WHEN RIGHTS CLASH: APPLYING OUR PRINCIPLED AND PRUDENTIAL CONSTITUTION

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PROLOGUE FROM A FRAYING SOCIETY

Because of extreme levels of poverty, drug abuse, violent crime, and an innumerable variety of social ills, inner-city neighborhoods in many American metropolitan cities are in complete disorder. The Director of Public Safety for the Chicago Housing Authority (CHA), in one notable example, testified that the rate of murder, sexual assault, robbery, and other violent crimes is twice as high in Chicago's low-income public housing neighborhoods as in greater Chicago.[1] In a number of these cities, the police have responded to this dire situation with a strong-arm approach to securing the most violent neighborhoods, in an attempt to bring some degree of order to them.[2]

For example, after a seven-year-old resident of the Robert Taylor Homes -- the most violent public housing project in south Chicago -- was shot and killed by gang-related cross-fire, CHA police responded by initiating a dramatic program of police "sweeps" through the

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1. Affidavit of Leroy Martin, Director of Public Safety, Chicago Housing Authority at 3, Summeries v. Chicago Hous. Auth. (N.D. Ill. Dec. 16, 1988) (No. 88 C 10566). I have relied generally on the historical recount of the police sweeps in the Chicago housing projects provided by Monica L. Selter, Comment, *Sweeps: An Unwarranted Solution to the Search for Safety in Public Housing*, 44 AM. U. L. REV. 1903 (1995). *See also* David E. B. Smith, *Clean Sweep or Witch Hunt?: Constitutional Issues in Chicago's Public Housing Sweeps*, 69 CHI.-KENT L. REV. 505 (1993); Steven Yarosh, Comment, *Operation Clean Sweep: Is the Chicago Housing Authority 'Sweeping' Away the Fourth Amendment?*, 86 NW. U. L. REV. 1103 (1992).

2. *See* Selter, *supra* note 1.

projects.[3] During the sweeps, CHA police proceeded through each building -- without a search warrant or probable cause -- combing each apartment for weapons and seizing any weapons found.[4] Police also imposed "lock-downs" on some project buildings. The CHA erected high fences around each building and restricted access to the building to tenants and escorted guests, with such restrictions scrupulously enforced by CHA police.[5] The gravity of these measures subjected the people who live in these neighborhoods to substantial hardships. Still, the sweeps offered hope of a restoration of peaceful, secure living conditions to the tenants of the CHA projects. Not surprisingly, the sweeps were supported by many of the CHA tenants.[6]

However, four tenants from the Robert Taylor Homes represented by the American Civil Liberties Union (ACLU) filed a class action suit in the United States District Court for the Northern District of Illinois requesting a preliminary injunction against the police tactics. In *Pratt v. Chicago Housing Authority*,[7] these plaintiffs argued that the sweeps violated their Fourth Amendment rights against unreasonable searches and seizures. The CHA argued that the sweeps were necessary in order to ensure CHA tenants their rights to safety and protection from crime.[8] The overwhelming majority of CHA tenants agreed. Presidents of 18 of the 19 CHA projects intervened in support of the CHA, and more than 5,000 tenants signed a petition supporting the sweeps.[9]

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3. Michael Abramowitz, *Daley Plans Crackdown on Violence: Boy's Killing Sparks "Sweeps" at Projects*, WASH. POST, Oct. 20, 1992, at A3 (cited in Selter, *supra* note 1, at 1904).

4. Pratt v. Chicago Hous. Auth., 848 F. Supp. 792, 793 (N.D. Ill. 1994).

5. Similar measures were used in Washington D. C.. *See* Serge F. Kovaleski, *Drastic Measures for a Desperate Place: Fences May Mean Freedom at D.C. Housing Complex*, WASH. POST, July 11, 1994, at D1 (cited in Selter, *supra* note 1, at 1904).

6. *See infra* note 9 and accompanying text.

7. 848 F. Supp. 792 (N.D. Ill. 1994).

8. *Id.* at 796.

9. *Id.* at 793. These tenant presidents eventually won a case to decertify the class on whose behalf the ACLU sued in *Pratt*. *See* Pratt v. Chicago Hous. Auth., 155 F.R.D. 178 (N.D. Ill. 1994).

Even so, the court balanced the tenants' rights to protection and personal safety[10] against the Fourth Amendment rights of their co-tenants and enjoined the sweeps. The court reasoned that while the safety-seeking tenants were understandably concerned about the safety of the projects, the searches simply could not be executed without violating other tenants' Fourth Amendment rights. Faced with a choice between which rights to protect, the judge opted to validate the latter tenants' rights, citing a constitutional principle:

> I am sworn to uphold and defend the Constitution, not to use the power of this office to override it, amend it or subvert it. . . . Americans are bound together in law and in fact. The erosion of the [search and seizure] rights of people on the other side of town will ultimately undermine the rights of each of us.[11]

The dramatic tone of the judge's holding reflects the ominous practical effect of his choice: the court effectively prevented any possibility of restoration of civil order to the Robert Taylor Homes offered by the sweeps. The invocation of the Fourth Amendment meant that the hoodlums that terrorized the Robert Taylor Homes would be able to return their neighborhood to a virtual gang battlefield.

It would be unfair, of course, to blame the judge who granted the injunction for the brutality of this result. Any other disposition imposed by the judge would have carried brutality with it as well. Restoring civilization to neighborhoods like the Robert Taylor Homes necessarily entails police having much more latitude in searching and handling citizens in that neighborhood. With this increased latitude

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10. *Id.* at 796. A valuable discussion of the fundamental nature of these interests as rights is outlined in Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991).

11. *Pratt*, 848 F. Supp. at 797. The district court acknowledged the trade-off of rights the court's decision entailed: "Many tenants within CHA housing, apparently convinced by sad experience that the larger community will not provide normal law enforcement services to them, are prepared to forgo their own constitutional right" in exchange for the safety that the sweeps would provide. *Id.* at 796.

comes the potential for abusive searches. By giving warrants out more freely, the judge risks provoking police brutality.

I am not, for the purposes of this article, concerned with how the rights of each of these tenants should be ordered. I recount this example only to illustrate what is becoming a common phenomenon. When a political conflict in our society finally is reduced to a collision of one citizen's rights against another's, our rights-based regime is increasingly unable to articulate a *prudential* solution to the conflict. When clashes of "rights" arise, our regime's only options are *principled* in nature. In the urban housing project case, for example, the only thing a judge can do is affirm the right of the plaintiff and trump other tenants' rights to safety, or alternatively, affirm the rights of the tenants who desire protection and security, and, thereby, override the individual tenant's rights against unreasonable search and seizure. In either case, the solution is tragic: one set of rights is sacrificed in the endorsement of the others.

This article is an attempt to understand and address the inability of our current constitutional regime to avoid or resolve such tragic clashes of "rights," which increasingly appear in contemporary American political and social life. In Part I, I briefly outline a useful description of liberalism's strategy for maintaining a plural civilization, drawing on Robert Cover's distinction between "strong" civilization-building forces -- such as normative systems of morality -- and "weak" civilization maintaining forces -- such as the formal and procedural institutions of government. In Part II, I argue that the liberal claim that society can be maintained on weak forces alone cannot survive Alasdair MacIntyre's well known critique of liberalism. MacIntyre argues that because the liberal state aspires to an objective ground for political and moral rationality, citizens of liberal states believe, and argue as though, their own individual claims are grounded objectively. Consequently, these claims are usually presented in the language of principle, as unalienable "rights." However, given that the liberal state cannot rationally adjudicate between rights' claims, solutions to rights' clashes can only be arrived at by the arbitrary affirmation of one claim to rights at the expense of others. As a result, the prudential political

solutions and compromises so critically necessary to the success of a plural state are tragically traded off in favor of unworkable principles.

I argue in Part III, however, that the framers of the American constitutional regime anticipated this weakness of the liberal state. Unlike contemporary liberals, the dominant Founders understood that a self-sufficient regime could not be maintained on weak forces alone. Rather, the success of the American project has always been dependent on "strong" forces. In particular, I draw on the recent work of Akhil Reed Amar to demonstrate that the Founders provided for a regime that was a mixture of weak *and* strong forces: the maintaining forces of the constitutional system are dependent on the supply of normative judgments from popular majorities. I argue that a restoration of this mixed understanding of constitutional government has the promise of reintroducing normative fuel to our institutions, so that the political prudence necessary to the success of a plural regime can once again be engaged.

In Part IV, I argue that the American regime gradually abandoned its attempt to maintain a "mixed" regime during the historical period between Reconstruction and the passage of the 1964 Civil Rights Act, under the weight of abuses of power by southern legislative majorities. I will argue that in view of history, a successful attempt at reviving a "mixed" regime must access the prudential judgments which can be supplied only by popular majorities, but at the same time provide a mechanism for protecting individuals from the possibility of majoritarian tyranny. I close with speculation regarding two possible revisions in American judicial institutions which may advance both of these goals.

I. PLURALISM AND THE LIBERAL STATE

In a famous Foreword to the 1982 Supreme Court Term entitled *Nomos and Narrative*,[12] the late Yale Law Professor Robert Cover claimed that modern liberal political thought assumes a basic distinction between "strong" social forces and "weak" political forces.

12. Robert M. Cover, *The Supreme Court 1982 Term, Forward: Nomos and Narrative*, 97 HARV. L. REV. 1 (1983).

In short, "strong" forces are those which are necessary for the establishment of a civil order which does not yet exist;[13] they are "world building."[14] "Weak" forces are those forces which are essential for the preservation of a civil order which already exists; they are "world maintaining."[15]

World building strong forces are ordinarily the fruit of a specific community which develops a common conception of morality or the common good.[16] Cover warns, however, that the strong forces internal to such normative communities are too powerful to be contained in one unit. When communities cannot contain the tremendous multiplicity of meanings conveyed by their rich narratives and fertile traditions, these communities divide into multiple groups. Competition inevitably develops between the resulting multiplicity of communities for interpretive and political authority in the larger community which includes all of them. Cover's description of this phenomenon is compelling:

> It is the problem of the multiplicity of meaning -- the fact that never only one but always many worlds are created by the too fertile forces of jurisgenesis -- that leads at once to the imperial virtues and the imperial mode of world maintenance. Maintaining the world is no small matter and requires no less energy than creating it. Let loose, unfettered, the worlds created would be unstable and sectarian in their social organization, disassociative and incoherent in their discourse, wary and violent in their interactions. The sober imperial mode of world maintenance holds the mirror of critical objectivity to meaning, imposes the discipline of institutional justice upon norms, and places the constraint of peace on the void at which strong bonds cease.[17]

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13. *Id.* at 12.
14. *Id.* at 13.
15. *Id.*
16. *Id.* at 13-14. Cover cites the Hebrew community centered around Torah and Temple service, and the Christian commitment to Biblical community as examples of communities which produce strong forces.
17. Cover, *supra* note 12, at 15-16.

"Weak" forces are developed by the liberal state for maintenance of a civil order which has been established by the world creating forces. Because the liberal society is pluralistic, there cannot be a common creed with its basis in narrative that is "recognized as the moving normative force of the community."[18] As a result, in a liberal community which affirms the freedom of citizens to participate in whatever normative community they choose, a weak regime must develop. The primary function of the weak regime is to maintain order between competing "strong" communities which eventually emerge in a pluralistic society. This regime engages impartial tools for managing the panoply of competing normative groups. "The universalist virtues that we have come to identify with modern liberalism, the broad principles of our law, are essentially system-maintaining 'weak' forces. They are virtues that are justified by the need to ensure the *coexistence* of worlds of strong normative meaning."[19]

These virtues include basic universal norms which people in the community use to judge behavior. The norms are in turn enforced by impartial procedures and institutions.[20] Stability is possible, despite the multiplicity of groups, because the weak regime's claims are objective in nature. Cover explains: "In [the world maintenance] model, norms are universal and *enforced* by institutions. They need not be taught at all, as long as they are effective. Discourse is premised on objectivity — upon that which is external to the discourse itself."[21] The imperial regime's success at world maintenance requires only that the groups within it share "a minimalist obligation to refrain from the coercion and violence that would make impossible the objective mode of discourse and the impartial and neutral application of norms."[22]

Cover's analysis suggests the dramatic liberal claim on which this article focuses: Liberalism lives or dies on the assumption that *although strong forces may be necessary to establish a civilization, a civilization that is established can be maintained with weak forces*

18. *Id.* at 14.
19. *Id.* at 12.
20. *Id.* at 13.
21. *Id.*
22. Cover, *supra* note 12, at 13.

alone.[23] Presumably, the implication of this claim is that once a civilization is built, there is no longer a need for strong forces. Indeed, to the extent that the strong forces remain, their hegemonic influence on the public square risks undermining the weak, procedural, commitments to "fairness" and "impartiality" necessary to maintain a

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23. Cover suggests this point with an illuminating discussion of Joseph Caro's 16th-century commentary on a talmudic tract. Because of the seminal value of this insight for the balance of this article, I will quote Cover's discussion of this point at length.

According to one of Judaism's oldest rabbinic traditions, Simeon the Just [circa 200 B.C.E.] said:

> Upon three things the world stands: upon Torah; upon the temple worship service; and upon deeds of kindness.

The "world" of which Simeon the Just spoke was the *nomos*, the normative universe. Three hundred years later, after the destruction of the Temple whose worship service was one of the pillars upon which the "world" of Simeon the Just stood, Rabbi Simeon Ben Gamaliel said, "Upon three things the world [continues to] exist[ ]: upon justice, upon truth, and upon peace."

These two parallel aphorisms are reported within a single chapter in the talmudic tractate *Aboth* and frame the chapter's contents. Of the aphorisms, the great sixteenth century codifier, commentator, and mystic, Joseph Caro, wrote the following:

> [F]or Simeon the Just spoke in the context of his generation in which the Temple stood, and Rabbi Simeon Ben Gamaliel spoke in the context of his generation after the destruction of Jerusalem. Rabbi Simeon B. Gamaliel taught that even though the temple no longer existed and we no longer have its worship service and even though the yoke of our exile prevents us from engaging in Torah [study of divine law and instruction] and good deeds to the extent desirable, nonetheless the [normative] universe continues to exist by virtue of these three other things [justice, truth, and peace] which are similar to the first three. For there is a difference between the [force needed for the] preservation of that which already exists and the [force needed for the] initial realization of that which had not earlier existed at all. . . . And so, in this instance, it would have been impossible to have created the world on the basis of the three principles of Rabbi Simeon Ben Gamaliel. But after the world had been created on the three things of Simeon the Just, it can continue to exist upon the basis of Rabbi Simeon B. Gamaliel's three.

Caro's insight is important. The universalist virtues that we have come to identify with modern liberalism, the broad principles of our law, are essentially system-maintaining "weak" forces. They are virtues that are justified by the need to ensure the *coexistence* of worlds of strong normative meaning. The systems of normative life that they maintain are the products of "strong" forces: culture-specific designs of particularist meaning.

Id. at 11-12 (footnotes omitted).

pluralistic community. To that extent, such strong forces should be -- formally at least -- dismissed from their role in the public square.[24]

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24. For example, some have argued that a religious person must articulate whatever claims he makes in the public square in purely secular terms. In his dissent in Bowers v. Hardwick, Justice Blackmun articulates this view as follows:

> The assertion that "traditional Judeo-Christian values proscribe" the conduct involved cannot provide an adequate justification for [Georgia's anti-sodomy law]. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine. Thus, far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that [the anti-sodomy law] represents a legitimate use of secular coercive power.

Bowers v. Hardwick, 478 U.S. 186, 211 (1986) (citations omitted). Justice Blackmun then implies that, in a secular society, moral judgments grounded in religious beliefs are equivalent to racial intolerance. *Id.* at 212. *See also* Robert Audi, *The Separation of Church and State and the Obligations of Citizenship,* PHILOSOPHY AND PUB. AFFAIRS 18 (Summer 1992); JOHN RAWLS, POLITICAL LIBERALISM 243 (1993) (liberalism's legitimacy in a pluralist polity requires that "citizens be able to explain their vote[s] to one another in terms of a reasonable balance of public political values" as opposed to the language of a specific community within the polity); MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991). A reluctant version of this position can be found in KENT GREENAWALT, RELIGIOUS CONVICTION AND POLITICAL CHOICE (1988). This position has been heavily criticized. *See, e.g.*, David Smolin, *Regulating Religious and Cultural Conflicts in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067 (1991) (arguing that new liberalism is intolerant of traditional and conservative religious worldviews because they do not concede to liberalism's commitment to advancing personal autonomy); Paul F. Campos, *Secular Fundamentalism*, 94 COLUM. L. REV. 1814 (1994) (responding to Rawls); RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984) (arguing that liberalism's attempt to secularize political debate is ahistorical, may undermine liberalism's moral project, and may facilitate certain forms of totalitarianism); Stephen Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989) (arguing that religious and non-religious convictions are equally legitimate in public political debate); STEPHEN CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993) (same).

II. THE WEAKNESS OF THE WEAK STATE

In his landmark critique of liberalism, *After Virtue*,[25] Alasdair MacIntyre recounted that our intellectual ancestors saw the liberal, secular state as the rational solution to the chaos of religious pluralism, which had culminated in the horrors of the religious wars.[26] In place of the competing religious accounts of morality and the good, our forebears envisioned a purely political grounding of power in an agnostic state, with a universal system of moral rationality which would span rival moral claims and provide an objective criterion for ordering them.[27] MacIntyre insists that the Enlightenment's attempt -- and subsequent failure -- to provide a universal morality based in reason alone has had profoundly disabling consequences for moral reasoning in the West.

MacIntyre argues that the past two centuries have exposed a crucial defect in the liberal regime. In the Enlightenment conception of the state, the main characteristic of citizens is their ontological autonomy from the state.[28] Citizens are individuals prior to their participation in the state. This autonomy of the individual is secured by "rights," which are characterized as inalienable attributes of any human being.[29]

Autonomous individuals adopt a variety of moral systems that are rationally coherent.[30] These various moral systems permit individuals to pursue varying ends of personal utility.[31] A person's claim to advance his own utility, is grounded *subjectively*.[32] The claim is absolutely permissible only when viewed within one's personal moral system.[33]

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25. ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (1981).

26. For other insightful discussions of this point, *see* STEPHEN TOULMIN, COSMOPOLIS: THE HIDDEN AGENDA OF MODERNITY (1990) and JEFFREY STOUT, THE FLIGHT FROM AUTHORITY: RELIGION, MORALITY, AND THE QUEST FOR AUTONOMY (1981).

27. MACINTYRE, *supra* note 25, at 39-50.

28. *Id.* at 68-69.

29. *Id.*

30. *Id.*

31. *Id.* at 70.

32. MACINTYRE, *supra* note 25, at 39-50.

33. *Id.*

The crucial problem for contemporary moral and political reasoning is that while the right to pursue a particular utility is secured only *subjectively*, the Western liberal political tradition relies on the citizens of the liberal state being persuaded that they have a justification for their claims which they consider to be *objective*, grounded in their inalienable "rights." That is to say, people speak of rights as though they have some objective rational grounds which other citizens -- if they were only rational -- must accept.[34] The autonomous individual citizen, however, soon finds out that an action taken in pursuit of his utility collides with another's conception of morality. Without an objective, rational ground for choosing between these colliding conceptions of morality, however, the liberal state can do little but affirm one claim over another. To the extent that the competing moral views are rationally incommensurable, the state's choice between the two is purely arbitrary.[35]

Meanwhile, the liberal regime's characterization of rights as principled unwittingly discourages the political compromises between citizens that are necessary for maintaining a stable society. Each person's claim to be permitted to do a particular act in pursuit of his

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34. *Id.* at 68-72.

35. *Id.* at 71, 252-53. Justice Scalia pointed out the zero-sum nature of the Court's attempt to prioritize two rights in an exchange with Justice Brennan in Michael H. v. Gerald D., 491 U.S. 110 (1989). Scalia wrote:

> We do not accept Justice Brennan's criticism that this result "squashes" the liberty that consists of "the freedom not to conform." It seems to us that reflects the erroneous view that there is only one side to this controversy -- that one disposition can expand a "liberty" of sorts without contracting an equivalent "liberty" on the other side. Such a happy choice is rarely available. Here, to *provide* protection to an adulterous natural father is to *deny* protection to a marital father, and vice versa. If Michael has a "freedom not to conform" (whatever that means), Gerald must equivalently have a "freedom to conform." One of them will pay a price for asserting that "freedom" – Michael by being unable to act as father of the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the traditional family unit he and Victoria have established. Our disposition does not choose between these two "freedoms," but leaves that to the people of California. Justice Brennan's approach chooses one of them as the constitutional imperative, on no apparent basis except that the unconventional is to be preferred.

Id. at 130 (Scalia, J., plurality opinion) (citation omitted).

utility is grounded in that person's subjective morality. Conversely, a second person's claim to having a different version of morality which forbids the first person from acting act out her utility is grounded in that second person's subjective morality. If each of these particular moralities is internally coherent, there is no basis for citizens with two differing moralities to challenge one another's positions in any way that makes any sense to the other. The parties to moral conflict can do nothing but continuously restate their positions to each other, with the continuing expectation that the other will see the rationality of the claimant's position and concede the argument.

At the same time, neither party has a rational basis for disclaiming his position. After all, if each party believes that his claim is grounded rationally, the resistance of the other side appears to be irrational. To make matters worse, the participants in the debate have strong incentives to maintain their claims -- to give up is to concede precious personal rights. The sum of these incentives is that each party's frustration with the other party increases as the argument progresses. MacIntyre's insight into the nature of contemporary moral argument sounds disturbingly accurate:

> It is easy also to understand why *protest* becomes a distinctive moral feature of the modern age and why *indignation* is a predominant modern emotion. "To protest" and its Latin predecessors and French cognates are originally as often or more often positive as negative; to protest was once to bear witness *to* something and only as a consequence of that allegiance to bear witness *against* something else.
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> But protest is now almost entirely that negative phenomenon which characteristically occurs as a reaction to the alleged invasion of someone's *rights* in the name of someone else's *utility*. The self-assertive shrillness of protest arises because the facts of incommensurability ensure that protestors can never win an *argument*; the indignant self-righteousness of protest arises because the facts of incommensurability ensure equally that the protestors can never lose an argument either. Hence the *utterance* of

> protest is characteristically addressed to those who already *share* the protestors' premises. The effects of incommensurability ensure that protestors rarely have anyone else to talk to but themselves. This is not to say that protest cannot be effective; it is to say that it cannot be *rationally* effective and that its dominant modes of expression give evidence of a certain perhaps unconscious awareness of this.[36]

As a result, the resolution of such disputes comes only arbitrarily and usually at the cost of embittering the one whose rights have not been validated.[37]

If MacIntyre's diagnosis of the inevitable disintegration of moral debate in a rights-based regime is correct, his claim has important implications for the American attempt at nurturing such a regime in spite of the plurality of rival systems of morality current in American life. First, a plurality of moral systems has and will continue to develop coherent worldviews with divergent methods of moral reasoning and conceptions of the good. The moral systems which survive over time tend to be internally coherent and, as a result, disagreement between personal moral systems can usually be traced back to debate over the divergent presuppositions at the foundation of these positions. The state -- being impartial -- is forbidden from affirming any particular moral system, and, therefore, each citizen who affirms a particular moral system has an equivalent claim on the state's endorsement of his claim. Though the claim to have one's own utility implemented is subjective, it is nevertheless pled to the state as an objective *right* which presumably can be rationally ordered as against claims by persons with other moral systems.

Because, however, the liberal state -- committed to pluralism -- has no way of managing claims over rights characterized as "fundamental" by the advancers of the claims, the state is forced to

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36. MACINTYRE, *supra* note 25, at 71.

37. A similar account of the problematic consequences of liberalism's reliance on principled rights can be found in MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

constantly traffic in what appear to be tragic choices between principles. One person's "right" will be affirmed, and the other person's right will be recharacterized as a non-right, or a lesser right. Moreover, notice how each party in such a situation will view the state's decision in such a dispute. For the one, his rational, objective right has been rightly affirmed. For the other, however, the ordering of rights appears to be both irrational and unfair. The loser in such clashes has little choice but to bitterly complain that he has been the victim of tyranny -- the trampling of his fundamental rights. When rights clash in a weak state, the dispute is necessarily framed as a clash of principle. The principled nature of the state's scheme for identifying these rights implies that the state cannot develop a prudential solution to disputes between them. If it did, liberal citizens could not understand the solution. Given the weak regime's characterization of rights as principled, rights must be held virtually inviolable, or they are nothing at all.

Again, in Cover's view, the seminal liberal assumption is the claim that while strong forces are necessary for establishing a civilization, weak forces, once they are successfully designed and implemented, are sufficient to maintain a civilization which has been established. Consequently, in what may be the most well-conceived description of the paradigmatic liberal state -- that articulated in John Rawls' *Political Liberalism* -- the state is reliant only on a "freestanding" "political conception of values" which self-consciously rejects any dependence on any particular "reasonable comprehensive doctrine."[38]

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38. JOHN RAWLS, POLITICAL LIBERALISM (1993). Rawls explains:

> [A] political conception of justice is presented as a freestanding view. While we want a political conception to have a justification by reference to one or more comprehensive doctrines, it is neither presented as, nor as derived from, such a doctrine applied to the basic structure of society, as if this structure were simply another subject to which that doctrine applied. . . . But a distinguishing feature of a political conception is that it is presented as freestanding and expounded apart from, or without reference to, any such wider background. . . . [A] political conception tries to elaborate a reasonable conception for the basic structure alone and involves, so far as possible, no wider commitment to any other doctrine.

Id. at 12-13.

Against this conception of the liberal state, I have presented Alasdair MacIntyre's concern that the liberal state's reliance on principled "rights" to secure the autonomy of individuals within it leaves the state without the ability to make the prudential judgments necessary to address the subtle problems presented by the clash of these rights in the plural state. Our experience with the breakdown of urban civilization in a number of American cities is evidence that MacIntyre's claim may be correct.

The inability of a rights-based, weak regime to make reasonable responses to political disputes among citizens is important. As the United States becomes increasingly plural, the potential for significant clashes between individuals who come from competing moral communities increases as well. If the American regime is a "weak" regime with no resources that make prudential judgments on fundamental matters, the future of American pluralism appears to be bleak. MacIntyre may not have been far off the mark when he predicted that contemporary political life in a liberal state would reduce to "civil war carried on by other means."[39]

Therefore, a paramount issue for the future of American liberalism presents itself: Is there no way to avoid the liberal state's inability to make prudential judgments given its self-imposed reliance on principled rights alone? Does pluralism in fact obligate the liberal state to embrace such a predicament?

III. THE AMERICAN PROJECT AS A *MIXED* REGIME

It should surprise no one that the Founders anticipated the problems MacIntyre identifies as inherent in a purely weak regime. The Founders believed that their formulation of self-government provided the most freedom for citizens of any government in history. Still, they understood that with these political freedoms came social risks. Many Founders would have joined John Adams in his solemn warning: "We have no government armed with power capable of contending with human passions unbridled by morality and religion.

39. MACINTYRE, *supra* note 25, at 253.

Our constitution was made only for a moral and a religious people. It is wholly inadequate for the government of any other."[40]

Indeed, when characterizing the new Constitution's articulation of "rights," the dominant 18th-century definition of "rights" assumed that there was substantial tension between liberty and personal autonomy. As Colgate University historian Barry Shain has recently argued at length, liberty at the time of the Founding was "framed by Anglo-American presuppositions of a rationally ordered and purposeful universe in which the central antithesis to liberty was licentiousness."[41] Although the analogy is not exact, the 18th-century definition of license is the equivalent of what 20th-century Americans describe as autonomy. To be licentious was to claim that one could not be restrained by the "true moral order."[42]

Shain explains that late-18th century Americans would never have accepted that "liberty" would include today's rights-based claim to be free from local social or political control. In fact, the term "liberty" always implied moral boundaries in which freedom could be exercised responsibly. Shain's explanation of the term "liberty" as it was generally understood at the Founding suggests that the Founders did not build a principled view of personal autonomy into the new Constitution or the Bill of Rights. Quite the contrary:

> [T]he substance of liberty [in the revolutionary era] was concerned with restricting permissible human behavior to a relatively narrow range. It described voluntary submission to

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40. RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 95 (1984).

41. BARRY A. SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM 161 (1994). Jim Rogers has recently argued that the abandonment of the definition of liberty as understood at the Founding for the modern understanding of "autonomy" obliterates the Constitution's tri-fold commitment to "life, liberty, and happiness." James R. Rogers, "Civil Liberties and Rights in the Vocabulary of the American Founding," in ON FAITH AND FREE GOVERNMENT: THE VIEW FROM THE FOUNDING (forthcoming).

42. One New Englander drew the distinction as follows in a 1778 letter: "*[To] absolutely . . . follow their own will and pleasures*, what is it, in true sense, but to follow their own corrupt inclinations, to give the reins to their lusts. . . . Are they whose character this is at liberty? So far from it, that instead of being *free*, they are *very slaves*." SHAIN, *supra* note 41, at 161 (quoting S.M., Letter to the Printer, Apr. 6, 1778, at 2).

> rules of behavior constrained by slender boundaries of corporate-serving divine or natural law, or it was a political gift to a designated corporation offering a provisional exemption from authoritative and hierarchical governmental controls that did nothing to free the individual from frequently onerous local communal controls. In both instances, it was an opportunity for individual self-regulation or corporate regulation of the individual in the service of God or the public good. Liberty as individual autonomy or self-creation was not described, or even hinted at, in these definitions.[43]

If Shain's historical analysis is correct, the 18th-century understanding of liberty presumed submission to the moral restraints which, in turn, permitted the formal liberties embodied in the Constitution to be extended to ordinary citizens. These liberties, rightly understood, were established to protect moral people from a tyrannical government. They were not intended to provide cover for immoral people to perpetrate wrongs that majorities would not tolerate.

If the Founding generation defined liberty in this way, it would appear that the American republic they designed would be especially vulnerable to the present-day problems confronting our plural society. The liberty written into the American rights-based state was defined in such a way that it was informed by normative restraints of local communities. In the modern liberal state, however, liberty has mutated into autonomy: liberty is defined as principled license from the reach of majoritarian moral restraints, enforced by constitutional rights. But, if the autonomy to pursue one's personally chosen utility is a "right" grounded in principle, social renegades, like any other liberal citizen, can claim that their rights to pursue their renegade agendas are also grounded in principle. If, by its nature, the liberal state cannot draw on normative resources to make moral distinctions between rights claims, the state will be vulnerable to social renegades who plead their rights in order to insulate them from the reach of the strong, normative

43. *Id.* at 162-63.

forces necessary to maintain, and in some cases, reconstruct, civilization in spite of them.

As I have stated, however, my claim is that the Founders anticipated the problems of the weak State and provided for an external normative source to service that state. My argument is that in order to account for the challenges presented to the weak state by pluralism, we must reassess the importance of the Founders' new political category, the "People," to the American project. It is in the People that the Founders gave the weak state access to the strong normative resources essential to its success.

This is a controversial claim. In the conventional approach to constitutional law in the American liberal state, legislative majorities generally determine the policies of the regime. The Bill of Rights, however, is viewed as a list of fundamental rights that all humans have as a matter of principle. These rights provide a mechanism for the judicial branch of government to restrain an overstepping majority from trampling the rights of individuals.[44] This model has dominated American jurisprudence since the passage of the Fourteenth Amendment.

However, the recent constitutional scholarship of Yale Law Professor Akhil Reed Amar has questioned the accuracy of this model.[45] In Amar's view, the first concern of both the Constitution and the Bill of Rights was *not* the protection of individuals and political minorities from oppressive majorities. Rather, the primary concern of the Framers was how to manage the agency costs posed by a centralized, distant government: how to restrain elected government officials from using their offices to expand their power and to advance personal interests that were inconsistent with the ends of the

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44. For a representative of this approach to constitutional law, *see* Jesse H. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810 (1974).

45. The basic elements of Amar's challenge to this view can be found in the following articles: Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988); Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside of Article V*, 94 COLUM. L. REV. 457 (1994); Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1993).

majority.[46] To be sure, the protection of political minorities from majoritarian tyranny was an important concern of the Framers. But it was secondary to their primary concern for the protection of majority interests. It was only with the arrival of the Fourteenth Amendment that this secondary interest became the priority.[47]

This suggests a new way of thinking about the Bill of Rights: prior to the adoption of the Fourteenth Amendment, the rights in the Bill of Rights were treated as *principled* only to the extent that they protected the popular majority from a tyrannical federal government. In all other cases, rights were *prudential*: they were controlling only to the extent that they cohered with the practical and moral judgments of the majority. It is only with the adoption of the Fourteenth Amendment that the Framers' prudential understanding of individual rights gave way to a principled view of these same rights. I will return to this important development later.[48]

A. The Nature of "Rights" in a Majoritarian Constitution

The starting point for Amar's majoritarian reading of the Constitution is the Preamble to the Declaration of Independence. This is an odd starting place, because the dominant scholarship of the Preamble has insisted that Jefferson's self-evident truth that all men "are endowed by their Creator with certain unalienable Rights"[49] represents the Framers' Lockean commitment to securing a host of fundamental rights for individuals which could not be abridged by the majority.[50] But Amar is interested in the more neglected half of the Preamble:

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46. *See* discussion *infra* part III.A.

47. *See* discussion *infra* parts IV., IV.A.

48. *Id.*

49. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

50. *See* GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 229-30 (1978). I should point out that Amar shares this reading of this portion of the Preamble. *See* Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 463 (1994).

> That whenever any Form of Government becomes destructive of [the Peoples'] ends, it is the Right of the People to *alter or to abolish it, and to institute new Government*, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[51]

For Amar, the right to alter or abolish the form of government and reconstitute a new form is the background and most fundamental right retained by the People. Whatever other rights individuals may have, the People always retain a legal right to alter the Constitution by the legal "revolution" of a constitutional convention.[52]

The dominant interpretation of the right to "alter or abolish government," however, views the amendment procedure of Article V as the exclusive means for the people to exercise their right to alter or abolish their government.[53] Article V empowers the Congress and the state legislatures to call a convention and introduce constitutional amendments. It also provides a mechanism for ratification of those amendments. Presumably, these amendment procedures are the exclusive means that the Framers provided to empower Jefferson's famous right of popular revolution.

Amar concedes that Article V does in fact provide the exclusive means for elected officials to amend the Constitution. But what about the *People* themselves? Amar stresses that the Framers in general, and Jefferson in particular, drew a strong distinction between the People and the government officials they elect and send to Congress or the state legislatures.[54] The People create a certain form of government and then elect a group of representatives to fill its offices. If the government becomes corrupt or proves unable to preserve the People's safety and happiness, the Declaration recognizes the Peoples' right, independent of the government, to make the changes they see fit.[55]

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51. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).
52. Amar, *supra* note 50, at 458-59. *See* discussion *infra* note 67 and accompanying text.
53. Amar, *supra* note 50, at 458.
54. *Id.* at 460.
55. *Id.*

Amar insists that the dominant reading of Article V as the exclusive means by which the People alter or abolish their government ignores Jefferson's distinction between the Government and the People. After all, a small portion of Government could thwart the People in their attempt to alter or abolish their government: one-third plus one of the state legislatures can stop a state-initiated call for a Constitutional Convention. One-third of either House of Congress can stop a Congressional movement to call a convention. Once an amendment is proposed, one-fourth of the state legislatures or official delegations to a special convention can stop any amendment.[56]

Amar's point is well taken. If Article V's amendment procedures are the exclusive method by which the People may alter their government, when it is not tending the People's interests, it would make no sense if amendments to the Constitution can only be initiated by the Government. If Article V is the Constitution's embodiment of the People's right to alter their government, how can it be that, once such a process is initiated, it is very easy for any small portion of Government to stop any such amendment? It is easy to sympathize with Amar's complaint with the dominant reading of Article V.

> The conventional view of Article V . . . makes hash of Jefferson's language and logic. First, Article V is *Government*-driven: if exclusive, it gives ordinary Government officials -- Congress and state legislatures -- a monopoly on initiating the process of constitutional change. By contrast, Jefferson's self-evident truth, and the popular sovereignty ideology that emerged from the American Revolution, are *People*-driven. Popular sovereignty cannot be satisfied by a Government monopoly on amendment, for the Government might simply block any constitutional change that limits Government's power, even if strongly desired by the People. . . . If exclusive, Article V betrays this right [to alter or abolish the government], for it is child's play to conjure up cases where the obstacle course of Article V

56. U.S. CONST. art. V.

> would block the amendment path, even if a bona fide majority of American voters enthusiastically supported amendment.[57]

The more reasonable reading of Article V for Amar is to view it as a *non-exclusive* means of amending the Constitution.[58] In particular, Article V should be read as only a limit on the power of elected government officials to amend the Constitution. The Founders feared the Government's lust for power, and Article V's difficult amendment procedures are appropriate to this fear. Article V is not, however, a limit on the People themselves. Article V is irrelevant to the People's right to alter or abolish their government.

Amar appears to be correct at least insofar as his argument references the text of Article V itself. Article V does not explicitly state that it is the exclusive means of amending the Constitution.

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures, of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. . . .[59]

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57. Amar, *supra* note 50, at 460. Two examples spring to mind: the attempt to add an Equal Rights Amendment in the mid-1970s and the recent attempt to pass a Balanced Budget Amendment in 1995. The popular support for the ERA at times achieved a popular voting majority in popular polls. JANE J. MANSBRIDGE, WHY WE LOST THE ERA 201-13 (1986). The popular support for the 1995 Balanced Budget Amendment was overwhelming. By late 1995, 34 state legislatures had passed resolutions calling for a federal balanced budget amendment. Robert Novak, *To Horror of Pols, Public Won't Let Term Limits Die*, CHI. SUN-TIMES, Aug. 31, 1995, at 202. One commentator reported poll evidence that the amendment was supported by more than 80% of the public. Bruce Fein, *Victory from the ashes of defeat? Resuscitation strategy*, WASH. TIMES, March 6, 1995, at A16.

58. Amar, *supra* note 50, at 459.

59. U.S. CONST. art. V.

Article V only sets out the limits on the manner by which elected officials in the Congress or state legislatures can introduce a constitutional amendment and ratify it.[60] Jefferson's right of the People to alter or abolish their Government presumably remains.

> [A]rticle V nowhere prevents the *People* themselves, acting apart from ordinary Government, from exercising their legal right to alter or abolish Government via the proper legal procedures. Article V presupposes this background legal right of the people, and does nothing to interfere with it. It merely specifies how ordinary Government can amend the Constitution without recurring to the People themselves, the true and sovereign source of all lawful power.[61]

Amar cites a litany of arguments made by numerous participants in the Philadelphia convention and the individual state ratifying conventions, to the effect that the dominant understanding of constitutionalism at the Founding was that whatever form of government was adopted, the People retained the right to alter or abolish it if it turned out to be unsuitable to their interests.[62] James Madison, for example, argued that the Maryland constitution's amendment procedure limited the Maryland *government's* method of amendment, but, like Article V, did not limit the Maryland *People* themselves from making changes they desired. Madison applied this reasoning to all the states:

> The difficulty in Maryland was no greater than in other States, where no mode of change was pointed out by the Constitution. . . . *The people were in fact, the fountain of all*

60. Amar, *supra* note 50, at 460.

61. *Id.* at 459.

62. Amar also uses his discussion of the Founders' commitments to popular sovereignty to argue against the widely held argument that the Philadelphia Constitution was illegal. *See, e.g.*, BRUCE ACKERMAN, DISCOVERING THE CONSTITUTION (1986). Recently, Ackerman and a colleague have aggressively rejoined Amar. Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475 (1995). Although I am sympathetic to Amar's claim for the legality of the Constitution, my argument is not dependent upon Amar being correct.

> *power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased.* It was a principle in the Bills of rights, that first principles might be resorted to.[63]

Madison's claim tracks the Founders' general philosophical commitment to popular sovereignty. While the ordinary officers of government -- the Congress, or the state legislatures -- were limited in their means to alter the form of government, the People themselves were the "fountain of all power" which animated the state, and, by analogy, the federal, constitutions. The People could, therefore, modify their form of government without limitation. In other words, the form of government articulated in a constitution was *principled* as against the untrustworthy government officers who always stood ready to expand their powers. But with respect to the People, the form of government was a *prudential* matter, subservient to the People's interests in safety and happiness.

James Wilson, whose participation in the authorship of the Constitution was second only to Madison, emphasized the prudential status of the Constitution as against the People:

> Perhaps some politician, who has not considered with sufficient accuracy our political systems, would answer that, in our governments, the supreme power was vested in the [state] constitutions. . . . This opinion approaches a step nearer to the truth, but does not reach it. *The truth is, that, in our governments, the supreme, absolute, and uncontrollable power remains in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions.* Indeed, the superiority, in this last instance, is much greater; for the people possess over our constitutions control in *fact*, as well as right.

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63. Amar, *supra* note 50, at 470 (emphasis added) (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 476 (Max Farrand ed., 1937)).

> *The consequence is, that the people may change the constitutions wherever and however they please. This is a right of which no positive institution can ever deprive them.*[64]

Edmund Pendleton, the Virginia Convention President, echoed Madison in the Virginia ratifying convention, in order to reassure delegates who were wary of the new Constitution. Pendleton reminded them of their reserved power:

> We, the people, possessing all power, form a government, such as we think will secure happiness: and suppose, in adopting this plan, we should be mistaken in the end; where is the cause of alarm on that quarter? In the same plan we point out an easy and quiet method of reforming what may be found amiss. No, but, say gentlemen, we have put the introduction of that method in the hands of our servants, who will interrupt it from motives of self-interest. What then? . . . Who shall dare to resist *the People*? No, we will assemble in Convention, wholly recall our delegated powers, or reform them so as to prevent such abuse; and punish those servants who have perverted powers, designed for our happiness, to their own emolument.[65]

Madison, Wilson, and Pendleton all articulated a general assumption behind the Constitution that the ends of the People were always prior to the particular form of government they employed at any given moment. This principle was secured in the doctrine of popular sovereignty itself and was prior to whatever formal constraints the People had imposed on their government officials. [66]

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64. Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside of Article V*, 94 COLUM. L. REV. 457, 474 (emphasis added in first paragraph) (quoting Jonathan Elliot, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 432 (1836)).

65. Amar, *supra* note 50, at 490 (quoting Jonathan Elliot, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 37 (1881) (emphasis added)).

66. In addition, once we understand that the "first principle" of popular sovereignty motivated the Founders' understanding of the Constitution, the Ninth and Tenth

I will not address in this article the implementational challenges Amar's approach to popular constitutional amendment faces. Suffice it to say that Amar believes that the People themselves could call a national constitutional convention or referendum by which amendments to the Constitution could be passed by a majority vote of the national registered voting population.[67] I will leave readers who

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Amendments become more understandable: The "people" served as a backdrop to the Constitution as a whole. Whereas in a regime which views rights as individual's absolute limitations against majorities, the Ninth Amendment appears to be an uncomfortable source for judicial creation of a wide range of unenumerated rights, or alternatively as so dangerous that we must ignore it as hyperbole on the Constitution. In a constitutional regime motivated by popular sovereignty, however, the Ninth Amendment fits in perfectly: it is an articulation of the motivating principle of the Constitution. *See* Akhil R. Amar, *The Bill of Rights as a Constitution,* 100 YALE L. J. 1131, 1199-1200 (1991).

67. Amar does not clearly articulate how this action of the people might come about. *See* Akhil R. Amar, *Philadephia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1064-65 (1988). One of the more interesting questions facing Amar is what level of the polity -- local, state, or national -- is the appropriate level to assess what a "majority" in fact holds on a particular issue. Could a single state call a convention and make claims on the rest of the country? Or, would the initiation of a constitutional convention require the participation of a majority of the states? Amar calls this the "denominator" question. For his answer to the problem, Amar agrees with Abraham Lincoln's argument against the seceding states in the Civil War South. Lincoln argued that for any constitutional revision by a "majority" to be legally binding it must be national in character. *Id.*

Justice Thomas, however, has recently argued that the Constitution's treatment of "the people" is a reference to the people as they are organized within their various states. Thomas wrote:

> [I]t would make no sense to speak of powers as being reserved to the undifferentiated people of the nation as a whole, because the Constitution does not contemplate that those people will either exercise power or delegate it. The Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation.

U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1876-77 (1995)(Thomas, J., dissenting).

However, while Thomas' claim that the "the Constitution does not contemplate" that the "undifferentiated people of the Nation as a whole" can act in any substantive way suggests that Thomas would not accept Amar's position that a majority could be assessed at the national level. Thomas would agree with Amar that the assessment of a majority's opinion on a constitutional revision must be national in character. Thomas would follow Article V's prescription for the people ratifying a constitutional convention's product by electoral action at the state level. *Id.* Amar's theory, however, appears to leave open the possibility that the

take issue with Amar's basic argument to work through his defense in the articles I have cited.[68]

The importance of Amar's work for my argument is that it supports my basic claim that the Founders did not believe that the "weak" formal forces of the American state were sufficient in themselves to maintain the American liberal regime. The Founders envisioned a state in which the primary threat of tyranny was that of the government officials being elected and then manipulating the form and tools of government so as to promote their own self-interest. To this end, the framers of the Constitution placed strong controls on the ordinary officers of government to prevent them from undertaking such abuses. The doctrine of the separation of powers is the most famous of these limits. Article V's limit on government officers' power to amend the Constitution is another.

Besides these internal controls, however, the chief protection from the tyranny of government over the people was the background assumption that the People had the right to alter or abolish and reinstitute their government. This reserved power established that the formal system of government, to use Cover's term, the "weak, world maintaining regime," is to serve the ends of the majority. Reading the Constitution in view of the Founders' commitment to popular sovereignty establishes that the institutional structure of government -- including the enumerated and unenumerated rights provided by the Bill of Rights -- is prudential in nature. The Founders established a "mixed" regime, with both weak and strong aspects. To the extent that the weak forces of liberal institutional government are inadequate to service the ends of the People, the People serve as the "strong" normative and prudential resource necessary to make the practical judgments faced by a plural society.

This analysis implies the following working hypothesis: The formal restraints on government articulated in the Founders' Constitution are *principled* as against the self-promoting actions of government officials. With respect to the People, however, the form

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opinion of the majority could be assessed in a convention of undifferentiated national citizens. *See* Amar, *supra* note 50, at 457.

68. *See, supra* note 45.

of government, including the rights listed in the Bill of Rights are *prudential*, subservient to the People's overriding interests.

The distinction between the principled and prudential status of rights must be recovered. Once the rights of the American regime are viewed as prudential, the rights-ordering problem of the liberal state that MacIntyre identified disappears. The prioritizing of rights is always possible, because the People stand ready to inform the state with their practical, prudential judgments. More than that, under a popular sovereignty regime, individuals understand that the scope of their rights are to a large extent a function of majoritarian processes. Citizens in a majoritarian state understand that their rights are in the end, prudential, and when they enter public debate, they recognize that disputes between themselves and others will have political solutions: there will be compromises, practical concessions of private absolutes, and so on.

IV. FACILITATING A MIXED REGIME AFTER GETTYSBURG

It would distort history, of course, to ignore the Framers' second, but still fundamental, intent to protect political minorities against tyranny by the majority. In his famous Federalist No. 51, Madison stressed that republics must protect against *two* threats of tyranny: "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."[69] Amar recounts that this second concern took center stage in American history when a number of southern state legislatures resisted Reconstruction.[70] The framers of the Fourteenth Amendment apparently considered it necessary to incorporate the constitutional protections against legislative majorities in the states which until then had been exercised against the federal government alone.[71] Indeed, the better part of constitutional theory in

69. THE FEDERALIST No. 51 (James Madison).

70. Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

71. This claim is, of course, the matter of considerable academic dispute. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) (arguing that the privileges and immunities clause of the Fourteenth

the 20th-century has concentrated on how the federal constitution protects individuals against state legislative majorities by reference to the Bill of Rights.[72]

Incorporation has been successful, however, only because it has imputed to each of the rights in the Bill of Rights a principled status that such a right did not have under the Founders' understanding of the Bill of Rights.[73] As discussed above, the Founders' Constitution, which, of course, did not include the Fourteenth Amendment, always understood the rights contained in the Bill of Rights to be subservient to the possibility of ordering and restraint by legislative majorities in the several states. The Fourteenth Amendment recast these rights, such that their primary value is as applied directly against these majorities. Under the Founders' vision, rights were *prudential* and ordered by the *majority*; after the passage of the Fourteenth Amendment, the rights are *principled* and protected by *judges*.

Amendment was intended only to incorporate the protections already codified in the Civil Rights Act of 1866). Michael Curtis argues that the framers of the Fourteenth Amendment did in fact intend to incorporate the Bill of Rights. *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 60-61, 88-89 (1986); Michael Kent Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980). Professor Charles Fairman is skeptical that such an intent can be found. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949). William Crosskey rejoins Fairman, arguing that Fairman has misread the evidence in the legislative history and that an intent to incorporate can be found. *See* William W. Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954). An interesting recent attempt to reopen the debate argues that the historical background of the main drafters of the Fourteenth Amendment, including John Bingham, suggests that they had a "naturalist" view of rights, including a naturalist commitment to a theory of national citizenship which implies that they would have intended incorporation. Trisha Olsen, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347 (1995). Whatever the case, Justice Hugo Black's claim that the Privileges or Immunities Clause and the Due Process Clause "extend[ed] to all the people of the nation the complete protection of the Bill of Rights," in his famous dissent in Adamson v. California, 332 U.S. 46, 89 (1949) (Black, J., dissenting) has become the controlling view of the Court and the academy.

72. Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1133 (1991).

73. Indeed, a recent book argues that one subtext to the Gettysburg Address was Lincoln's attempt to restore the Founders' Lockean understanding of natural rights. GARRY WILLS, LINCOLN AT GETTYSBURG 129-47 (1992).

But note that if this metamorphosis has occurred, then the Fourteenth Amendment's transformation of rights as prudential into rights as principled would appear to make the American regime vulnerable to the problems of rights-based liberalism that MacIntyre has identified. Principled rights enforced by judges against state legislative majorities cannot be prioritized by those legislative majorities when they happen to conflict. What facility a popular sovereignty reading of the Bill of Rights grants, the Fourteenth Amendment apparently takes away. If the Fourteenth Amendment wrests the power to set priorities away from the judgments of legislative majorities, are we not again left without resource to prudence? The historical importance of the Fourteenth Amendment likewise forces an important rejoinder: in pursuit of a basis for prudence, must the American regime jettison the protection of individual rights against the majority altogether?

I want to suggest a third alternative. The Fourteenth Amendment's application of the rights enumerated in the Bill of Rights against legislative majorities in the States was necessary to curb the majoritarian tyranny current in the South in the period following the Civil War until passage of the 1964 Civil Rights Act. In the long run, however, rights understood as principled tend to eclipse the prudential and political compromises necessary to life in a plural state. Thus, the challenge presented by the majoritarian insight of the Founding and the historical evidence of majoritarian abuses since then is straightforward enough: the American regime must identify a non-majoritarian mechanism for protecting individual rights, without sacrificing its access to the normative judgments supplied by the People. What we seek is a method of constructing the weak state in such a way as to protect individuals against tyrannical popular majorities, without relying on a judicial construction of rights which precludes reference to the strong forces supplied by those same people. The regime, as the Founders understood, must be "mixed." In the following sections, I speculate regarding two possible mixed regimes.

A. Mixed Regime #1: Recovering the Jury's Prudential Role

One possible solution is suggested by returning to the problem presented by the decivilization of urban projects like the Robert Taylor Homes in Chicago. To recap: Because of extreme levels of poverty, drug abuse and trafficking, and violent crime, these low-cost housing projects at times are in complete disorder. In Chicago, the police, in an attempt to bring order to these neighborhoods, undertook a strong-arm approach to policing the projects with the widespread support of housing project tenants. Nevertheless, the ACLU filed suit for a permanent injunction against these practices, arguing that the Fourth Amendment rights of tenants of the housing projects were being infringed. Despite countervailing claims from tenants referencing their rights to safety and protection, the injunction was granted.

The principled approach to rights forced this extreme result. The evolution of search and seizure law is a dramatic example of how the liberal state's tendency to characterize all political claims as absolute rights destroys any opportunity for prudential, reasonable solutions to social ills such as these.

To illustrate this effect, compare this situation with the Fourth Amendment regime in operation at the time of the Founding. Recall that a primary motivation for the protections of the Bill of Rights was to protect moral citizens from tyrannical government officers. In the American colonies, a major source of contention presented by the Crown's governing bodies included unreasonable invasions of both house and person by the British authorities. Drafted within a few years after the end of British occupation, the text of the Fourth Amendment had this memory clearly in view:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[74]

74. U.S. CONST. amend. IV.

Amar's historical analysis is again useful for my argument.[75] Amar points out that the text of the Fourth Amendment does not require warrants prior to every search.[76] Nor does it require probable cause prior to a search.[77] A plain reading of the amendment merely states that the judiciary cannot grant a warrant without probable cause. Warrantless searches are not prohibited at all.[78]

What the text of the Fourth Amendment requires is that *all searches must be reasonable*.[79] A determination of reasonableness is by definition a prudential judgment. How was reasonableness judged? Government officials who made searches were vulnerable to civil liability in a simple trespass tort action. Civil liability for unreasonable searches -- the reasonableness of which was judged by a colonial jury-- was a forceful deterrent on British excesses.[80] Not surprisingly, this right was preserved in the new Constitution.

The claim that the Fourth Amendment requires that a warrant supported by probable cause be issued prior to a search[81] was developed in an historical moment in which it was necessary for the high Court to insulate the various rights of political minorities and individuals against oppressive state-based legislative majorities. In the period between the passage of the Civil War Amendments and the passage of the Civil Rights Act of 1964, southern legislative majorities acted in concert with state executives to thwart congressional and judicial mandates to end widespread discrimination against blacks. The most fundamental examples of discrimination were attempts by

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75. Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994). The warrant clause was historically a textual protection against the excesses of police who would, by obtaining a warrant, be completely immune from civil liability of an American colonial jury. Thus, the Founders also added the probable cause requirement for warrants, dramatically limiting the availability of such immunity granting warrants.

76. *Id.* at 759.

77. *Id.*

78. *Id.* at 757.

79. *Id.* at 758-60.

80. Amar, *supra* note 75, at 774. As Amar notes, this gives new force to the colonists' insistence on the right to trial by jury. *See also* Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 49-58.

81. Johnson v. United States, 333 U.S. 10, 15-16 (1948).

white legislatures to impose procedural obstacles on the right to vote, constructed to limit black participation in elections.[82] Though blacks constituted a large portion of the voting age populations in a number of southern states, these restrictions on blacks' voting permitted whites to maintain dominant control of state legislatures. The infamous "Jim Crow" laws were powerful evidence of majoritarian tyranny, and white police forces and government officials were too often more than willing to enforce them.[83] Given that majoritarian abuses like these were the most important social issues of the 1950s and 1960s, it is no surprise that the Supreme Court of that period used the Fourteenth Amendment to adopt a principled understanding of the full range of the rights listed in the Bill of Rights to protect blacks and other political minorities against tyrannical majorities. The Supreme Court's transformation of the right against unreasonable searches into a requirement that, barring exigent circumstances, all searches must be conducted with warrant supported by probable cause, as one example, is understandable in view of this history. Grounding individual rights in principle protects rights from encroachment by an overreaching legislature.

As we have learned, however, when rights are viewed through the lens of principle, they risk becoming distorted. Thus, in a remarkable moment in judicial history, the Framers' prudential right against *unreasonable searches* was transformed into a principled right against warrantless searches. As an absolute right, this new right against searches could not be abridged; it could only be waived. Thus, the Court transformed the Fourth Amendment's probable cause provision into something that is closely analogous to a consent or waiver doctrine. The probable cause requirement is now formulated as the manner by which a person waives his Fourth Amendment rights. Waiver occurs where there has been a judicial predetermination that *the individual has given* the police probable cause to believe that the search would be reasonable. Once a warrant has been issued, the right

82. A compelling account of the period immediately prior to the passage of the Civil Rights Act of 1964 is provided in TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63 (1988).

83. *Id.*

against searches is gone in the Court's view; the warrant acts as a near complete defense against any later tort claim that the searched individual's right has been violated.[84]

At the time of the framing of the Constitution, the Fourth Amendment was a prudential tool for judging police and governmental conduct; it was not an absolute, inalienable right to be enforced against all reason. The use of local juries to judge the suitability of police action permitted the use of a flexible, prudential basis protecting the right, rather than an absolute, principled one. The important issue was never who had the right, which a court would prioritize over another person's right. The issue was: What is a reasonable search, and what is not?

A recovery of this jury model for a broad range of constitutional issues may provide one solution to the liberal state's need for a basis for practical political judgments. Giving a jury latitude to determine legal outcomes gives the state access to a source for normative judgment. Juries are ideal for making determinations of reasonableness or to balance one person's utility against another's rights. Additionally, juries do not present the large scale risks of tyranny presented by majoritarian legislative bodies or unreachable federal judges. Juries are a small number of community-based citizens, and the scope of their power is limited to the circumstances of a single case at hand. Tyranny is not likely to find a home in their deliberations about what the right result in a particular case should be. If it does, tyranny lives only in the facts of one case.[85]

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84. This view of the right can also explain the exclusionary rule's overreaching remedy. If the right is absolute unless waived, then the only remedy for its violation is to return the defendant to the position she should have been in if the right had been kept inviolate. A civil damages remedy would be clearly insufficient. This is similar to the Court's position that an uncounseled confession cannot be used against a defendant when it is obtained in violation of the Sixth Amendment right against self-incrimination, or the Sixth Amendment right to counsel. *See* Mapp v. Ohio, 367 U.S. 643, 654-57 (1961) (explicitly analogizing constitutional seizure of evidence to procurement of uncounseled confession through unconstitutional means).

85. Incidentally, the fact that juries sit for only one case also offers the added benefit of eliminating the potential for "logrolling", i.e., the practice by legislators, and perhaps judges, to trade votes in particular cases in exchange for votes on future cases.

Consider how different the Robert Taylor Homes example might unfold under this "reasonableness" jury model. The police come into a certain project and engage in some particular search or seizure activity. Perhaps they might put a guard at each building door to search persons as they come in and out of the building. A tenant of the building sues the police department in tort, arguing that a particular search was unreasonable. A jury of the community is called, and the police department presents evidence regarding the incidence of crime in the neighborhood, the effect of the searches on crime, and other relevant data. The objecting tenant might present witnesses who testify regarding the need for such searches, the brutality of the particular methods used, and so on. The jury, using their community-based judgment, would then determine whether the search was reasonable in view of the circumstances of that case. If the lack of order in the neighborhood at the time of the search makes such an action reasonable, one would expect a jury to rule for the police. Presumably, the same jury would be prepared to hold liable a police force which, under a claim of attempting to restore order to the housing project, performed unannounced and destructive searches of random tenants' homes, in spite of a general consensus in the community that drug activity and violence had dramatically decreased prior to the searches.

Note, however, that the result of this hypothetical is not determined by an arbitrary choice between one's absolute right over another. The issue is more practical: did the police act reasonably? A jury of people would deliberate over this question and make a prudential critique of the reasonableness of the police activity.

B. Mixed Regime #2: Rethinking the Scope of Incorporation

The liberal state may also be able to use legislative majorities to make prudential judgments in rights disputes by redefining the scope of incorporation. Incorporation has transformed virtually all federal constitutional protections against the federal government into principled protections from state majorities as well. If the purpose of incorporation provides a principled way of categorizing the

enumerated rights in the Bill of Rights as either principled or prudential, this may provide a solution to the problem I have outlined. The liberal state would then be able to use the prudential judgment of the legislature to inform its management of prudential rights' clashes and, at the same time, protect against majoritarian intrusion in the context of principled rights.

The purpose of incorporation would not rule out such categorization. The purpose of incorporation was to prevent majoritarian tyranny by state legislatures.[86] Therefore, incorporation would require us to categorize as principled only those rights that are necessary to protect political minorities from majoritarian tyranny.

To this end, Professor Alexander Meiklejohn has articulated a useful concept in a famous article entitled *The First Amendment is an Absolute*.[87] Meiklejohn surveyed the implications of the Founders' intent to establish self-government on the Bill of Rights. He argues that there is a core set of rights which are fundamental to the operation of any authentic self-governing republic. As such, the majoritarian system itself implies special protection for these rights from legislative majorities.

The majority cannot complain when its power is limited with respect to these rights, because the majority's own authority to act is a function of these same rights. Although Meiklejohn limited his consideration of these types of rights to only those contained in the First Amendment, his reasoning would apply to all of those rights which are necessary for the political functioning of a republic. His insight bears quotation at length:

> [The Constitution] protects the freedom of those activities of thought and communication by which we "govern." It is concerned, not with a private right, but with a public power, a governmental responsibility.

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86. The seminal argument in favor of total incorporation is Justice Black's dissent in Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

87. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

> In the specific language of the Constitution, the governing activities of the people appear only in terms of casting a ballot. But in the deeper meaning of the Constitution, voting is merely the external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments, which that freedom to govern lays upon them. . . .
>
> We, the people who govern, must try to understand the issues which, incident by incident, face the nation. We must pass judgment upon the decisions which our agents make upon those issues. And, further, we must share in devising methods by which those decisions can be made wise and effective or, if need be, supplanted by others which promise greater wisdom and effectiveness. Now it is these activities, in all their diversity, whose freedom fills up "the scope of the First Amendment." These are the activities to whose freedom it gives *its unqualified protection*. [88]

Consequently, "[the Constitution] forbids Congress to abridge the freedom of a citizen's speech, press, peaceable assembly, or petition, whenever those activities are utilized for the governing of the nation."[89]

It is important to stress that categorizing these rights -- whatever they are -- as *principled* is implicit in majoritarianism itself. The determination of what any "majority" position on any issue happens to be requires that that very determination be derived from a consideration of the opinions of all citizens who are eligible to vote. A "majority" is by definition fifty percent of the voters plus one. As a result, any legislative proclamation which claimed power based on its endorsement by the majority of voters would be self-refuting if it did not survey all the voters' opinions on the matter.[90]

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88. *Id.* at 255 (emphasis added).

89. *Id.* at 256.

90. Of course, a substantive argument can be made that these rights are necessary to advance the self-governing nature of the democratic liberal state. *See* Owen M. Fiss, Comment, *State Activism and State Censorship*, 100 YALE L.J. 2087 (1991) (democratic

A cursory list of the rights which would require principled protection to avoid majoritarian tyranny would necessarily include Meiklejohn's core: the right to vote, the right to peaceable assembly, the right to free political speech, and the right to petition the government.[91] Arguably, other rights may also qualify for principled protection. Determining the suitability of the whole host of rights for this category would require consideration which extends beyond the scope of this article.

However, it is not necessary to treat all the rights included in the Bill of Rights as principled to protect against majoritarian tyranny.[92] The balance of these rights should be construed "prudentially," that is, they always exist and operate within the prudential wisdom and utility of the public majority. Once these rights are categorized as prudential, the majority would be able to manage rights clashes in the plural state. The legislature could be called on to order the priority of such rights by passing legislation articulating the majority's determination of how the rights clashes ought to be resolved.

Applying this hypothetical regime to the urban neighborhood situation, a legislature could pass a law permitting local governments to authorize police to engage in the sorts of measures that were taken in Chicago's Robert Taylor Homes. As such, the legislature would be

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nature of our society requires First Amendment values as essential for republican self-government).

91. Meiklejohn, *supra* note 87, at 255-57.

92. Amar makes a similar point with respect to the rights that would be required by the Guarantee Clause.

> Certain rights and freedoms proclaimed in the Bill of Rights might indeed be unabridgeable by any state that was truly "Republican." Without broad protection for antigovernmental discourse, petitions, and assemblies, for example, popular sovereignty and the right of the people to alter or abolish their existing government might be meaningless. But not all provisions of the original Bill of Rights clearly connect to the central meaning of Republican Government. A state that obliged criminal defendants to take the witness stand -- just as civil defendants and witnesses generally are often obliged to testify against their wishes -- might be called unfair, or even illiberal; but it would hardly be un-Republican.

Akhil R. Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 755-56 (1994) (footnotes omitted).

ordering the prudential rights of the prospective citizens of such neighborhoods; the legislature would be giving priority to the prudential rights of security and protection over the prudential right to be free from unreasonable searches and seizures. Unlike the district judge, however, the legislature can prioritize the right in subtle, prudential ways. The legislature could put strong limitations on the activities that police could engage in. A statute might also state an explicit time limit for the suspension of search and seizure prohibitions. The point is simple: When search and seizure protections are removed from the list of principled, inalienable rights, prudential solutions to problems such as these once again become possible.

It is important to stress, however, that simply because the right to be free from search and seizure is removed from the list of principled rights, it remains a prudential right. Thus, a person who can establish that the particular behavior of police officers who are executing the legislatively authorized police action is unnecessarily abusive would still have standing to state a claim against the government. A jury could be called on to review the police department's execution of the authorized measures as applied in a particular situation. A jury, with the legislative ordering of rights in mind, could consider the actions of the officer under the circumstances he faced and determine if his actions were reasonable applications of the legislative mandate.

CONCLUSION

This paper has made two basic claims. First, I have attempted to articulate a fundamental weakness in the liberal constitutional regime. The paradigmatic liberal state rejects use of any particular normative vision to inform its decision-making. Liberalism assumes that once a civil order has been established, the state can maintain order using the institutional forces internal to liberalism alone. The most obvious example of this reliance on the form of government alone is the liberal regime's claim that disputes between competing normative groups within American political life can be managed based upon each group's demand for the protection of their principled "rights." As Alasdair MacIntyre has warned, a rights-based regime is unable to

facilitate the resolution of the numerous incommensurable normative disputes that will emerge between competing groups within a plural state.

The fundamental problem is this: In order to maintain the state with reliance on values that are independent of any particular group within the community, the liberal state must provide for the protection of each individual normative group in the form of government itself. Thus, the American constitutional approach gives each citizen principled rights against intrusion by members of other normative groups and complementary rights to pursue their own versions of the good life. These rights, however, inevitably lead to the clash of one group's utility with another group's rights. Because each side of the conflict has a principled right to its particular position in the dispute, the state cannot make prudential judgments about how the resolution of the dispute would be resolved. Ironically, the commitment to a principled view of rights -- which is necessary for the goal of having a political system which is not reliant on any particular community's normative vision -- disables the liberal state from making the prudential judgments which are necessary to the maintenance of any such plural state.

The second claim I have made is that, despite this weakness in the prototypical modern liberal regime, there is cause for optimism in the Founders' vision for their new republic. The Founders anticipated that a regime which relied only upon the "weak" resources provided for in the form of government itself would be insufficient to maintain a state in the long run. The Founders, therefore, reserved in the People the right to alter or abolish and reinstitute their government.

As rights-based liberalism continues to foster the fraying of our increasingly plural society, the Founder's reservation of this right should be reevaluated. The Founders' provision for such a right demonstrates that the Founders rejected a wholly principled view of the Constitution and its Bill of Rights. Instead, they viewed the Constitution as first and foremost a prudential document that services the utility of "We the People." As noted by James Wilson, our republic is not ultimately governed by the Constitution. Rather, "[t]he truth is, that, in our governments, the supreme, absolute, and

uncontrollable power *remains* in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions."[93]

The importance of recovering a "prudential" understanding of the Constitution -- and the Bill of Rights, in particular -- cannot be overstated. The political conflicts that dominate a plural state are those in which the rights of persons who are members of different normative communities collide with one another. A group of housing tenants wants a strong-arm police presence in their project to ensure their rights to safety and the pursuit of happiness, while a particular tenant may demand that the police leave him alone lest his rights against search and seizure be compromised.

Whether the two potential mixed regimes I have outlined address these hypotheticals in a practical way is less important than recognizing the seriousness of the challenge they seek to address. The challenge to the contemporary plural liberal state is to recover a mechanism for accessing the prudential sources of the people which the Founders provided for. History teaches us that this must be done in a manner which does not facilitate a tyranny of the majority.

The risk of majoritarian tyranny should give us pause. Nevertheless, the increasing volatility of rights clashes in American political life also teaches us that permitting the fear of such tyranny alone to disable the plural state from even considering ways to engage the prudence it needs to survive will surely lead to no less tragic consequences.

93. Amar, *supra* note 64.