Constitution Day Lecture

1. begins with Mills' assertion that central to the existence of a political society is allegiance or loyalty. 1
a) " [T]here [must be]be in the constitution of the State something which is settled, something permanent, and not to be called in question."
b) Mill said there must be something that men hold sacred.
c) "Arguably, every political community possesses a constitution of sorts—a certain "something which is settled . . . permanent, and not to be called in question," a certain "something which, by general agreement, has a right to be where it is, and to be secure against disturbance, whatever else may change." 2
d) Even an absolute monarch must bow to certain sacred things in the political community.
e) "With comparable examples in mind, the baron de Montesquieu observes, 'There is one thing which one can sometimes oppose to the will of the prince: that is religion.'"
--Religion, said Montesquieu, religion can form as a " 'kind of depository possessed of permanence.'"
--If not religion, custom is venerated. 4
2. "Ancient Constitutionalism"
a) In the US the key constitution is the one that venerates political liberty.
b) "To the best of my knowledge, liberty first became a critical feature of constitutionalism in classical Greece." 4
c) "[O]ne finds Athens' democratic *politeía*—its democratic constitution—celebrated in the funeral oration delivered shortly after the beginning of the Peloponnesian War by Pericles of Athens."
d) "[I] it is clear from what is said and from what is left unsaid that, when he [Pericles] speaks of his city's *politeía* and ponders that 'something which is' at Athens 'settled, something permanent, and not to be called in question," Pericles is thinking less of the city's fundamental laws than of the *trópoi* [modes; folkways]that constitute the peculiar Athenian way of life."
e) When the Greeks thought of the constitution of liberty, they zeroed in on character.
f) "[I]in one passage of *The Politics,* Aristotle suggests that it is the provision of a common education (*paideía*)—and nothing else—that turns a multitude (plêthos) into a unit and constitutes it as a pólis." 7
g) "To judge the *politeía* was to judge the citizens." 10
h) St. Augustine: " '[A] people is a multitudinous assemblage of rational beings united by concord regarding loved things held in common.'"
3. "Modern Constitutionalism"
a) Modern constitutionalism focuses on institutions. 11
b) What separates man from other animals, according to Aristotle, is the "capacity for rational speech (*lógos*)." 12
c) Logos "makes it possible for him to perceive and make clear to others through reasoned discourse the difference between what is advantageous and what is harmful, between what is just and what is unjust, and between what is good and what is evil."12
d) It is the polis that develops "fully those faculties of rational argument (*lógos*) and cooperative action (*práxis*) which men possess and the other nonpolitical animals lack altogether." 12
e) Ancients like Aristotle "placed full confidence in the human capacity for self-government."
--Moderns, like Machiavelli, denied this presumption.

f) For Machiavelli, Hobbes, Hume "reason is always and everywhere the slave of the passions."
--Thus for Machiavelli there is the presumption that the polis is based on man's natural "wickedness."
g) "From the same set of premises—that desire is insatiable, that reason is the slave of the passions, and that the legislator must presume all men to be knaves—Thomas Hobbes drew an opposed conclusion: that the public good will be honored only in an absolute monarchy because only in such a polity is the private interest of the ruler identical with the public good."15 ???
g) Harrington, following Hobbes, said " 'reason is nothing but interest.'"
-- "The 'superstructures' of the well-ordered commonwealth are intended to be substitutes for the political virtue that no man can be supposed to possess."
h) For "Harrington " 'the whole Mystery of a Common-wealth . . . lyes only individing and choosing.'"
-- "Harrington's scheme of political architecture . . . . influenced subsequent constitutional prudence, but not nearly as much as his conviction that cleverly devised institutions can serve as a guarantee for justice."
i) "Hume acknowledged that it might appear 'somewhat strange, that a maxim should be true in politics, which is false in fact," but he contended nonetheless that it is 'a just political maxim, that every man must be supposed a knave.'"
-- "**Hume's restatement of the Machiavellian and Hobbesian position was exceedingly popular in America." 20**
j) "No one stated the presumptions of modern constitutional prudence more forcefully than John Trenchard." 21
k) "In Cato's Letters, the most frequently cited and reprinted of all the radical Whig tracts, Trenchard and Thomas Gordon took great pains to instill in their readers the skeptical and distrustful spirit that serves as the foundation for the political architecture of Harrington's Whig disciples."
--Public spiritedness was seen as a passion that could be taken to excess.
-- Trenchard and Gordon in Cato's letters defined republican virtue thus: "[E]very View that Men have, is selfish in some Degree; but when it does Good to the Publick in its Operation and Consequence, it may be justly called disinterested in the usual Meaning of that Word. So that when we call any Man disinterested, we should intend no more by it, than that the Turn of his Mind is towards the Publick, and that he has placed his own personal Glory and Pleasure in serving it. To serve his Country is his private Pleasure, Mankind is his Mistress; and he does Good to them by gratifying himself." 21-22
l) The trick in the polity was to turn the interest of the people into virtue.
4. "American Constitutionalism"
a) "Nowhere did they presume on the virtue of those chosen for high office." 24
b) "The Founding Fathers were practitioners of modernity's characteristic "politics of distrust."24
c) "It would, however, be an error to suppose that the American Founders were straightforward exponents of an unmitigatedly modern constitutionalism."
d) Montesquieu: "If virtue and moderation can be discarded, it is because in a monarchy 'the laws take the place of all these virtues, for which there is no need; the state confers on you a dispensation from them.'"
e) The United States was "certainly was not a republic of virtue. And yet its framers doubted whether it could survive if its citizens were utterly bereft of that quality."

f) Rahe contends that "ancients chose to refer to as a mixed regime." 28
g) Madison and other founders "rejected enlightened despotism and a slavish dependence on political architecture and on man's unreasoning spirit of resistance, so they stopped well short of endorsing the presumption, fundamental to the proponents of these mechanical principles, that reason is simply the slave of the passions." 28
h) "By means of the extended sphere, federalism, the separation of powers, and the other 'inventions of prudence' built into the constitutional frame, they hoped that 'the passions' of the citizens could 'be controuled and regulated by the government' so that 'the reason of the public,' liberated from bondage, might serve "to control and regulate the government' in turn."29
i) The founders believed in the possibility of transcendence of narrow self-interest.
j) "In their judgment of the human capacity for transcendence, the authors of *The Federalist* staked out a position intermediate between Hobbes and the ancient republicans somewhat closer to "the politics of distrust" than to 'the politics of trust.'" 29
k) "For, to the extent that the federal charter was the Declaration's 'word' made flesh, it was to provide that *paideía*, to embody 'that concord,' to make manifest that 'soul,' to serve as the nation's ancestral constitution (*pátrios politeía*), and to exemplify its *mos maiorum*. For Americans, the Constitution was to become what Madison and his fellow framers intended it to be: the "depository possessed of permanence" described by Montesquieu, an object of 'allegiance or loyalty' fulfilling what John Stuart Mill took to be one of the conditions of 'permanent political society.'" 32
Source: Paul A. Rahe, "Between Trust and Distrust: The Federalist and the Emergence of Modern Republican Constitutionalism"