

In conclusion, one can hardly deny that Crèvecoeur was right when he predicted that 'the man will get the better of the citizen, [that] his political maxims will vanish'; that those who in all earnestness say, 'The happiness of my family is the only object of my wishes', will be applauded by nearly everyone when, in the name of democracy, they vent their rage against the 'great personages who are so far elevated above the common rank of man' that their aspirations transcend their private happiness, or when, in the name of the 'common man' and some confused notion of liberalism, they denounce public virtue, which certainly is not the virtue of the husbandman, as mere ambition, and those to whom they owe their freedom as 'aristocrats' who (as in the case of poor John Adams) they believe were possessed by a 'colossal vanity'.⁴⁴ The conversion of the citizen of the revolutions into the private individual of nineteenth-century society has often been described, usually in terms of the French Revolution, which spoke of *citoyens* and *bourgeois*. On a more sophisticated level, we may consider this disappearance of the 'taste for political freedom' as the withdrawal of the individual into an 'inward domain of consciousness' where it finds the only 'appropriate region of human liberty'; from this region, as though from a crumbling fortress, the individual, having got the better of the citizen, will then defend himself against a society which in its turn gets 'the better of individuality'.⁴⁵ This process, more than the revolutions, determined the physiognomy of the nineteenth century as it partly does even that of the twentieth century.

CHAPTER FOUR

Foundation I:

Constitutio Libertatis

I

THAT there existed men in the Old World to dream of public freedom, that there were men in the New World who had tasted public happiness – these were ultimately the facts which caused the movement for restoration, for recovery of the old rights and liberties, to develop into a revolution on either side of the Atlantic. And no matter how far, in success and failure, events and circumstances were to drive them apart, the Americans would still have agreed with Robespierre on the ultimate aim of revolution, the constitution of freedom, and on the actual business of revolutionary government, the foundation of a republic. Or perhaps it was the other way round and Robespierre had been influenced by the course of the American Revolution when he formulated his famous 'Principles of Revolutionary Government'. For in America the armed uprising of the colonies and the Declaration of Independence had been followed by a spontaneous outbreak of constitution-making in all thirteen colonies – as though, in John Adams' words, 'thirteen clocks had struck as one' – so that there existed no gap, no hiatus, hardly a breathing spell between the war of liberation, the fight for independence which was the condition for freedom, and the constitution of the new states. Although it is true that 'the first act of the great drama', the 'late American war', was closed before the American Revolution had come to an end,¹ it is equally true that these two altogether different stages of the revolutionary process began at almost the same moment and continued to run parallel to each other all through the years of war. The importance of this development can hardly be over-

estimated. The miracle, if such it was, that saved the American Revolution was not that the colonists should have been strong and powerful enough to win a war against England but that this victory did not end 'with a multitude of Commonwealths, Crimes and Calamities ...; till at last the exhausted Provinces [would] sink into Slavery under the yoke of some fortunate Conqueror',² as John Dickinson had rightly feared. Such is indeed the common fate of a rebellion which is not followed by revolution, and hence the common fate of most so-called revolutions. If, however, one keeps in mind that the end of rebellion is liberation, while the end of revolution is the foundation of freedom, the political scientist at least will know how to avoid the pitfall of the historian who tends to place his emphasis upon the first and violent stage of rebellion and liberation, on the uprising against tyranny, to the detriment of the quieter second stage of revolution and constitution, because all the dramatic aspects of his story seem to be contained in the first stage and, perhaps, also because the turmoil of liberation has so frequently defeated the revolution. This temptation, which befalls the historian because he is a storyteller, is closely connected with the much more harmful theory that the constitutions and the fever of constitution-making, far from expressing truly the revolutionary spirit of the country, were in fact due to forces of reaction and either defeated the revolution or prevented its full development, so that — logically enough — the Constitution of the United States, the true culmination of this revolutionary process, is understood as the actual result of counter-revolution. The basic misunderstanding lies in the failure to distinguish between liberation and freedom; there is nothing more futile than rebellion and liberation unless they are followed by the constitution of the newly won freedom. For 'neither morals, nor riches, nor discipline of armies, nor all these together will do without a constitution' (John Adams).

Yet even if one resists this temptation to equate revolution with the struggle for liberation, instead of identifying revolution with the foundation of freedom, there remains the additional, and in our context more serious, difficulty that there is very little in form or content of the new revolutionary constitutions which

was even new, let alone revolutionary. The notion of constitutional government is of course by no means revolutionary in content or origin; it means nothing more or less than government limited by law, and the safeguard of civil liberties through constitutional guarantees, as spelled out by the various bills of rights which were incorporated into the new constitutions and which are frequently regarded as their most important part, never intended to spell out the new revolutionary powers of the people but, on the contrary, were felt to be necessary in order to limit the power of government even in the newly founded body politic. A bill of rights, as Jefferson remarked, was 'what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference'.³

In other words, constitutional government was even then, as it still is today, limited government in the sense in which the eighteenth century spoke of a 'limited monarchy', namely, a monarchy limited in its power by virtue of laws. Civil liberties as well as private welfare lie within the range of limited government, and their safeguard does not depend upon the form of government. Only tyranny, according to political theory a bastard form of government, does away with constitutional, namely, lawful government. However, the liberties which the laws of constitutional government guarantee are all of a negative character, and this includes the right of representation for the purposes of taxation which later became the right to vote; they are indeed 'not powers of themselves, but merely an exemption from the abuses of power';⁴ they claim not a share in government but a safeguard against government. Whether we trace the notion of this constitutionalism back to Magna Charta and hence to feudal rights, privileges, and pacts concluded between the royal power and the estates of the kingdom, or whether, on the contrary, we assume that 'nowhere do we find modern constitutionalism until an effective central government has been brought into existence',⁵ is relatively unimportant in our context. If no more had ever been at stake in the revolutions than this kind of constitutionalism, it would be as though the revolutions had remained true to their modest beginnings when they still

could be understood as attempts at restoration of 'ancient' liberties: the truth of the matter, however, is that this was not the case.

There is another and perhaps even more potent reason why we find it difficult to recognize the truly revolutionary element in constitution-making. If we take our bearings not by the revolutions of the eighteenth century but by the series of upheavals that followed upon them throughout the nineteenth and twentieth centuries, it seems as though we are left with the alternative between revolutions which become permanent, which do not come to an end and do not produce their end, the foundation of freedom, and those where in the aftermath of revolutionary upheaval some new 'constitutional' government eventually comes into existence that guarantees a fair amount of civil liberties and deserves, whether in the form of a monarchy or a republic, no more than the name of limited government. The first of these alternatives clearly applies to the revolutions in Russia and China, where those in power not only admit the fact but boast of having maintained indefinitely a revolutionary government; the second alternative applies to the revolutionary upheavals which swept nearly all European countries after the First World War, as well as to many colonial countries that won their independence from European rule after the Second World War. In these cases, constitutions were by no means the result of revolution; they were imposed, on the contrary, after a revolution had failed, and they were, at least in the eyes of the people living under them, the sign of its defeat, not of its victory. They were usually the work of experts, though not in the sense in which Gladstone had called the American Constitution 'the most wonderful work ever struck off at a given time by the brain and purpose of man', but rather in the sense in which Arthur Young even in 1792 felt that the French had adopted the 'new word', which 'they use as if a constitution was a pudding to be made by a recipe'.⁶ Their purpose was to stem the tide of revolution, and if they too served to limit power, it was the power of the government as well as the revolutionary power of the people whose manifestation had preceded their establishment.⁷

One, and perhaps not the least, of the troubles besetting a

discussion of these matters is merely verbal. The word 'constitution' obviously is equivocal in that it means the act of constituting as well as the law or rules of government that are 'constituted'; be these embodied in written documents or, as in the case of the British constitution, implied in institutions, customs, and precedents. It is clearly impossible to call by the same name and to expect the same results from those 'constitutions' which a non-revolutionary government adopts because the people and their revolution had been unable to constitute their own government, and those other 'constitutions' which either, in Gladstone's phrase, 'had proceeded from progressive history' of a nation or were the result of the deliberate attempt by a whole people at founding a new body politic. The distinction as well as the confusion are perfectly apparent in the famous definition of the word by Thomas Paine, a definition in which he only summed up and reasoned out what the fever of American constitution-making must have taught him: 'A constitution is not the act of a government, but of a people constituting a government'.⁸ Hence the need in France as in America for constituent assemblies and special conventions whose sole task it was to draft a constitution; hence also the need to bring the draft home and back to the people and have the Articles of Confederacy debated, clause by clause, in the town-hall meetings and, later, the articles of the Constitution in the state congresses. For the point of the matter was not at all that the provincial congresses of the thirteen colonies could not be trusted to establish state governments whose powers were properly and sufficiently limited, but that it had become a principle with the constituents 'that the people should endow the government with a constitution and not vice versa'.⁹

A brief glance at the various destinies of constitutional government outside the Anglo-American countries and spheres of influence should be enough to enable us to grasp the enormous difference in power and authority between a constitution imposed by a government upon a people and the constitution by which a people constitutes its own government. The constitutions of experts under which Europe came to live after the First World War were all based, to a large extent, upon the model of the

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American Constitution, and taken by themselves they should have worked well enough. Yet the mistrust they have always inspired in the people living under them is a matter of historical record as is the fact that fifteen years after the downfall of monarchical government on the European continent more than half of Europe lived under some sort of dictatorship, while the remaining constitutional governments, with the conspicuous exception of the Scandinavian countries and of Switzerland, shared the sad lack of power, authority, and stability which even then was already the outstanding characteristic of the Third Republic in France. For lack of power and the concomitant want of authority have been the curse of constitutional government in nearly all European countries since the abolition of absolute monarchies, and the fourteen constitutions of France between 1789 and 1875 have caused, even before the rainfall of postwar constitutions in the twentieth century, the very word to become a mockery. Finally, we may remember, the periods of constitutional government were nicknamed times of the 'system' (in Germany after the First World War and in France after the Second), a word by which the people indicated a state of affairs where legality itself was submerged in a system of half-corrupt connivances from which every right-minded person should be permitted to excuse himself since it hardly seemed worth while even to rise in revolt against it. In short, and in the words of John Adams, 'a constitution is a standard, a pillar, and a bond when it is understood, approved and beloved. But without this intelligence and attachment, it might as well be a kite or balloon, flying in the air.'¹⁰

The difference between a constitution that is the act of government and the constitution by which people constitute a government is obvious enough. To it must be added another difference which, though closely connected with it, is much more difficult to perceive. If there was anything which the constitution-makers of the nineteenth and twentieth centuries had in common with their American ancestors in the eighteenth century, it was a mistrust in power as such, and this mistrust was perhaps even more pronounced in the New World than it ever had been in the old countries. That man by his very nature is 'unfit to be trusted

with unlimited power', that those who wield power are likely to turn into 'ravenous beasts of prey', that government is necessary in order to restrain man and his drive for power and, therefore, is (as Madison put it) a reflection upon human nature' — these were commonplace in the eighteenth century no less than in the nineteenth, and they were deeply ingrained in the minds of the Founding Fathers. All this stands behind the bills of rights, and it formed the general agreement on the absolute necessity of constitutional government in the sense of limited government; and yet, for the American development it was not decisive. The founders' fear of too much power in government was checked by their great awareness of the enormous dangers of the rights and liberties of the citizen that would arise from within society. Hence, according to Madison, 'it is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part,' to save 'the rights of individuals, or of the minority . . . from interested combinations of the majority.'¹¹ This, if nothing else, required the constitution of public, governmental power whose very essence could never be derived from something which is a mere negative, i.e., constitutional limited government, although European constitution-makers and constitutionalists saw in it the quintessence of the blessings of the American Constitution. What they admired, and from the viewpoint of Continental history rightly, was in fact the blessings of 'mild government' as it had developed organically out of British history, and since these blessings were not only incorporated into all constitutions of the New World but most emphatically spelled out as the inalienable rights of all men, they failed to understand, on one hand, the enormous, overriding importance of the foundation of a republic and, on the other, the fact that the actual content of the Constitution was by no means the safeguard of civil liberties but the establishment of an entirely new system of power.

In this respect, the record of the American Revolution speaks an entirely clear, unambiguous language. It was not constitutionalism in the sense of 'limited', lawful government that preoccupied the minds of the founders. On this they were agreed

beyond the need for discussion or even clarification, and even in the days when feeling against England's king and Parliament ran highest in the country, they remained somehow conscious of the fact that they still dealt with a 'limited monarchy' and not with an absolute prince. When they declared their independence from this government, and after they had forsworn their allegiance to the crown, the main question for them certainly was not how to limit power but how to establish it, not how to limit government but how to found a new one. The fever of constitution-making which gripped the country immediately after the Declaration of Independence prevented the development of a power vacuum, and the establishment of new power could not be based upon what had always been essentially a negative on power, that is, the bills of rights.

This whole matter is so easily and frequently confused because of the important part the 'Declaration of the Rights of Man and the Citizen' came to play in the course of the French Revolution, where these rights indeed were assumed not to indicate the limitations of all lawful government, but on the contrary to be its very foundation. Quite apart from the fact that the declaration 'All men are born equal', fraught with truly revolutionary implications in a country which still was feudal in social and political organization, had no such implication in the New World, there is the even more important difference in emphasis with regard to the only absolutely new aspect in the enumeration of civil rights, and that is that these rights were now declared solemnly to be rights of all men, no matter who they were or where they lived. This difference in emphasis came about when the Americans, though quite sure that what they claimed from England were 'the rights of Englishmen', could no longer think of themselves in terms of 'a nation in whose veins the blood of freedom circulates' (Burke); even the trickle of non-English and non-British stock in their midst was enough to remind them: 'Whether you be English, Irish, Germans, or Swedes, . . . you are entitled to all the liberties of Englishmen and the freedom of this constitution.'¹² What they were saying and proclaiming was in fact that those rights which up to now had been enjoyed only by Englishmen should be enjoyed in

the future by all men's - in other words, all men should live under constitutional, 'limited' government. The proclamation of human rights through the French Revolution, on the contrary, meant quite literally that every man by virtue of being born had become the owner of certain rights. The consequences of this shifted emphasis are enormous, in practice no less than in theory. The American version actually proclaims no more than the necessity of civilized government for all mankind; the French version, however, proclaims the existence of rights independent of and outside the body politic, and then goes on to equate these so-called rights, namely the rights of man *qua* man, with the rights of citizens. In our context, we do not need to insist on the perplexities inherent in the very concept of human rights nor on the sad inefficacy of all declarations, proclamations, or enumerations of human rights that were not immediately incorporated into positive law, the law of the land, and applied to those who happened to live there. The trouble with these rights has always been that they could not but be less than the rights of nationals, and that they were invoked only as a last resort by those who had lost their normal rights as citizens. We need only to ward off from our considerations the fateful misunderstanding, suggested by the course of the French Revolution, that the proclamation of human rights or the guarantee of civil rights could possibly become the aim or content of revolution.

The aim of the state constitutions which preceded the Constitution of the Union, whether drafted by provincial congresses or by constitutional assemblies (as in the case of Massachusetts), was to create new centres of power after the Declaration of Independence had abolished the authority and power of crown and Parliament. On this task, the creation of new power, the founders and men of the Revolution brought to bear the whole arsenal of what they themselves called their 'political science', for political science, in their own words, consisted in trying to discover 'the forms and combinations of power in republics'.¹³ Highly aware of their own ignorance on the subject, they turned to history, collecting with a care amounting to pedantry all examples, ancient and modern, real and fictitious, of republican constitutions; what they tried to learn in order to

dispel their ignorance was by no means the safeguards of civil liberties – a subject on which they certainly knew much more than any previous republic – but the constitution of power. This was also the reason for the enormous fascination exerted by Montesquieu, whose role in the American Revolution almost equals Rousseau's influence on the course of the French Revolution; for the main subject of Montesquieu's great work, studied and quoted as an authority on government at least a decade before the outbreak of the Revolution, was indeed 'the constitution of political freedom',¹⁶ but the word 'constitution' in this context has lost all connotations of being a negative, a limitation and negation of power; the word means, on the contrary, that the 'grand temple of federal liberty' must be based on the foundation and correct distribution of power. It was precisely because Montesquieu – unique in this respect among the sources from which the founders drew their political wisdom – had maintained that power and freedom belonged together; that, conceptually speaking, political freedom did not reside in the I-will but in the I-can, and that therefore the political realm must be construed and constituted in a way in which power and freedom would be combined, that we find his name invoked in practically all debates on constitution.¹⁷ Montesquieu confirmed what the founders, from the experience of the colonies, knew to be right, namely, that liberty was 'a natural Power of doing or not doing whatever we have a Mind', and when we read in the earliest documents of colonial times that 'deputies thus chosen shall have power and liberty to appoint' we can still hear how natural it was for these people to use the two words almost as synonyms.¹⁸

It is well known that no question played a greater role in these debates than did the problem of the separation or the balance of powers, and it is perfectly true that the notion of such a separation was by no means Montesquieu's exclusive discovery. As a matter of fact, the idea itself – far from being the outgrowth of a mechanical, Newtonian world view, as has recently been suggested – is very old; it occurs, at least implicitly, in the traditional discussion of mixed forms of government and thus can be traced back to Aristotle, or at least to Polybius, who was perhaps the

first to be aware of some of the advantages inherent in mutual checks and balances. Montesquieu seems to have been unaware of this historical background; he had taken his bearings by what he believed to be the unique structure of the English constitution, and whether or not he interpreted this constitution correctly is of no relevance today and was of no great importance even in the eighteenth century. For Montesquieu's discovery actually concerned the nature of power, and this discovery stands in so flagrant a contradiction to all conventional notions on this matter that it has almost been forgotten, despite the fact that the foundation of the republic in America was largely inspired by it. The discovery, contained in one sentence, spells out the forgotten principle underlying the whole structure of separated powers: that only 'power arrests power', that is, we must add, without destroying it, without putting impotence in the place of power.¹⁹ For power can of course be destroyed by violence; this is what happens in tyrannies, where the violence of one destroys the power of the many, and which therefore, according to Montesquieu, are destroyed from within: they perish because they engender impotence instead of power. But power, contrary to what we are inclined to think, cannot be checked, at least not reliably, by laws, for the so-called power of the ruler which is checked in constitutional, limited, lawful government is in fact not power but violence, it is the multiplied strength of the one who has monopolized the power of the many. Laws, on the other hand, are always in danger of being abolished by the power of the many, and in a conflict between law and power it is seldom the law which will emerge as victor. Yet even if we assume that law is capable of checking power – and on this assumption all truly democratic forms of government must rest if they are not to degenerate into the worst and most arbitrary tyranny – the limitation which laws set upon power can only result in a decrease of its potency. Power can be stopped and still be kept intact only by power, so that the principle of the separation of power not only provides a guarantee against the monopolization of power by one part of the government, but actually provides a kind of mechanism, built into the very heart of government, through which new power is constantly gener-

ated, without, however, being able to overgrow and expand to the detriment of other centres or sources of power. Montesquieu's famous insight that even virtue stands in need of limitation and that even an excess of reason is undesirable occurs in his discussion of the nature of power;²⁰ to him, virtue and reason were powers rather than mere faculties, so that their preservation and increase had to be subject to the same conditions which rule over the preservation and increase of power. Certainly it was not because he wanted less virtue and less reason that Montesquieu demanded their limitation.

This side of the matter is usually overlooked because we think of the division of power only in terms of its separation in the three branches of government. The chief problem of the founders, however, was how to establish union out of thirteen 'sovereign', duly constituted republics; their task was the foundation of a 'confederate republic' which – in the language of the time, borrowed from Montesquieu – would reconcile the advantages of monarchy in foreign affairs with those of republicanism in domestic policy.²¹ And in this task of the Constitution there was no longer any question of constitutionalism in the sense of civil rights – even though a Bill of Rights was then incorporated into the Constitution as amendments, as a necessary supplement to it – but of erecting a system of powers that would check and balance in such a way that the power neither of the union nor of its parts, the duly constituted states, would decrease or destroy one another.

How well this part of Montesquieu's teaching was understood in the days of the foundation of the republic! On the level of theory, its greatest defender was John Adams, whose entire political thought turned about the balance of powers. And when he wrote: 'Power must be opposed to power, force to force, strength to strength, interest to interest, as well as reason to reason, eloquence to eloquence, and passion to passion', he obviously believed he had found in this very opposition an instrument to generate more power, more strength, more reason, and not to abolish them.²² On the level of practice and the erection of institutions, we may best turn to Madison's argument on the proportion and balancing of power between the federal

and the state governments. Had he believed in the current notions of the indivisibility of power – that divided power is less power²³ – he would have concluded that the new power of the union must be founded on powers surrendered by the states, so that the stronger the union was to be, the weaker its constituent parts were to become. His point, however, was that the very establishment of the Union had founded a new source of power which in no way drew its strength from the powers of the states, as it had not been established at their expense. Thus he insisted: 'Not the states ought to surrender their powers to the national government, rather the powers of the central government should be greatly enlarged . . . It should be set as a check upon the exercise by the state governments of the considerable powers which must still remain with them.'²⁴ Hence, if [the governments of the particular states] were abolished, the general government would be compelled by the principle of self-preservation to reinstate them in their proper jurisdiction'.²⁵ In this respect, the great and, in the long run, perhaps the greatest American innovation in politics as such was the consistent abolition of sovereignty within the body politic of the republic, the insight that in the realm of human affairs sovereignty and tyranny are the same. The defect of the Confederacy was that there had been no 'partition of power between the General and the Local Governments'; and that it had acted as the central agency of an alliance rather than as a government; experience had shown that in this alliance of powers there was a dangerous tendency for the allied powers not to act as checks upon one another but to cancel one another out, that is, to breed impotence.²⁶ What the founders were afraid of in practice was not power but impotence, and their fears were intensified by the view of Montesquieu, quoted throughout these discussions, that republican government was effective only in relatively small territories. Hence, the discussion turned about the very viability of the republican form of government, and both Hamilton and Madison called attention to another view of Montesquieu, according to which a confederacy of republics could solve the problems of larger countries under the condition that the constituted bodies – small republics – were capable of constituting

a new body politic, the confederate republic, instead of resigning themselves to a mere alliance.²⁷

Clearly, the true objective of the American Constitution was not to limit power but to create more power, actually to establish and duly constitute an entirely new power centre, destined to compensate the confederate republic, whose authority was to be exerted over a large, expanding territory, for the power lost through the separation of the colonies from the English crown. This complicated and delicate system, deliberately designed to keep the power potential of the republic intact and prevent any of the multiple power sources from drying up in the event of further expansion, 'of being increased by the addition of other members', was entirely the child of revolution.²⁸ The American Constitution finally consolidated the power of the Revolution, and since the aim of revolution was freedom, it indeed came to be what Bracton had called *Constitutio Libertatis*, the foundation of freedom.

To believe that the short-lived European postwar constitutions or even their predecessors in the nineteenth century, whose inspiring principle had been distrust of power in general and fear of the revolutionary power of the people in particular, could constitute the same form of government as the American Constitution, which had sprung from confidence in having discovered a power principle strong enough to found a perpetual union, is to be fooled by words.

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However obnoxious these misunderstandings may be, they are not arbitrary and hence cannot be ignored. They would not have arisen if it had not been for the historical fact that the revolutions had started as restorations, and that it was difficult indeed, most difficult for the actors themselves, to say when and why the attempt at restoration was transformed into the irresistible event of revolution. Since their original intention had not been the foundation of freedom but the recovery of the rights and liberties of limited government, it was only natural that the men of

revolution themselves, when finally confronted by the ultimate task of revolutionary government, the foundation of a republic, should be tempted to speak of the new freedom, born in the course of revolution, in terms of ancient liberties.

Something very similar is true with respect to the other key terms of revolution, the interrelated terms of power and authority. We mentioned before that no revolution ever succeeded, that few rebellions ever started, so long as the authority of the body politic was truly intact. Thus, from the very beginning, the recovery of ancient liberties was accompanied by the reinstitution of lost authority and lost power. And again, just as the old concept of liberty, because of the attempted restoration, came to exert a strong influence on the interpretation of the new experience of freedom, so the old understanding of power and authority, even if their former representatives were most violently denounced, almost automatically led the new experience of power to be channelled into concepts which had just been vacated. It is this phenomenon of automatic influences which indeed entitles the historians to state: 'The nation stepped into the shoes of the Prince' (F. W. Maitland) but 'not before the Prince himself had stepped into the pontifical shoes of Pope and Bishop' - and then to conclude that this was the reason why 'the modern Absolute State, even without a Prince, was able to make claims like a Church'.²⁹

Historically speaking, the most obvious and the most decisive distinction between the American and the French Revolutions was that the historical inheritance of the American Revolution was 'limited monarchy' and that of the French Revolution an absolutism which apparently reached far back into the first centuries of our era and the last centuries of the Roman Empire. Nothing, indeed, seems more natural than that a revolution should be predetermined by the type of government it overthrows; nothing, therefore, appears more plausible than to explain the new absolute, the absolute revolution, by the absolute monarchy which preceded it, and to conclude that the more absolute the ruler, the more absolute the revolution will be which replaces him. The records of both the French Revolution in the eighteenth century and the Russian Revolution which modelled

itself upon it in our own century could easily be read as one series of demonstrations of this plausibility. What else did even Sieyès do but simply put the sovereignty of the nation into the place which had been vacated by a sovereign king? What could have been more natural to him than to put the nation above the law, as the French king's sovereignty had long since ceased to mean independence from feudal pacts and obligations and, at least since the days of Bodin, had meant the true absoluteness of regal power, a *potestas legibus soluta*, power absolved from the laws? And since the person of the king had not only been the source of all earthly power, but his will the origin of all earthly law, the nation's will, obviously, from now on had to be the law itself.³⁰ On this point the men of the French Revolution were no less in complete agreement than the men of the American Revolution were in agreement on the necessity to limit government, and just as Montesquieu's theory of the separation of powers had become axiomatic for American political thought because it took its cue from the English constitution, so Rousseau's notion of a General Will, inspiring and directing the nation as though it were no longer composed of a multitude but actually formed one person, became axiomatic for all factions and parties of the French Revolution, because it was indeed the theoretical substitute for the sovereign will of an absolute monarch. The point of the matter was that the absolute monarch — unlike the constitutionally limited king — not only represented the potentially everlasting life of the nation, so that 'the king is dead, long live the king' actually meant that the king 'is a Corporation in himself that liveth ever',³¹ he also incarnated on earth a divine origin in which law and power coincided. His will, because it supposedly represented God's will on earth, was the source of both law and power, and it was this identical origin that made law powerful and power legitimate. Hence, when the men of the French Revolution put the people into the seat of the king it was almost a matter of course for them to see in the people not only, in accord with ancient Roman theory and in full agreement with the principles of the American Revolution, the source and the locus of all power, but the origin of all laws as well.

The singular good fortune of the American Revolution is undeniable. It occurred in a country which knew nothing of the predicament of mass poverty and among a people who had a widespread experience with self-government; to be sure, not the least of these blessings was that the Revolution grew out of a conflict with a 'limited monarchy'. In the government of king and Parliament from which the colonies broke away, there was no *potestas legibus soluta*, no absolute power absolved from laws. Hence, the framers of American constitutions, although they knew they had to establish a new source of law and to devise a new system of power, were never even tempted to derive law and power from the same origin. The seat of power to them was the people, but the source of law was to become the Constitution, a written document, an enduring objective thing, which, to be sure, one could approach from many different angles and upon which one could impose many different interpretations, which one could change and amend in accordance with circumstances, but which nevertheless was never a subjective state of mind, like the will. It has remained a tangible worldly entity of greater durability than elections or public-opinion polls. Even when, at a comparatively late date and, presumably, under the influence of Continental constitutional theory, the supremacy of the Constitution was argued 'on the ground solely of its rootage in popular will', it was felt that, once the decision was taken, it remained binding for the body politic to which it gave birth,³² and even if there were people who reasoned that in a free government the people must retain the power 'at any time, for any cause, or for no cause, but their own sovereign pleasure, to alter or annihilate both the mode and the essence of any former government, and adopt a new one in its stead',³³ they remained rather lonely figures in the Assembly. In this, as in other cases, what appeared in France as a genuine political or even philosophical problem came to the fore during the American Revolution in such an unequivocally vulgar form that it was discredited even before anybody had bothered to make a theory out of it. For, of course, those who expected from the Declaration of Independence 'a form of government [in which], by being independent of the rich men, every man would then be able to

do as he pleased, were never lacking,³⁴ yet they remained without any influence on theory or practice of the Revolution. And still, however great the good fortune of the American Revolution, it was not spared the most troublesome of all problems in revolutionary government, the problem of an absolute.

That the problem of an absolute is bound to appear in a revolution, that it is inherent in the revolutionary event itself, we might never have known without the American Revolution. If we had to take our cue solely from the great European revolutions: from the English civil war in the seventeenth century, the French Revolution in the eighteenth, and the October Revolution in the twentieth, we might be so overwhelmed with historical evidence pointing unanimously to the interconnection of absolute monarchy followed by despotic dictatorships as to conclude that the problem of an absolute in the political realm was due exclusively to the unfortunate historical inheritance, to the absurdity of absolute monarchy, which had placed an absolute, the person of the prince, into the body politic, an absolute for which the revolutions then erroneously and vainly tried to find a substitute. It is tempting indeed to blame absolutism, the antecedent of all but the American Revolution, for the fact that its fall destroyed the whole fabric of European government together with the European community of nations, and that the flames of revolutionary conflagration, kindled by the abuses of the *anciens régimes*, eventually were to set the whole world on fire. Whereby today it is no longer of great relevance whether the new absolute to be put into the place of the absolute sovereign was Sieyès's nation from the beginnings of the French Revolution or whether it became with Robespierre, at the end of four years of revolutionary history, the revolution itself. For what eventually set the world on fire was precisely a combination of these two, of national revolutions or revolutionary gaitalism, of nationalism speaking the language of revolution or of revolutions arousing the masses with nationalist slogans. And in neither case was the course of the American Revolution ever followed or repeated: constitution-making was again understood as the foremost and the noblest of all revolutionary deeds, and constitutional government, if it came into existence

at all, had a tendency to be swept away by the revolutionary movement which had brought it into power. Not constitutions, the end product and also the end of revolutions, but revolutionary dictatorships, designed to drive on and intensify the revolutionary movement, have thus far been the more familiar outcome of modern revolution — unless the revolution was defeated and succeeded by some kind of restoration.

The fallacy of such historical reflections, however legitimate, is that they take for granted what upon closer inspection turns out to be by no means a matter of course. European absolutism in theory and practice, the existence of an absolute sovereign whose will is the source of both power and law, was a relatively new phenomenon; it had been the first and most conspicuous consequence of what we call secularization, namely, the emancipation of secular power from the authority of the Church. Absolute monarchy, commonly and rightly credited with having prepared the rise of the nation-state, has been responsible, by the same token, for the rise of the secular realm with a dignity and a splendour of its own. The short-lived, tumultuous story of the Italian city-states, whose affinity with the later story of revolutions consists in a common harkening back to antiquity, to the ancient glory of the political realm, might have forewarned and could have foretold what the chances and what the perplexities would be that lay in store for the modern age in the realm of politics, except, of course, that there exist no such foretellings and forewarnings in history. Moreover, it was precisely the use of absolutism which for centuries clouded these perplexities because it seemed to have found, within the political realm itself, a fully satisfactory substitute for the lost religious sanction of secular authority in the person of the king or rather in the institution of kingship. But this solution, which the revolutions soon enough were to unmask as a pseudo-solution, served only to hide, for some centuries, the most elementary predicament of all modern political bodies, their profound instability, the result of some elementary lack of authority.

The specific sanction which religion and religious authority had bestowed upon the secular realm could not simply be replaced by an absolute sovereignty, which, lacking a transcendent

and transmundane source, could only degenerate into tyranny and despotism. The truth of the matter was that when the Prince had stepped into the pontifical shoes of Pope and Bishop, he did not, for this reason, assume the function and receive the sanctity of Bishop or Pope; in the language of political theory, he was not a successor but a usurper, despite all the new theories about sovereignty and the divine rights of princes. Secularization, the emancipation of the secular realm from the tutelage of the Church, inevitably posed the problem of how to found and constitute a new authority without which the secular realm, far from acquiring a new dignity of its own, would have lost even the derivative importance it had held under the auspices of the Church. Theoretically speaking, it is as though absolutism were attempting to solve this problem of authority without having recourse to the revolutionary means of a new foundation; it solved the problem, in other words, within the given frame of reference in which the legitimacy of rule in general, and the authority of secular law and power in particular, had always been justified by relating them to an absolute source which itself was not of this world. The revolutions, even when they were not burdened with the inheritance of absolutism as in the case of the American Revolution, still occurred within a tradition which was partly founded on an event in which the 'word had become flesh', that is, on an absolute that had appeared in historical time as a mundane reality. It was because of the mundane nature of this absolute that authority as such had become unthinkable without some sort of religious sanction, and since it was the task of the revolutions to establish a new authority, unaided by custom and precedent and the halo of immemorial time, they could not but throw into relief with unparalleled sharpness the old problem, not of law and power *per se*, but of the source of law which would bestow legality upon positive, posited laws, and of the origin of power which would bestow legitimacy upon the powers that be.

The enormous significance for the political realm of the lost sanction of religion is commonly neglected in the discussion of modern secularization, because the rise of the secular realm, which was the inevitable result of the separation of church and

state, of the emancipation of politics from religion, seems so obviously to have taken place at the expense of religion; through secularization, the Church lost much of her earthly property and, more important, the protection of secular power. Yet, as a matter of fact, this separation cut both ways, and just as one speaks of an emancipation of the secular from the religious, one may, and perhaps with even more rights, speak of an emancipation of religion from the demands and burdens of the secular, which had weighed heavily upon Christianity ever since the disintegration of the Roman Empire had forced the Catholic Church to assume political responsibilities. For 'true religion', as William Livingstone once pointed out, 'wants not the princes of this world to support it; but has in fact either languished or been adulterated wherever they meddled with it.'³⁵ The numerous difficulties and perplexities, theoretical and practical, that have beset the public, political realm ever since the rise of the secular, the very fact that secularization was accompanied by the rise of absolutism and the downfall of absolutism followed by revolutions whose chief perplexity was where to find an absolute from which to derive authority for law and power, could well be taken to demonstrate that politics and the state needed the sanction of religion even more urgently than religion and the churches had ever needed the support of princes.

The need for an absolute manifested itself in many different ways, assumed different disguises, and found different solutions. Its function within the political sphere, however, was always the same: it was needed to break two vicious circles, the one apparently inherent in human law-making, and the other inherent in the *penitio principii* which attends every new beginning, that is, politically speaking, in the very task of foundation. The first of these, the need of all positive, man-made laws for an external source to bestow legality upon them and to transcend as a 'higher law' the legislative act itself, is of course very familiar and was already a potent factor in the shaping of absolute monarchy. What Sieyès maintained with respect to the nation, that 'it would be ridiculous to assume that the nation is bound by the formalities or by the constitution to which it has subjected its mandates',³⁶ is equally true with respect to the

absolute prince, who indeed, like Sieyès's nation had 'to be the origin of all legality', the 'fountain of justice', and thus could not be subject to any positive laws. This was the reason why even Blackstone had maintained that an 'absolute despotic power must in all governments reside somewhere,'³⁷ whereby it is obvious that this absolute power becomes despotic once it has lost its connection with a higher power than itself. That Blackstone calls this power despotic is a clear indication of the extent to which the absolute monarch had cut himself loose, not from the political order over which he ruled, but from the divine or natural-law order to which he had remained subject prior to the modern age. Yet, if it is true that the revolutions did not 'invent' the perplexities of a secular political realm, it is a fact that with their arrival, that is, with the necessity of making new laws and of founding a new body politic, former 'solutions' – such as the hope that custom would function as a 'higher law' because of a 'transcendental quality' ascribed to 'its vast antiquity,'³⁸ or the belief that the exalted position of the monarch as such would surround the whole governmental sphere with an aura of sanctity, as in the often quoted appraisal of the British monarchy by Bagehot: 'The English monarchy strengthens our government with the strength of religion' – stood now revealed as facile expedients and subterfuges. This exposure of the dubious nature of government in the modern age occurred in bitter earnest only when and where revolutions eventually broke out. But in the realm of opinion and ideology it came to dominate political discussion everywhere, to divide the discussants into radicals who recognized the fact of revolution without understanding its problems, and conservatives who clung to tradition and the past as to fetishes with which to ward off the future, without understanding that the very emergence of revolution on the political scene as event or as threat had demonstrated in actual fact that this tradition had lost its anchorage, its beginning and principle, and was cut adrift.

Sieyès, who, in the field of theory, had no peer among the men of the French Revolution, broke the vicious circle, and the *petitio principii* of which he spoke so eloquently, first by draw-

ing his famous distinction between a *pouvoir constituant* and a *pouvoir constitué* and, second, by putting the *pouvoir constituant*, that is, the nation, into a perpetual 'state of nature'. ('On doit concevoir les Nations sur la terre, comme des individus, hors du lien social . . . dans l'état de nature'.) Thus, he seemingly solved both problems, the problem of the legitimacy of the new power, the *pouvoir constitué*, whose authority could not be guaranteed by the Constituent Assembly, the *pouvoir constituant*, because the power of the Assembly itself was not constitutional and could never be constitutional since it was prior to the constitution itself, and the problem of the legality of the new laws which needed a 'source and supreme master', the 'higher law' from which to derive their validity. Both power and law were anchored in the nation, or rather in the will of the nation, which itself remained outside and above all governments and all laws.³⁹ The constitutional history of France, where even during the revolution constitution followed upon constitution while those in power were unable to enforce any of the revolutionary laws and decrees, could easily be read as one monotonous record illustrating again and again what should have been obvious from the beginning, namely that the so-called will of a multitude (if this is to be more than a legal fiction) is ever-changing by definition, and that a structure built on it as its foundation is built on quicksand. What saved the nation-state from immediate collapse and ruin was the extraordinary case with which the national will could be manipulated and imposed upon whenever someone was willing to take the burden or the glory of dictatorship upon himself. Napoleon Bonaparte was only the first in a long series of national statesmen who, to the applause of a whole nation, could declare: 'I am the *pouvoir constituant*.' However, while the dictate of one will achieved for short periods the nation-state's fictive ideal of unanimity, it was not will but interest, the solid structure of a class society, that bestowed upon the nation-state for the longer periods of its history its measure of stability. And this interest – the *intérêt du corps*, in the language of Sieyès, by which not the citizen but the individual allies itself only with some others' – was never an expression of the will but, on the contrary, the

manifestation of the world or rather of those parts of the world which certain groups, *corps*, or classes had in common because they were situated between them.⁴⁰

Theoretically, it is obvious that Sieyès's solution for the perplexities of foundation, the establishment of a new law and the foundation of a new body politic, had not resulted and could not result in the establishment of a republic in the sense of an empire of laws and not of men' (Harrington), but had replaced monarchy, or one-man rule, with democracy, or rule by the majority. We find it difficult to perceive how much was at stake in this early shift from the republic to the democratic form of government because we commonly equate and confound majority rule with majority decision. The latter, however, is a technical device, likely to be adopted almost automatically in all types of deliberative councils and assemblies, whether these are the whole electorate or a town-hall meeting or small councils of chosen advisers to the respective rulers. In other words, the principle of majority is inherent in the very process of decision-making and thus is present in all forms of government, including despotism, with the possible exception only of tyranny. Only where the majority, after the decision has been taken, proceeds to liquidate politically, and in extreme cases physically, the opposing minority does the technical device of majority decision degenerate into majority rule.⁴¹ These decisions, to be sure, can be interpreted as expressions of will, and no one will doubt that under modern conditions of political equality they present and represent the ever-changing political life of a nation. The point of the matter, however, is that in the republican form of government such decisions are made, and this life is conducted, within the framework and according to the regulations of a constitution which, in turn, is no more the expression of a national will or subject to the will of a majority than a building is the expression of the will of its architect or subject to the will of its inhabitants. The great significance attributed, on both sides of the Atlantic, to the constitutions as written documents testifies to their elementary objective, worldly character perhaps more than anything else. In America, at any rate, they were framed with the express and conscious intention to prevent, as far as humanly

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possible, the procedures of majority decisions from generating into the 'elective despotism' of majority rule.⁴²

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The great and fateful misfortune of the French Revolution was that none of the constituent assemblies could command enough authority to lay down the law of the land; the reproach rightly levelled against them was always the same: they lacked the power to constitute by definition; they themselves were unconstitutional. Theoretically, the fateful blunder of the men of the French Revolution consisted in their almost automatic, uncritical belief that power and law spring from the selfsame source. Conversely, the great good fortune of the American Revolution was that the people of the colonies, prior to their conflict with England, were organized in self-governing bodies, that the revolution - to speak the language of the eighteenth century - did not throw them into a state of nature,⁴³ that there never was any serious questioning of the *pouvoir constituant* of those who framed the state constitutions and, eventually, the Constitution of the United States. What Madison proposed with respect to the American Constitution, namely, to derive its 'general authority . . . entirely from the subordinate authorities',⁴⁴ repeated only on a national scale what had been done by the colonies themselves when they constituted their state governments. The delegates to the provincial congresses or popular conventions which drafted the constitutions for state governments had derived their authority from a number of subordinate, duly authorized bodies - districts, counties, townships; to preserve these bodies unimpaired in their power was to preserve the source of their own authority intact. Had the Federal Convention, instead of creating and constituting the new federal power, chosen to curtail and abolish state powers, the founders would have met immediately the perplexities of their French colleagues; they would have lost their *pouvoir constituant* - and this, probably, was one of the reasons why even the most convinced supporters of a strong central government did not want to abolish

the powers of state governments altogether.⁴⁵ Not only was the federal system the sole alternative to the nation-state principle; it was also the only way not to be trapped in the vicious circle of *pouvoir constituant* and *pouvoir constitué*.

The astounding fact that the Declaration of Independence was preceded, accompanied, and followed by constitution-making in all thirteen colonies revealed all of a sudden to what an extent an entirely new concept of power and authority, an entirely novel idea of what was of prime importance in the political realm had already developed in the New World, even though the inhabitants of this world spoke and thought in the terms of the Old World and referred to the same sources for inspiration and confirmation of their theories. What was lacking in the Old World were the townships of the colonies, and, seen with the eyes of a European observer, 'the American Revolution broke out, and the doctrine of the sovereignty of the people came out of the townships and took possession of the state.'⁴⁶ Those who received the power to constitute, to frame constitutions, were duly elected delegates of constituted bodies; they received their authority from below, and when they held fast to the Roman principle that the seat of power lay in the people, they did not think in terms of a fiction and an absolute, the nation above all authority and absolved from all laws, but in terms of a working reality, the organized multitude whose power was exerted in accordance with laws and limited by them. The American revolutionary insistence on the distinction between a republic and a democracy or majority rule hinges on the radical separation of law and power, with clearly recognized different origins, different legitimations, and different spheres of application.

What the American Revolution actually did was to bring the new American experience and the new American concept of power out into the open. Like prosperity and equality of condition, this new power concept was older than the Revolution, but unlike the social and economic happiness of the New World - which would have resulted in abundance and affluence under almost any form of government - it would hardly have survived without the foundation of a new body politic, designed explicitly

to preserve it; without revolution, in other words, the new power principle would have remained hidden, it might have fallen into oblivion or be remembered as a curiosity, of interest to anthropologists and local historians, but of no interest to statecraft and political thought.

Power - as the men of the American Revolution understood it as a matter of course because it was embodied in all institutions of self-government throughout the country - was not only prior to the Revolution, it was in a sense prior to the colonization of the continent. The Mayflower Compact was drawn up on the ship and signed upon landing. For our argument, it is perhaps of no great relevance, though it would be interesting to know whether the Pilgrims had been prompted to 'covenant' because of the bad weather which prevented their landing farther south within the jurisdiction of the Virginia Company that had granted them their patent, or whether they felt the need 'to combine themselves together' because the London recruits were an 'undesirable lot' challenging the jurisdiction of the Virginia Company and threatening to 'use their owne libertie'.⁴⁷ In either case, they obviously feared the so-called state of nature, the untrod wilderness, unlimited by any boundary, as well as the unlimited initiative of men bound by no law. This fear is not surprising; it is the justified fear of civilized men who, for whatever reasons, have decided to leave civilization behind them and strike out on their own. The really astounding fact in the whole story is that their obvious fear of one another was accompanied by the no less obvious confidence they had in their own power, granted and confirmed by no one and as yet unsupported by any means of violence, to combine themselves together into a 'civil Body Politick' which, held together solely by the strength of mutual promise 'in the Presence of God and one another', supposedly was powerful enough to 'enact, constitute, and frame all necessary laws and instruments of government. This deed quickly became a precedent, and when, less than twenty years later, colonists from Massachusetts emigrated to Connecticut, they framed their own 'Fundamental Orders' and 'plantation covenant' in a still uncharted wilderness, so that when the royal charter finally arrived to unite the new settlements into the

colony of Connecticut it sanctioned and confirmed an already existing system of government. And precisely because the royal charter of 1662 had only sanctioned the Fundamental Orders of 1639, the self-same charter could be adopted in 1776, virtually unchanged, as 'the Civil Constitution of this State under the sole authority of the people thereof, independent of any King and Prince whatever.'

Since the colonial covenants had originally been made without any reference to king or prince, it was as though the Revolution liberated the power of covenant and constitution-making as it had shown itself in the earliest days of colonization. The unique and all-decisive distinction between the settlements of North America and all other colonial enterprises was that only the British emigrants had insisted, from the very beginning, that they constitute themselves into 'civil bodies politic'. These bodies, moreover, were not conceived as governments, strictly speaking; they did not imply rule and the division of the people into rulers and ruled. The best proof of this is the simple fact that the people thus constituted could remain, for more than a hundred and fifty years, the royal subjects of the government of England. These new bodies politic really were 'political societies,' and their great importance for the future lay in the formation of a political realm that enjoyed power and was entitled to claim rights without possessing or claiming sovereignty.⁴⁸ The greatest revolutionary innovation, Madison's discovery of the federal principle for the foundation of large republics, was partly based upon an experience, upon the intimate knowledge of political bodies whose internal structure predetermined them, as it were, and conditioned its members for a constant enlargement whose principle was neither expansion nor conquest but the further combination of powers. For not only the basic federal principle of uniting separate and independently constituted bodies, but also the name 'confederation' in the sense of 'combination' or 'association' was actually discovered in the earliest times of colonial history, and even the new name of the union to be called the United States of America was suggested by the short-lived New England Confederation to be 'called by the name of United Colonies of New England'.⁴⁹ And it was this

experience, rather than any theory, which emboldened Madison to elaborate and affirm a casual remark of Montesquieu, namely that the republican form of government, if based upon the federal principle, was appropriate for large and growing territories.⁵⁰

John Dickinson, who once almost casually remarked, 'Experience must be our only guide. Reason may mislead us,'⁵¹ may have been dimly aware of this unique but theoretically inarticulate background of the American experiment. It has been said that 'America's debt to the idea of the social contract is so huge as to defy measurement,'⁵² but the point of the matter is that the early colonists, not the men of the Revolution, 'put the idea into practice', and they certainly had no notion of any theory. On the contrary, if Locke in a famous passage states, 'That which begins and actually constitutes any political society is nothing but the consent of any number of freemen capable of majority, to unite and incorporate into such society,' and then calls this act the 'beginning to any lawful government in the world', it rather looks as though he was more influenced by the facts and events in America, and perhaps in a more decisive manner, than the founders were influenced by his *Treatises of Civil Government*.⁵³ The proof of the matter - if proof in such matters can exist at all - lies in the curious and, as it were, innocent way in which Locke construed this 'original compact', in line with the current social-contract theory, as a surrender of rights and powers to either the government or the community, that is, not at all as a 'mutual' contract but as an agreement in which an individual person resigns his power to some higher authority and consents to be ruled in exchange for a reasonable protection of his life and property.⁵⁴

Before we proceed, we must recall that in theory the seventeenth century clearly distinguished between two kinds of 'social contract'. One was concluded between individual persons and supposedly gave birth to society; the other was concluded between a people and its ruler and supposedly resulted in legitimate government. However, the decisive differences between these two kinds (which have hardly more in common than a commonly shared and misleading name) were early neglected

because the theorists themselves were primarily interested in finding a universal theory covering all forms of public relationships, social as well as political, and all kinds of obligations; hence, the two possible alternatives of 'social contract', which, as we shall see, actually are mutually exclusive, were seen, with more or less conceptual clarity, as aspects of a single twofold contract. In theory, moreover, both contracts were fictions, the fictitious explanations of existing relationships between the members of a community called society, or between this society and its government; and while the history of the theoretical fictions can be traced back deep into the past, there had been no instance, prior to the colonial enterprise of the British people, when even a remote possibility of testing their validity in actual fact had presented itself.

Schematically, the chief differences between these two kinds of social contract may be enumerated as follows: The mutual contract by which people bind themselves together in order to form a community is based on reciprocity and presupposes equality; its actual content is a promise, and its result is indeed a 'society' or 'cosociation' in the old Roman sense of *societas*, which means alliance. Such an alliance gathers together the isolated strength of the allied partners and binds them into a new power structure by virtue of 'free and sincere promises'.⁵⁸ In the so-called social contract between a given society and its ruler, on the other hand, we deal with a fictitious, aboriginal act on the side of each member, by virtue of which he gives up his isolated strength and power to constitute a government; far from gaining a new power, and possibly more than he had before, he resigns his power such as it is, and far from binding himself through promises, he merely expresses his 'consent' to be ruled by the government, whose power consists of the sum total of forces which all individual persons have channelled into it and which are monopolized by the government for the alleged benefit of all subjects. As far as the individual person is concerned, it is obvious that he gains as much power by the system of mutual promises as he loses by his consent to a monopoly of power in the ruler. Conversely, those who 'covenant and combine themselves together' lose, by virtue of reciprocity, their isolation,

while in the other instance it is precisely their isolation which is safeguarded and protected.

Whereas the act of consent, accomplished by each individual person in his isolation, stands indeed only 'in the Presence of God', the act of mutual promise is by definition enacted 'in the presence of one another'; it is in principle independent of religious sanction. Moreover, a body politic which is the result of covenant and 'combination' becomes the very source of power for each individual person who outside the constituted political realm remains impotent; the government which, on the contrary, is the result of consent acquires a monopoly of power so that the governed are politically impotent so long as they do not decide to recover their original power in order to change the government and entrust another ruler with their power.

In other words, the mutual contract where power is constituted by means of promise contains *in nuce* both the republican principle, according to which power resides in the people, and where a 'mutual subjection' makes of rulership an absurdity — 'if the people be governors, who shall be governed'⁵⁹ — and the federal principle, the principle of 'a Commonwealth for increase'⁶⁰ (as Harrington called his utopian *Oceana*), according to which constituted political bodies can combine and enter into lasting alliances without losing their identity. It is equally obvious that the social contract which demands the resignation of power to the government and the consent to its rule contains *in nuce* both the principle of absolute rulership, of an absolute monopoly of power 'to overawe them all' (Hobbes) (which, incidentally, is liable to be construed in the image of divine power, since only God is omnipotent), and the national principle according to which there must be one representative of the nation as a whole, and where the government is understood to incorporate the will of all nationals.

'In the beginning', Locke once remarked, 'all the world was America.' For all practical purposes, America should have presented to the social-contract theories that beginning of society and government which they had assumed to be the fictitious condition without which the existing political realities could be neither explained nor justified. And the very fact that the sudden

rise and great variety of social-contract theories during the early centuries of the modern age were preceded and accompanied by these earliest compacts, combinations, 'cosociations, and confederations in colonial America would indeed be very suggestive, if it were not for the undeniable other fact that these theories in the Old World proceeded without ever mentioning the actual realities in the New World. Nor are we entitled to assert that the colonists, departing from the Old World, took with them the wisdom of new theories, eager, as it were, for a new land in which to test them out and to apply them to a novel form of community. This eagerness for experimentation, and the concomitant conviction of absolute novelty, of a *novus ordo saeculorum*, was conspicuously absent from the minds of the colonists, as it was conspicuously present in the minds of those men who one hundred and fifty years later were to make the Revolution. If there was any theoretical influence that contributed to the compacts and agreements in early American history, it was, of course, the Puritans' reliance on the Old Testament, and especially their rediscovery of the concept of the covenant of Israel, which indeed became for them an 'instrument to explain almost every relation of man to man and man to God'. But while it may be true that 'the Puritan theory of the origin of the church in the consent of the believers led directly to the popular theory of the origin of government in the consent of the governed',⁵⁷ this could not have led to the other much less current theory of the origin of a 'civil body politic' in the mutual promise and binding of its constituents. For the Biblical covenant as the Puritans understood it was a compact between God and Israel by virtue of which God gave the law and Israel consented to keep it, and while this covenant implied government by consent, it implied by no means a political body in which rulers and ruled would be equal, that is, where actually the whole principle of rulership no longer applied.⁵⁸

Once we turn from these theories and speculations about influences to the documents themselves and their simple, uncluttered, and often awkward language, we see immediately that it is an event rather than a theory or a tradition we are confronted with, an event of the greatest magnitude and the greatest

import for the future, enacted on the spur of time and circumstances, and yet thought out and considered with the greatest care and circumspection. What prompted the colonists 'solemnly and mutually in the Presence of God and one another, [to] covenant and combine ourselves together into a civil Body Politick . . . ; and by virtue hereof [to] enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Offices, from time to time, as shall be thought most meet and convenient for the general Good of the Colony; unto which we promise all due Submission and Obedience' (as the Mayflower Compact has it), were the 'difficulties and discouragements which in all probabilities must be forecast upon the execution of this business'. Clearly the colonists, even before embarking, had rightly and thoroughly considered 'that this whole adventure grows upon the joint confidence we have in each others fidelity and resolution herein, so as no man of us would have adventured it without assurance of the rest'. Nothing but the simple and obvious insight into the elementary structure of joint enterprise as such, the need 'for the better encouragement of ourselves and others that shall joyne with us in this action', caused these men to become obsessed with the notion of compact and prompted them again and again 'to promise and bind' themselves to one another.⁵⁹ No theory, theological or political or philosophical, but their own decision to leave the Old World behind and to venture forth into an enterprise entirely of their own led into a sequence of acts and occurrences in which they would have perished, had they not turned their minds to the matter long and intensely enough to discover, almost by inadvertence, the elementary grammar of political action and its more complicated syntax, whose rules determine the rise and fall of human power. Neither grammar nor syntax was something altogether new in the history of Western civilization; but to find experiences of equal import in the political realm and to read a language of equal authenticity and originality - namely, so incredibly free of conventional idioms and set formulas - in the huge arsenal of historical documents, one might have to go back into a very distant past indeed, a past, at any rate, of which the settlers were totally ignorant.⁶⁰

What they discovered, to be sure, was no theory of social contract in either of its two forms, but rather the few elementary truths on which this theory rests.

For our purpose in general, and our attempt to determine with some measure of certainty the essential character of the revolutionary spirit in particular, it may be worth while to pause here long enough to translate, however tentatively, the gist of these pre-revolutionary and even pre-colonial experiences into the less direct but more articulate language of political thought. We then may say that the specifically American experience had taught the men of the Revolution that action, though it may be started in isolation and decided upon by single individuals for very different motives, can be accomplished only by some joint effort in which the motivation of single individuals — for instance, whether or not they are an 'undesirable lot' — no longer counts, so that homogeneity of past and origin, the decisive principle of the nation-state, is not required. The joint effort equalizes very effectively the differences in origin as well as in quality. Here, moreover, we may find the root of the surprising so-called realism of the Founding Fathers with respect to human nature. They could afford to ignore the French revolutionary proposition that man is good outside society, in some fictitious original state, which, after all, was the proposition of the Age of Enlightenment. They could afford to be realistic and even pessimistic in this matter because they knew that whatever men might be in their singularity, they could bind themselves into a community which, even though it was composed of 'sinners', need not necessarily reflect this 'sinful' side of human nature. Hence, the same social state which to their French colleagues had become the root of all human evil was to them the only reasonable life for a salvation from evil and wickedness at which men might arrive even in this world and even by themselves, without any divine assistance. Here, incidentally, we may also see the authentic source of the much misunderstood American version of the then current belief in the perfectibility of man. Before American common philosophy fell prey to Rousseauan notions in these matters — and this did not happen prior to the nineteenth century — American faith was not at all based on a

semi-religious trust in human nature, but on the contrary, on the possibility of checking human nature in its singularity by virtue of common bonds and mutual promises. The hope for man in his singularity lay in the fact that not man but men inhabit the earth and form a world between them. It is human worldliness that will save men from the pitfalls of human nature. And the strongest argument, therefore, John Adams could muster against a body politic dominated by a single assembly was that it was liable to all the vices, follies and frailties of an individual.⁶¹

Closely connected with this is an insight into the nature of human power. In distinction to strength, which is the gift and the possession of every man in his isolation against all other men, power comes into being only if and when men join themselves together for the purpose of action, and it will disappear when, for whatever reason, they disperse and desert one another. Hence, binding and promising, combining and covenanting are the means by which power is kept in existence; where and when men succeed in keeping intact the power which sprang up between them during the course of any particular act or deed, they are already in the process of foundation, of constituting a stable worldly structure to house, as it were, their combined power of action. There is an element of the world-building capacity of man in the human faculty of making and keeping promises. Just as promises and agreements deal with the future and provide stability in the ocean of future uncertainty where the unpredictable may break in from all sides, so the constituting, founding, and world-building capacities of man concern always not so much ourselves and our own time on earth as our 'successor', and 'posterities'. The grammar of action: that action is the only human faculty that demands a plurality of men; and the syntax of power: that power is the only human attribute which applies solely to the worldly in-between space by which men are mutually related, combine in the act of foundation by virtue of the making and the keeping of promises, which, in the realm of politics, may well be the highest human faculty.

In other words, what had happened in colonial America prior to the Revolution (and what had happened in no other part of the world, neither in the old countries nor in the new colonies)

was, theoretically speaking, that action had led to the formation of power and that power was kept in existence by the then newly discovered means of promise and covenant. The force of this power, engendered by action and kept by promises, came to the fore when, to the great surprise of all the great powers, the colonies, namely, the townships and provinces, the counties and cities, their numerous differences amongst themselves notwithstanding, won the war against England. But this victory was a surprise only for the Old World; the colonists themselves, with a hundred and fifty years of covenant-making behind them, rising out of a country which was articulated from top to bottom – from provinces or states down to cities and districts, townships, villages, and counties – into duly constituted bodies, each a commonwealth of its own, with representatives ‘freely chosen by the consent of loving friends and neighbours’,⁶² each, moreover, designed ‘for increase’ as it rested on the mutual promises of those who were ‘cohabiting’ and who, when they ‘conjoynd [them] selves to be as one Publike State or Commonwealth’, had planned not only for their ‘successors’ but even for ‘such as shall be adjoynd to [them] at any tyme hereafter’⁶³ – the men who out of the uninterrupted strength of this tradition ‘bid a final adieu to Britain’ knew their chances from the beginning; they knew of the enormous power potential that arises when men ‘mutually pledge to each other [their] lives, [their] Fortunes and their sacred Honour’.⁶⁴

This was the experience that guided the men of the Revolution; it had taught not only them but the people who had delegat- ed and ‘so betrusted’ them, how to establish and found public bodies, and as such it was without parallel in any other part of the world. The same, however, is by no means true of their reason, or rather reasoning, of which Dickinson rightly feared that it might mislead them. Their reason, indeed, both in style and content was formed by the Age of Enlightenment as it had spread to both sides of the Atlantic; they argued in the same terms as their French or English colleagues, and even their dis- agreements were by and large still discussed within the frame- work of commonly shared references and concepts. Thus, Jeffer- son could speak of the consent by the people from which govern-

ments ‘derive their just powers’ in the same Declaration which he closes on the principle of mutual pledges, and neither he nor anybody else became aware of the simple and elementary differ- ence between ‘consent’ and mutual promise, or between the two types of social-contract theory. This lack of conceptual clarity and precision with respect to existing realities and experiences has been the curse of Western history ever since, in the after- math of the Periclean Age, the men of action and the men of thought parted company and thinking began to emancipate itself altogether from reality, and especially from political factuality and experience. The great hope of the modern age and the modern age’s revolution has been, from the beginning, that this rift might be healed; one of the reasons why this hope thus far has not been fulfilled, why, in the words of Tocqueville, not even the New World could bring forth a new political science, lies in the enormous strength and resiliency of our tradition of thought, which has withstood all the reversals and transforma- tion of values through which the thinkers of the nineteenth century tried to undermine and to destroy it.

However that may be, the fact of the matter, as it relates to the American Revolution, was that experience had taught the colonists that royal and company charters confirmed and legal- ized rather than established and founded their ‘commonwealth’, that they were ‘subject to the laws which they adopted at their first settlement, and to such others as have been since made by their respective Legislatures’, and that such liberties were ‘con- firmed by the political constitutions they have respectively as- sumed, and also by several charters of compact from the Crown.’⁶⁵ It is true, ‘the colonial theorists wrote much about the British constitution, the rights of Englishmen, and even of the laws of nature, but they accepted the British assumption that colonial governments derived from British charters and com- missions.’⁶⁶ Yet the essential point even in these theories was the curious interpretation, or rather misinterpretation, of the British constitution as a fundamental law which could limit the legis- lative powers of Parliament. This, clearly, meant understand- ing the British constitution in the light of American compacts and agreements, which indeed were such ‘fundamental Law’;

such 'fixed' authority, the 'bounds' of which even the supreme legislature might not 'overleap . . . without destroying its own foundation'. It was precisely because the Americans so firmly believed in their own compacts and agreements, that they would appeal to a British constitution and their 'constitutional Right', 'exclusion of any Consideration of Charter Rights'; whereby it is even relatively unimportant that they, following the fashion of the time, asserted this to be an 'unalterable Right, in nature', since, to them at least, this right had become law only because they thought it to be 'ingrafted into the British Constitution, as a fundamental Law'.⁶⁷

And again, experience had taught the colonists enough about the nature of human power to conclude from the by no means intolerable abuses of power by a particular king that kingship as such is a form of government fit for slaves, and that 'an American republic . . . is the only government which we wish to see established; for we can never be willingly subject to any other King than he who, being possessed of infinite wisdom, goodness and rectitude, is alone fit to possess unlimited power';⁶⁸ but the colonial theorists were still debating at length the advantages and disadvantages of the various forms of government — as though there were any choice in this matter. Finally, it was experience — 'the unified wisdom of North America . . . collected in a general congress'⁶⁹ — rather than theory or learning, that taught the men of the Revolution the real meaning of the Roman *potestas in populo*, that power resides in the people. They knew that the principle of *potestas in populo* is capable of inspiring a form of government only if one adds, as the Romans did, *auctoritas in senatu*, authority resides in the senate, so that government itself consists of both power and authority, or, as the Romans had it, *senatus populusque Romanus*. What the royal charters and the loyal attachment of the colonies to king and Parliament in England had done for the people in America was to provide their power with the additional weight of authority; so that the chief problem of the American Revolution, once this source of authority had been severed from the colonial body politic in the New World, turned out to be the establishment and foundation not of power but of authority.

CHAPTER FIVE

Foundation II:

Novus Ordo Saeculorum

Magnus ab integro saeculorum nascitur ordo. — VIRGIL

I

Power and authority are no more the same than are power and violence. We have hinted already at the latter distinction, which, however, we now must recall once more. The relevance of these differences and distinctions becomes especially striking when we consider the enormously and disastrously different actual outcomes of the one tenet the men of the two eighteenth-century revolutions held in common: the conviction that source and origin of legitimate political power resides in the people. For the agreement was in appearance only. The people in France, *le peuple* in the sense of the Revolution, were neither organized nor constituted; whatever 'constituted bodies' existed in the Old World, diets and parliaments, orders and estates, rested on privilege, birth, and occupation. They represented particular private interests but left the public concern to the monarch, who, in an enlightened despotism, was supposed to act as 'a single enlightened person against many private interests';¹ whereby it was understood that in a 'limited monarchy' these bodies had the right to voice grievances and to withhold consent. None of the European parliaments was a legislative body; they had at best the right to say 'yes' or 'no'; the initiative, however, or the right to act did not rest with them. No doubt the initial slogan of the American Revolution, 'No taxation without representation', still belonged in this sphere of 'limited monarchy' whose fundamental principle was consent of the subjects. We have difficulties today in perceiving the great potency of this prin-