no form of civil government at all."

In addition to affirming the gravity of the distinction between constitutional government, he seems to be denying that the latter can constitute the form of a truly *civil* society, as opposed to a domestic society or the primitive patriarchate of a tribe. Yet Locke obviously does not deny the historical fact that

there have been communities, which otherwise appear to be states, that have their character or form determined by absolute government. His point, therefore, seems to be that among types of government, absolute monarchy does not fit the nature of civil society.

If "constitution" is used merely as a synonym for "form" or "type," then even a state under absolute monarchy or despotic government can be said to have a constitution. Since every state is of some type, it can be said that it has a certain constitution, or that it is constituted in a certain way. If, however, we use the word "constitution" to conform to the distinction between constitutional and nonconstitutional government, we are compelled to say that there are states which do not have constitutions.

With this distinction in mind, the statement that "the constitution is the form of the state" takes on a different and more radical meaning. It signifies that there are communities, larger than and distinct from the family or tribe, which cannot be called "states" in the strict sense because they do not have constitutions. Hegel, for instance, points out that "it would be contrary even to commonplace ideas to call patriarchal conditions a 'constitution' or a people under patriarchal government a 'state' or its independence 'sovereignty.' " In such conditions, what is lacking, he writes, is "the objectivity of possessing in its own eyes and in the eyes of others, a universal and universally valid embodiment in laws." Without such an "objective law and an explicitly established rational constitution, its autonomy is . . . not sovereignty."

From this it would appear that a despotically governed community, such as ancient Persia, is a political anomaly. It is intermediate between the family and the state, for it is like a state in its extent and in the size and character of its population, yet it is not a state in its political form. The truly political community is constitutionally organized and governed. In this sense, the English words "political" and "constitutional" become almost interchangeable, and we can understand how these two English words translate a single word in Greek political discourse.

As THE FORM of the state, the constitution is the principle of its organization. Whether written or unwritten, whether a product of custom or explicit enactment, a constitution, Aristotle writes, "is the organization of offices in a state, and determines what is to be the governing body, and what is the end of each community."

The idea of political office—of officials and official status—is inseparable from the idea of constitution. That is why the concept of citizenship is also inseparable from constitution. As the chapter on CITIZEN indicates, citizenship is the primary or *indefinite* office set up by a constitution. Citizenship is always the prerequisite for holding any other *more definite* office in a constitutional government, from juryman to chief magistrate. In specifying the qualifications for citizenship, a constitution sets the minimum qualifications for all other offices which usually, though not always, demand more than citizenship of the man who is to fill them.

A political office represents a share of political power and authority. "Those are to be called offices," Aristotle explains, "to which the duties are assigned of deliberating about certain measures and of judging and commanding, especially the last; for to command is the especial duty of a magistrate." As representing a share of political power and authority, a political office can be said to constitute a share of sovereignty. That would not seem to be true, however, for those who, like Rousseau, maintain that "sovereignty is indivisible." Yet Rousseau also admits that "each magistrate is almost always charged with some governmental function" and exercises a "function of sovereignty."

Since it is an arrangement of offices, a constitution is, therefore, also a division or partition of the whole sovereignty of government—or at least of the exercise of sovereignty—into units which have certain functions to perform, and which must be given the requisite power and authority to perform them. These units are political offices, defined according to their functions, and vested with a certain power and authority depending on their place and purpose within the whole.

Hamilton's maxim that "every power ought to be in proportion to its object" formulates the equation by which the function of an office, or its duties, determines its rights and powers, privileges and immunities. And except for the provision of a temporary dictatorship in the early Roman constitution, or its modern constitutional equivalent in emergency grants of power, political offices under constitutional government always represent limited amounts of power and authority—limited in that each is always only a part of the whole.

A CONSTITUTION defines and relates the various political offices. It determines the qualifications of officeholders. But it does not name the individuals who, from all those qualified, shall be selected for any office. Because its provisions have this sort of generality, a constitution has the character of law. This is equally true of written and unwritten constitutions, of those shaped by custom and those enacted by constituent assemblies.

Unlike all other man-made laws, a constitution is the law which creates and regulates government itself, rather than the law which a government creates and by which it regulates the conduct of men, their relation to one another and to the state. This is perhaps the basic distinction with regard to the laws of the state. "The fundamental law in every commonwealth," says Hobbes, "is that which being taken away the commonwealth faileth and is utterly dissolved." Montesquieu distinguishes what he calls "the law politic," which constitutes the state, from ordinary legislation; and Rousseau likewise divides the laws into "political" or "fundamental" laws and the "civil laws"—those "which determine the form of the government" and those which the government, once it is constituted, enacts and enforces.

In addition to being the source of all other positive laws of the state—for it sets up the very machinery of lawmaking—a constitution is fundamental law in that it establishes the standard of legality by which all subsequent laws are measured. Aristotle observes that "the justice or injustice of laws varies of necessity with constitutions." What may be a just enactment in one state may be unjust in another according to the difference of the constitutions.

In American practice and that modeled upon it, a law which violates the letter or spirit of the constitution is judged to be unconstitutional and is deprived thereby of the authority of law. "Every act of a delegated authority," Hamilton writes in *The Federalist,* "contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid."

THE CONCEPTION of a constitution as a law or set of laws antecedent to all acts of government inevitably raises the question of how or by whom constitutions are made. If the provisions of a constitution were precepts of natural law, they would, according to the theory of natural law, be discovered by reason, not positively instituted. But though constitutions have the character of positive law, they cannot be made as other positive laws are made—by legislators, *i.e.,* men holding that office *under the constitution.*

The generally accepted answer is that a constitution is made by the people who form the political community. But, as Madison observes, some evidence exists to the contrary. "It is not a little remarkable," he writes, "that in every case reported by ancient history, in which government has been established with deliberation and consent, the task of framing it has not been committed to an assembly of men, but has been performed by some individual citizen of pre-eminent wisdom and approved integrity." He cites many examples from Plutarch to support this observation, but he adds the comment that it cannot be ascertained to what extent these lawgivers were "clothed with the legitimate authority of the people." In some cases, however, he claims that "the proceeding was strictly regular."

The writers of *The Federalist* are, of course,

primarily concerned with a constitution that is not the work of one man but the enactment of a constituent assembly or constitutional convention. From their knowledge of British law, they are also well aware that a constitution may sometimes be the product of custom, growing and altering with change of custom. But however it is exercised, the constitutive power is held by them to reside in the constituents of the state, the sovereign people. This power may be exercised through force of custom to produce an unwritten constitution, or through deliberative processes to draft a written one; but it can never be exercised by a government *except with popular consent,* since all the powers of a duly constituted government derive from its constitution. In the American if not the British practice, the amendment of the constitution also involves, at least indirectly, an appeal to the people.

Rousseau assigns the constitutive power to a mythical figure he calls "the legislator" or "the law-giver," describing him as the man who "sets up the Republic." Yet Rousseau says of this special office that it "nowhere enters into the constitution." He thus reaffirms the essential point that a constitution cannot create the office of constitution-making.

These remarks in *The Social Contract* have another significance. Rousseau tries to distinguish the formation of a government by the constitution (the political or fundamental law made by *the* legislator) from the formation of the state by the social contract entered into by the people in their original act of association. But is not the constitution also a formative contract or convention? If it is popular in origin, either through custom or enactment, is there more than a verbal difference between these two contracts—the one which establishes a political society and the one which establishes its government?

For Hobbes, and seemingly also for Locke, the compact by which men abandon the state of nature and establish a civil society results at the same time in the establishment of a government. It is, Hobbes writes, "as if every man should say to every man, I authorize and give my right of governing my self, to this Man or to this Assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner." According to Rousseau, "there is only one contract in the State, and that is the [original] act of association." For him, "the institution of government is not a contract."

The reality and significance of the difference between these three political philosophers would seem to depend on the precise historical meaning each gives to the hypothesis of men living in a state of nature prior to political association. If, prior to the state, men live in nonpolitical societies, and if the state, as opposed to the family or the despotically ruled community, begins to exist only when it is constituted, then the formation of the state and the formation of its government would seem to be the product of a single convention.

THE PRINCIPLE OF constitutionality is also necessary in order to understand the familiar distinction between government by laws and government by men. Except for the divine sort of government which is above both law and lawlessness, Plato employs "the distinction of ruling with law or without law" to divide the various forms of government into two groups. "The principle of law and the absence of law will bisect them all," the Eleatic Stranger says in the *Statesman.*

In the ordinary meaning of law as an instrument of government, it is difficult to conceive government by laws without men to make and administer them, or government by men who do not issue general directives which have the character of law. Government always involves both laws and men. But not all government rests upon the supremacy which consists in the equality of all before the law and the predominance of regular law as opposed to arbitrary decision. Nor is all government based upon a law that regulates the officials of government as well as the citizens and determines the legality of official acts, legislative, judicial, or executive. That law is, of course, the constitution.

Locke makes a distinction between governing by "absolute arbitrary power" and governing by "settled standing laws." It is his contention that "whatever form the commonwealth is under, the ruling power ought to gov-

ern by declared and received laws, and not by extemporary dictates and undetermined resolutions, for then mankind will be in a far worse condition than in a state of Nature . . . All the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws, that both the people may know their duty, and be safe and secure within the limits of the law, and the rulers, too, kept within their due bounds."

As Locke states the distinction between government by laws and government by men, it seems to be identical with the distinction between constitutional and nonconstitutional government. In the latter, an individual man invests himself with sovereignty and, as sovereign, puts himself above all human law, being both its source and the arbiter of its legality. Such government is absolute, for nothing limits the power the sovereign man exercises as a prerogative vested in his person. In constitutional government, men are not sovereigns but officeholders, having only a share of the sovereignty. They rule not through *de facto* power, but through the juridical power which is vested in the office they hold. That power is both created and limited by the law of the constitution which defines the various offices of government.

ALTHOUGH ABSTRACTLY or in theory absolute and constitutional government are clearly distinct—more than that, opposed—political history contains the record of intermediate types. These can be regarded as imperfect embodiments of the principle of constitutionality, or as attenuations of absolute rule by constitutional encroachments. Despite their incompatibility in principle, historic circumstances have managed to combine absolute with constitutional government. It is this combination which medieval jurists and philosophers call "the mixed regime" or the *regimen regale et politicum,* "royal and political government."

It may be thought that a foreshadowing of the medieval mixed regime can be found in Plato's *Laws,* in the passage in which the Athenian Stranger says that monarchy and democracy are the "two mother forms of states from which the rest may be truly derived." He then asserts that, to combine liberty with wisdom, "you must have both these forms of government in a measure." Since the Persian despotism is cited as the "highest form" of monarchy and the Athenian constitution as the archetype of democracy, the combination proposed would seem to be a mixture of absolute with constitutional government. But the Athenian Stranger also says that "there ought to be no great and unmixed powers" if the arbitrary is to be avoided; and since the whole tenor of the book, as indicated by its title, is to uphold the supremacy of law, it is doubtful that a truly mixed regime is intended—a government which is *partly* absolute and *partly* constitutional.

Aristotle, furthermore, gives us reason to think that such a mixture would be unthinkable to a Greek. At least in his own vocabulary, the terms *royal* and *political* are as contradictory as *round* and *square.* Royal, or kingly, government for Aristotle is "absolute monarchy, or the arbitrary rule of a sovereign over all." In royal government, there are no political offices, and no citizens. The ruler is sovereign in his own person and the ruled are subject to his will, which is both the source of law and exempt from all legal limitations.

To Aristotle, political government means pure constitutionalism. It exists only where "the citizens rule and are ruled in turn," for "when the state is framed upon the principle of equality and likeness, the citizens think they ought to hold office by turns." To the generic form of constitutional government, Aristotle sometimes gives the name of "polity," though he also uses this name for the mixed constitution which combines democratic with oligarchic criteria for citizenship and public office. The mixed constitution is not to be confused with the mixed regime, for it is a mixture of different constitutional principles, not of constitutionalism itself with absolute government. When the word "polity" signifies constitutional government generally, it has the meaning which the Romans express by the word "republic" and which the constitutionalists of the 18th century call "free government."

The distinctive characteristics of such government—whether it is called political, republican, constitutional, or free—lie in the fact that the citizens are both rulers and ruled; that no man, not even the chief magistrate, is above the law; that all political power or authority is derived from and limited by the constitution which, being popular in origin, cannot be changed except by the people as a whole.

It is perhaps only in the Middle Ages that we find the mixed regime in actual existence. "That rule is called politic and royal," Aquinas writes, "by which a man rules over free subjects who, though subject to the government of the ruler, have nevertheless something of their own, by reason of which they can resist the orders of him who commands." These words seem to present an accurate picture of the peculiarly medieval political formation which resulted from the adaptation of Roman law (itself partly republican and partly imperial) to feudal conditions under the influence of local customs and the Christian religion.

The medieval mixed regime is not to be confused with modern forms of constitutional monarchy any more than with the mixed constitution or polity of the Greeks. "The so-called limited monarchy, or kingship according to law," Aristotle remarks, "is not a distinct form of government." The chapter on MONARCHY deals with the nature of constitutional monarchy and its difference from the mixed regime as well as its relation to purely republican government. The medieval king was not a constitutional monarch, but a sovereign person, in one sense above the law and in another limited by it.

To the extent that he had powers and prerogatives unlimited by law, the medieval king was an absolute ruler. He was, as Aquinas says, quoting the phrase of the Roman jurists, *legibus solutus*—exempt from the force of all man-made law. Aquinas also describes him as "above the law" insofar as "when it is expedient, he can change the law, and rule without it according to time and place." Yet he was also bound by his coronation oath to perform the duties of his office, first among which was the maintenance of the laws of the realm—the immemorial customs of the people which define their rights and liberties. The king's subjects could be released from their oath of allegiance by his malfeasance or dereliction in office.

To this extent, then, the medieval king was a responsible ruler, and the mixed regime was constitutional. Furthermore, the king did not have jurisdiction over customary law; yet where custom was silent, the king was free to govern absolutely, to decree what he willed, and even to innovate laws.

MEDIEVAL IN ORIGIN, the institution of a government both royal and political, or what Sir John Fortescue, describing England in the 15th century, called a "political kingdom," exerted great influence on modern constitutional developments. As late as the end of the 17th century, Locke's conception of the relation of king and parliament, royal prerogative and legal limitations, may emphasize the primacy of law, but it does not entirely divest the king of personal sovereignty. Locke quotes with approval the speech from the throne in 1609, in which James I said that "the king binds himself by a double oath, to the observation of the fundamental laws of his kingdom. Tacitly, as by being a king, and so bound to protect as well the people, as the laws of his kingdom, and expressly by his oath at his coronation." To this extent the British kingdom is, as Fortescue had said, "political." But the king also retains the prerogative to dispense with law and to govern in particular matters by decree apart from law, and to this extent the government still remains royal.

Locke recognizes the difficulty of combining the absolute power of the king in administration with the limitations on that power represented by Parliament's jurisdiction over the laws which bind the king. To the question, Who shall be judge of the right use of the royal prerogative? he replies that "between an executive power in being, with such prerogative, and a legislative that depends upon his will for their convening, there can be no judge on earth . . . The people have no other remedy . . . but to appeal to heaven."

Montesquieu as well as Locke can conceive monarchy, as distinct from despotism, in no other terms than those of the mixed regime.

He separates despotism as lawless, or arbitrary and absolute, government from all forms of government by law, and divides the latter into monarchies and republics. Montesquieu insists that the ancients had no notion of the kind of monarchy which, while it is legal government, is not purely constitutional in the sense of being republican. He calls this kind of monarchy "Gothic government," and, as Hegel later points out, it is clear that "by 'monarchy' he understands, not the patriarchal or any ancient type, nor on the other hand, the type organized into an objective constitution, but only feudal monarchy."

It is not until the 18th century that the slightest vestige of royal power comes to be regarded as inimical to law. For Rousseau "every legitimate government is republican"; for Kant, "the only rightful Constitution . . . is that of a Pure Republic," which, in his view, "can only be constituted by a *representative system* of the people." The writers of *The Federalist* take the same stand. They interpret the "aversion of the people to monarchy" as signifying their espousal of purely constitutional or republican government. In the tradition of the great books, only Hegel speaks thereafter in a contrary vein. Constitutional monarchy represents for him the essence of constitutionalism and the only perfect expression of the idea of the state.

Because modern republics, and even modern constitutional or limited monarchies, have developed gradually or by revolution out of mixed regimes; and because this development came as a reaction against the increasing absolutism or despotism of kings, the principle of constitutionality has been made more effective in modern practice than it was in the ancient world. In addition to asserting limitations upon governments, constitutions have also provided means of controlling them. They have been given the *force,* as well as the authority, of positive law. They have made officeholders accountable for their acts; and through such juridical processes as impeachment and such political devices as frequent elections and short terms of office, they have brought the administration of government within the purview of the law.

Following Montesquieu, the Federalists recommend the separation of powers, with checks and balances, as the essential means of enforcing constitutional limitations of office and of preventing one department of government from usurping the power of another. The citizens are further protected from the misuse of power by constitutional declarations of their rights and immunities; and constitutional government is itself safeguarded from revolutionary violence by such institutions as judicial review and by the availability of the amending power as a means of changing the constitution through due process of law.

Half a century later, it is Tocqueville who recognizes the great originality of the federal constitution of the United States as founded and adopted in 1787–1789. Of it, he writes:

> This Constitution, which at first sight one is tempted to confuse with previous federal constitutions, in fact rests on an entirely new theory, a theory that should be hailed as one of the great discoveries of political science in our age.
>
> In all confederations previous to that of 1789 in America, the peoples who allied themselves for a common purpose agreed to obey the injunctions of the federal government, but they kept the right to direct and supervise the execution of the union's laws in their territory.
>
> The Americans who united in 1789 agreed not only that the federal government should dictate the laws but that it should itself see to their execution.
>
> In both cases the right is the same, and only the application thereof different. But that one difference produces immense results . . .
>
> In America the Union's subjects are not states but private citizens. When it wants to levy a tax, it does not turn to the government of Massachusetts, but to each inhabitant of Massachusetts. Former federal governments had to confront peoples, individuals of the Union. It does not borrow its power, but draws it from within. It has its own administrators, courts, officers of justice, and army.

IN THE HISTORY of political change, it is necessary to distinguish *change from* or *to* constitutional government and, within the sphere of constitutional government, the *change of* constitutions.

Republics are set up and constitutions established by the overthrow of despots or with their abdication. Republics are destroyed and constitutions overthrown by dictators who

usurp the powers of government. Violence, or the threat of violence, usually attends these changes. Both of these changes occur, with the usual violence, in Orwell's satire of the Russian Revolution, *Animal Farm:* the animals overthrow Farmer Jones and set up a brief animal constitution, the first rule of which is that "Whatever goes upon two legs is an enemy"; this commandment is broken by the pigs, who, by the end, are indistinguishable from their human oppressors.

A change of constitutions may take place in two ways: either when one constitution replaces another, as frequently occurs in the revolutions of the Greek city-states; or when an enduring constitution is modified by amendment, as is customary in modern republics. Every constitutional change is in a sense revolutionary, but if it can be accomplished by due process of law, violence can be avoided.

All the changes in which constitutional government or constitutions are involved raise fundamental questions of justice. Is republican government always better than absolute monarchy and the mixed regime—better in the sense of being more just, better because it gives men the liberty and equality they justly deserve? Is it better relative to the nature and condition of certain peoples but not all, or of a people at a certain stage of their development, but not always? In what respects does one constitution embody more justice than another? What sorts of amendment or reform can rectify the injustice of a constitution? Without answering such questions, we cannot discriminate between progress and decline in the history of constitutionalism.

Divergent answers will, of course, be found in the great books. Among the political philosophers, there are the defenders of absolutism and those who think that royal government is most like the divine; the exponents of the supremacy of the mixed regime; the republicans who insist that nothing less than constitutional government is fit for free men and equals. And there are those who argue that the justice of any form of government must be considered relative to the condition of the people, so that republican government may be better only in some circumstances, not in all.

The issue arising from these conflicting views concerning constitutional and absolute government is treated in the chapters on CITIZEN, MONARCHY, and TYRANNY AND DESPOTISM. But one other issue remains to be discussed here. It concerns the comparative justice of diverse constitutions. Constitutions can differ from one another in the way in which they plan the operations of government, or in the qualifications they set for citizenship and public office. Usually only the second mode of difference seriously affects their justice.

In Greek political life, the issue of justice as between the democratic and the oligarchic constitution is a conflict between those who think that all free men deserve the equality of citizenship and the opportunity to hold office, and those who think it is unjust to treat the rich and the poor as equals. The latter insist that citizenship should be restricted to the wealthy and that the magistracies should be reserved for men of considerable means.

Finding justice and injustice on both sides, Aristotle favors what he calls "the mixed constitution." This unites the justice of treating free men alike so far as citizenship goes, with the justice of discriminating between rich and poor with respect to public office. Such a mixture, he writes, "may be described generally as a fusion of oligarchy and democracy," since it attempts "to unite the freedom of the poor and the wealth of the rich." The mixed constitution, especially if accompanied by a numerical predominance of the middle class, seems to him to have greater stability, as well as more justice, than either of the pure types of constitution which, oppressive to either poor or rich, provoke revolution.

In modern political life, the issue between oligarchy and democracy tends toward a different resolution. The last defenders of the oligarchic constitution were men like Edmund Burke, Alexander Hamilton, and John Adams in the 18th century. Since then, the great constitutional reforms have progressively extended the franchise almost to the point of universal suffrage. These matters are, of course, further treated in the chapters on DEMOCRACY and OLIGARCHY.

POLITICAL REPRESENTATION, with a system of periodic elections, seems to be indispensable to constitutional government under modern conditions. The territorial extent and populousness of the nation-state as compared with the ancient city-state makes impossible direct participation by the whole body of citizens in the major functions of government.

Considering the ancient republics of Sparta, Rome, and Carthage, the writers of *The Federalist* try to explain the sense in which the principle of representation differentiates the American republic from these ancient constitutional governments. "The principle of representation," they say, "was neither unknown to the ancients nor wholly overlooked in their political constitutions. The true distinction between these and the American government lies *in the total exclusion of the people, in their collective capacity,* from any share in the *latter,* and not in the *total exclusion of the representatives of the people* from the administration of the *former.*"

The Federalists then go on to say that "the distinction . . . thus qualified must be admitted to leave a most advantageous superiority in favor of the United States. But to insure to this advantage its full effect, we must be careful not to separate it from the other advantage of an extensive territory. For it cannot be believed that any form of representative government could have succeeded within the narrow limits occupied by the democracies of Greece."

In their opinion, representative government is not merely necessitated by the conditions of modern society, but also has the political advantage of safeguarding constitutional government from the masses. As pointed out in the chapter on ARISTOCRACY, where the theory of representation is discussed, the officers of government chosen by the whole body of citizens are supposed—at least on one conception of representatives—to be more competent in the business of government than their constituents. It is in these terms that the Federalists advocate what they call "republican goverment" as opposed to "pure democracy."

Like the idea of political offices, the principle of representation seems to be inseparable from constitutionalism and constitutional government. Though the principle appears to a certain extent in ancient republics—whether oligarchies or democracies—ancient political writing does not contain a formal discussion of the theory of representation. That begins in medieval treatises which recognize the consultative or advisory function of those who represent the nobles and the commons at the king's court. But it is only in recent centuries—when legislation has become the exclusive function of representative assemblies—that the idea of representation and the theory of its practice assume a place of such importance that a political philosopher like J. S. Mill does not hesitate to identify representative with constitutional government.