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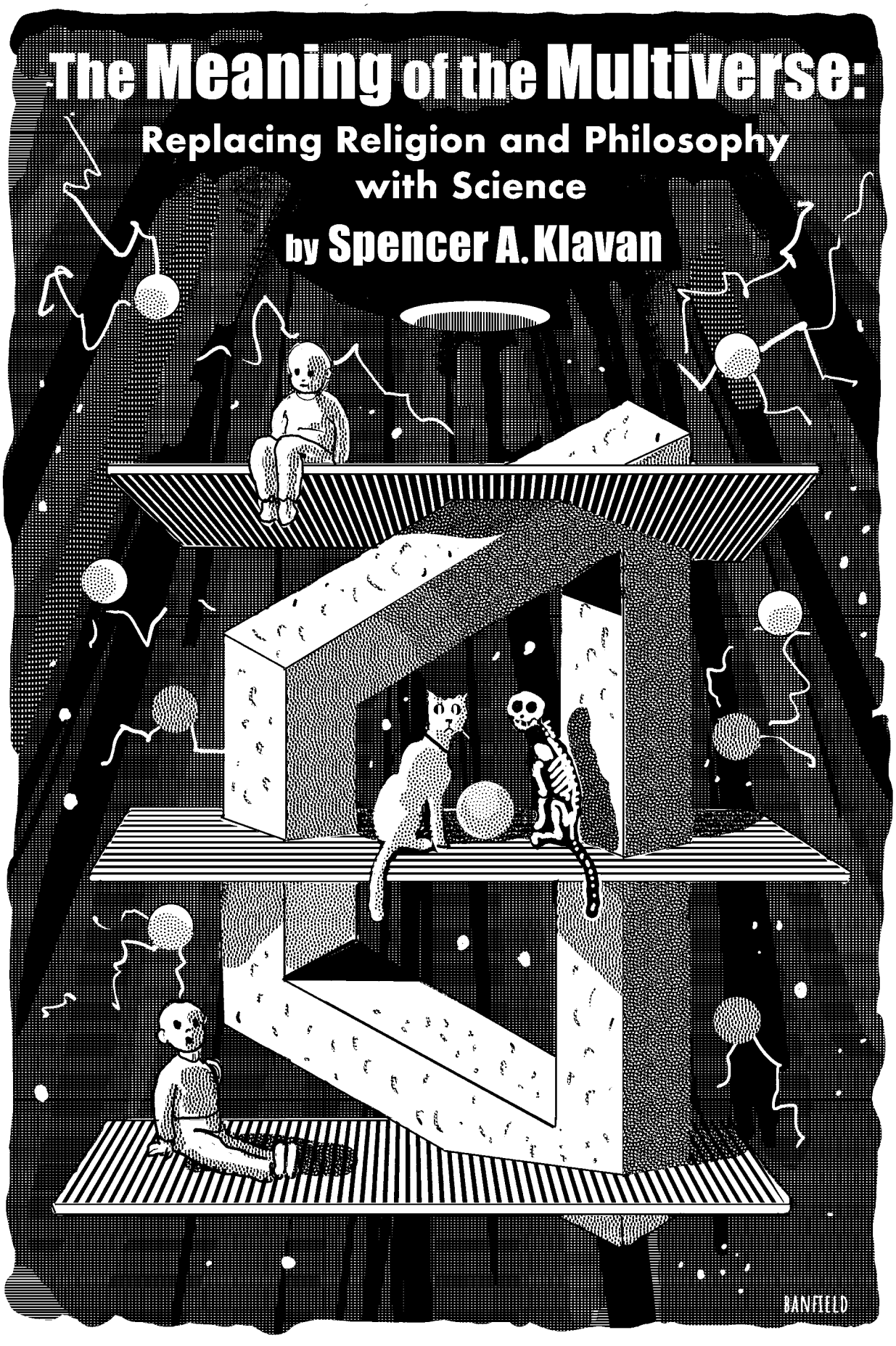

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Natural Right and History

It's nice to have your book reviewed in the *Claremont Review of Books*, but it is not so nice if the reviewer not only misunderstands the book but also fails to fulfill his primary obligation of relating what the book is about. Readers of Edward Erler's review of *Power and Liberty: Constitutionalism in the American Revolution* would never know that my book contained chapters on the imperial debate, state constitution-making, slavery, the separation of private and public realms, and an epilogue on Rhode Island and paper money ("The Pastness of the Past," Spring 2022).

The main issue between us comes from the fact that Erler is a political theorist and I am a historian. He is looking for timeless truths that were presumably rooted in the past, and I am trying to reconstruct that past as honestly and as accurately as possible even if that reconstruction undermines the timelessness of the political theorist's truth. The men who wrote the Declaration of Independence in 1776 may not have had in mind the meaning Abraham Lincoln gave to the idea of equality decades later, but the fact that Lincoln may have distorted the past should not detract from his achievement in wielding the idea of equality with extraordinary effectiveness. But historians have a different responsibility than the one Lincoln had. It certainly should not be their goal to create a past that will meet present-day political needs. That is the flaw in the 1619 Project.

Perhaps because Erler tends to blur the past and present, he seems to mix up my views of the past with the views of the historical figures I am dealing with. So if I describe the middling men scrambling into the state governments the way Madison described them—as "narrow-minded," "illiberal," "parochial"—Erler can only attribute these descriptions to my view of these people as "deplorables," thus leaving the reader of his review with the impression that I must be some deep-dyed Hillary Clinton-type liberal. (If that were true my wife would divorce me.)

Much to my amazement, Erler says that "Wood…believes that the Articles could have been amended and that doing so would have avoided the problems ushered in by the new Constitution." That was what Thomas Jefferson thought, but not what I think. Again, he doesn't seem to separate the historian from the people in the past whom the historian quotes.

The chapter that really exercised Erler was the one on judicial review, and he spent a good chunk of his review wrangling with my argument. He seems to think that my account of the origins of judicial review required me to erase the distinction between fundamental law and ordinary law. That is not correct. What I said was that a constitution or fundamental law, which at the outset seemed to be too awesome and terrifying to be invoked by mere judges in the courts, had to be tamed in order to allow it to run in the court system. But constitutional law never lost its fundamental character and always remained superior to ordinary legislation; otherwise, how could it be used to set aside ordinary legislative law? Considering the U.S. Constitution, in the wise words of the great legal scholar Gerald Gunther, as "a species of law and accordingly cognizable in courts of law" made possible American judicial review. Erler claims that I believe that Chief Justice John Marshall in his *Marbury v. Madison* decision collapsed the distinction between fundamental and ordinary law. Marshall did no such thing, but he did treat the Constitution as a kind of fundamental law that he and other judges could adjudicate in the courts—an innovative American point that an English jurist like William Blackstone, despite his belief in fundamental law, could not have accepted; but it was the crucial point for our practice of judicial review.

Gordon S. Wood
Brown University
Providence, RI

Edward J. Erler responds:

Professor Wood's letter exhibits an "orrery of errors"—to borrow from the title of E.P. Thompson's famous liberal book rooted in the past. Wood argues that our differences derive mainly from the fact that we belong to different disciplines. Mine seeks "timeless truths" that are "presumably rooted in the past" and his reconstructs the "past as honestly and as accurately as possible" even when that honesty and accuracy undermines "the timelessness of the political theorist's truth." One suspects—although Wood doesn't say so—that the historian's accuracy and honesty will *always* undermine the *presumption* of timeless truth. No "timeless truth," of course, can be "rooted in the past." If a truth is timeless, it has no past; it is eternal, with no beginning or end. This is why an appeal to natural right—what the founders called an appeal to first principles—was so revolutionary. Natural right was an appeal to the eternal principles of human nature which are older than any tradition or convention. Prof. Wood goes out of his way to avoid serious discussion of the Declaration of Independence and its dependence on timeless truth because he obviously agrees with post-Progressive historicism that ideas are only relevant to the era in which they were created, i.e., "timeless truths" do not exist. I quoted in my review the only substantive statement I could find of Wood's view of the Declaration: that its authors did not believe that blacks were equal to whites, thus agreeing with Justice Roger Taney in *Dred Scott v. Sandford*. For all his objection to the 1619 Project, does Wood really have any ground to stand on if he can't defend the timeless truths of the Declaration?

As for his description of the development of the "middling" classes after the Revolution, Madison clearly saw the dangers of the state legislatures and criticized this development, but he was committed to creating a democratic republic based on the middle classes. I can say for absolute certainty that he never used "narrow-minded," "illiberal," or "parochial" to describe the newly liberated "middling" classes that Wood depreciates for their lack of aristocratic *noblesse oblige*. (Wood cites a secondary source, not Madison,

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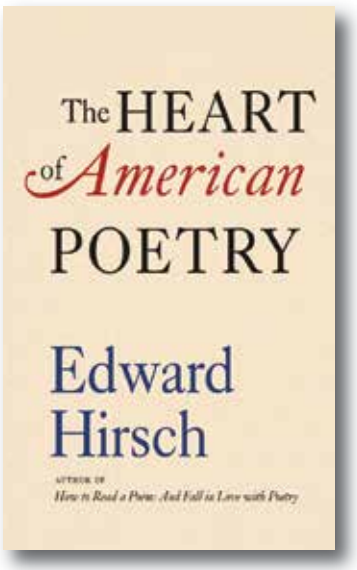

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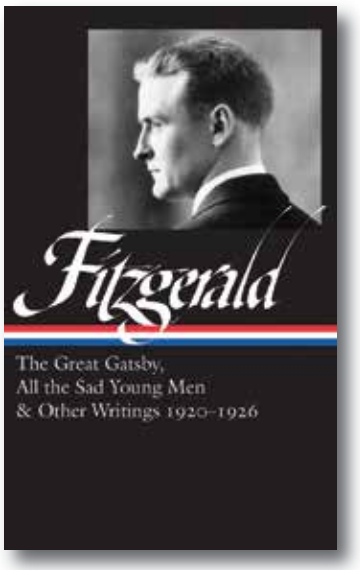

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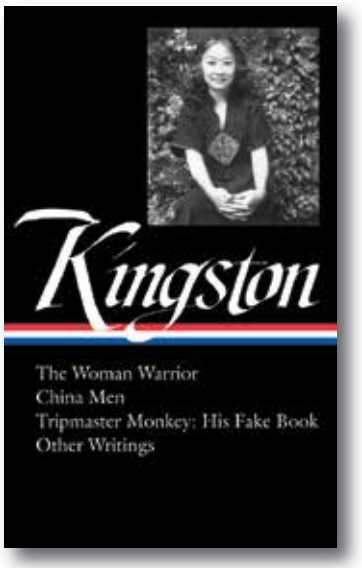

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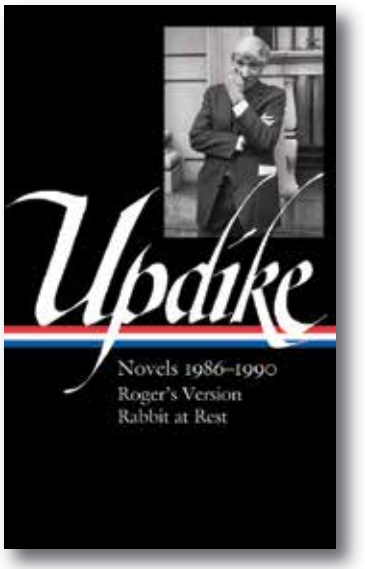

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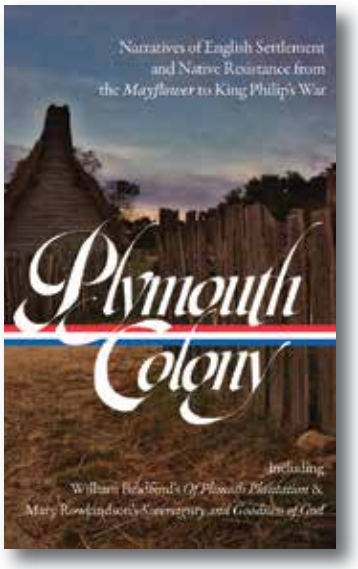

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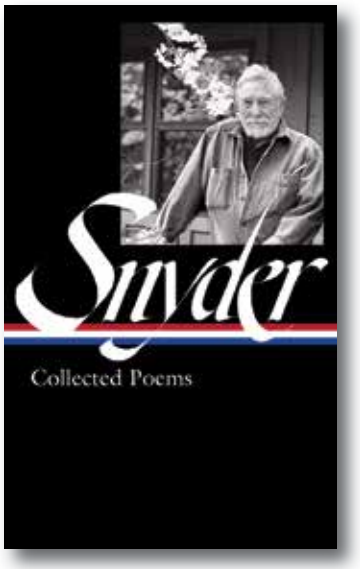

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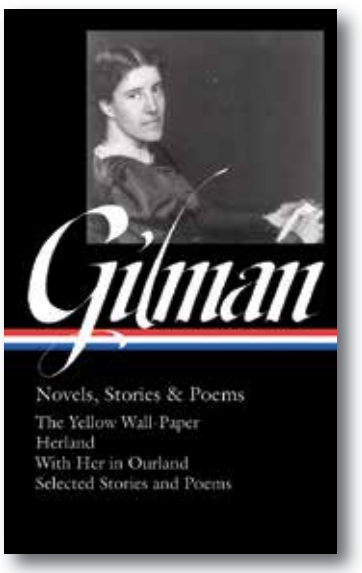

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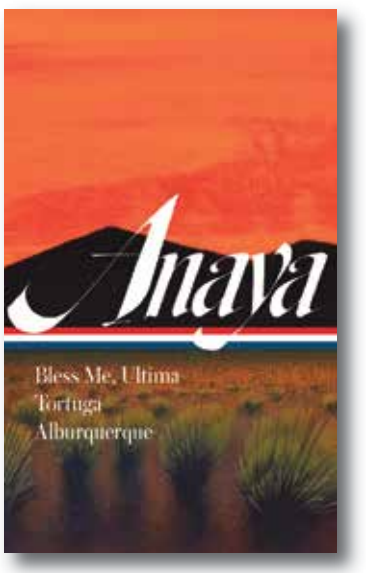

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and the source cites no relevant documents confirming the use of these words, which seem uncharacteristic of Madison). Knowing these were not Madison's words, I believed I was authorized to use some additions of my own, adding the equally "non-Madisonian" "deplorables," a term that was as much out of place as the terms Wood used. It was a kind of joke—or even mockery.

I did say that Wood believed, based on a favorable quote from Thomas Jefferson, that the Articles of Confederation could have been amended. Wood claims that everything he writes as a historian is neutral, but I believe that when a historian quotes an authoritative source with obvious approval, it can be inferred that the source is also expressing the author's opinion; in this case, as in others, I took the claim of "neutrality" to be an ideological pretext. He does argue that the replacement of the Articles by the Constitution was not "inevitable" because the economy and the general quality of life under the Articles were good. What drove the change was "excessive democracy in the states."

As regards *Marbury v. Madison*, Wood denies that he ever argued that this landmark decision abolished the distinction between fundamental law and ordinary law, as is frequently argued by progressive scholars today. He does hedge, however, when he says Justice Marshall did treat the "Constitution as a kind of *fundamental law*." What kind, Wood does not specify. He quotes "the great legal scholar Gerald Gunther" (with approval) as saying it was a "*species of law*" (emphasis added). What Wood will not recognize is that Marshall in his decision, as I demonstrated, followed the argument in the Declaration of social compact deriving from the sovereignty of the people. For Wood, and other progressive historians, the Constitution has become merely a "kind" or "species" of law, not fundamental law derived from a timeless truth, as the founders firmly believed. This is a possibility that Wood refuses—or is unable—to entertain. The historian's craft, as Wood defines it, does not allow us to understand the past as it understood itself because it assumes *a priori* that timeless truth is a delusion.

Who Will Guard the Guardians?

Randy Barnett admirably exposes the considerable deficiencies of Adrian Vermeule's "common good constitutionalism" ("Deep State Constitutionalism," Spring 2022). Unfortunately, while doing so, Professor Barnett advances his own flawed theory of constitutional law by taking conservative judges to task for failing to advance a muscular conservative activism. Instead of judges remaining silent when the Constitution is silent, Barnett envisions conservative judges spending their days filling constitutional lacunas with their view of the natural law. Barnett's vision is theoretically unsound and at odds with the constitutional order established by the founders.

In *Marbury v. Madison*, Chief Justice John Marshall grounded his theory of judicial review on the fact that the Constitution is written. If government actors are not bound by the text, "then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable." It is essential, therefore, to the very nature of a written constitution "that courts, as well as other departments, are bound by that instrument."

The Constitution's text simultaneously justifies courts' power of review and limits the scope of that review. Barnett's suggestion that courts should add the unwritten natural law to the written Constitution as grounds for their decisions would be repugnant to the very power they purport to be exercising.

I take it that Barnett bids conservative judges to elevate their view of the natural law to constitutional imperative because he thinks the natural law leads to good results. Justice Antonin Scalia would probably have agreed that implementing the natural law would lead to a good result in any given case (as his *Troxel v. Granville* dissent quoted in the review suggests), but he refused to use his power toward that end. The reason is obvious: if we vest in judges a freewheeling mandate to "do good," how can we know whose vision of the good will prevail? After all, every Justice who voted for a practically unlimited abortion license for the past 50 years (to name one example of many) thought they were doing good.

The central question of politics in general and constitutional law in particular is how to arbitrate between divergent views of the good. We cannot rely on a propensity among politicians and judges to do the right thing because no such propensity exists. As Immanuel Kant put it, "out of the crooked timber of humanity, no straight thing was ever made." The founders agreed with this low view of human nature. Consequently, they did not set for themselves the Sisyphean task of establishing a polity in which good always prevails. Rather, they established a constitutional order designed to mitigate as far as possible the

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"sinister designs" (to use James Madison's phrase) that were sure to come.

Madison explained in *The Federalist* that checking the "wicked" (again, his word) through the diffusion of power is the foundation upon which the constitutional superstructure was to be built. Barnett's proposal, if adopted, would destroy that foundation. Instead of diffusing power, he proposes concentrating it in the hands of a committee of unelected, life-tenured robed lawyers acting as a sort of National Council of Platonic Guardians who will tell the rest of us what the natural law demands in any given case. Doubtless it would be wonderful if we had a council of guardians dominated by Justice Clarence Thomas and like-minded jurists. The problem is the council would be an intolerable horror if it were dominated by Justice Sonia Sotomayor and her friends. And how could we ensure that we would always have the former and not the latter?

The founders created a system of government in which it was assumed wicked men will always vie for power, and the best one can do is diffuse their influence. The cost of diffusion of power is that it diffuses the power of good men as well as bad. But if we are unwilling to allow Sotomayor to decide cases based on her view of the good unrestrained by the text, history, and structure of the Constitution, then we cannot allow Thomas to do so either.

Barry K. Arrington
Arrington Law Firm
Plano, TX

Randy E. Barnett responds:

In his letter responding to my review of Adrian Vermeule's *Common Law Constitutionalism*, Barry Arrington writes, "Barnett's suggestion that courts should add the unwritten natural law to the written Constitution as grounds for their decisions would be repugnant to the very power they purport to be exercising." He provides no quotes from my review to support this characterization of my position. Happily for both of us, I neither suggested nor do I favor any such thing.

Instead, my view is that an understanding of natural rights is needed to explain why the Constitution is (or is not) morally legitimate, and therefore capable of producing positive laws that are binding in conscience on We the People. And an understanding of natural law is needed to appreciate why the nature of human flourishing makes it essential to legally recognize and protect our natural rights. In sum, natural rights define the boundaries within which each person is free to pursue the happiness or good life that is achieved by adhering to the natural law. And a written constitution that provides for mechanisms to effectively protect these rights is, therefore, conducive to achieving a good that is truly common to all.

So, in my review, I wrote that "The protection of natural rights is essential to the achievement of the common good, not only because the good of individuals is an end in itself, but because such rights constrain the age-old sacrifice of the individual for the greater good." Then in the very next sentence, I add: "How best to identify and protect these rights is a separate matter." This is a complex subject that I do not address in my review. Nowhere in my review, or in my other writings, do I propose that judges "add the unwritten natural law to the written Constitution as ground for their decisions." That just leaves Mr. Arrington's praise for my having exposed "the considerable deficiencies of Adrian Vermeule's 'common good constitutionalism.'" For this compliment I thank him.

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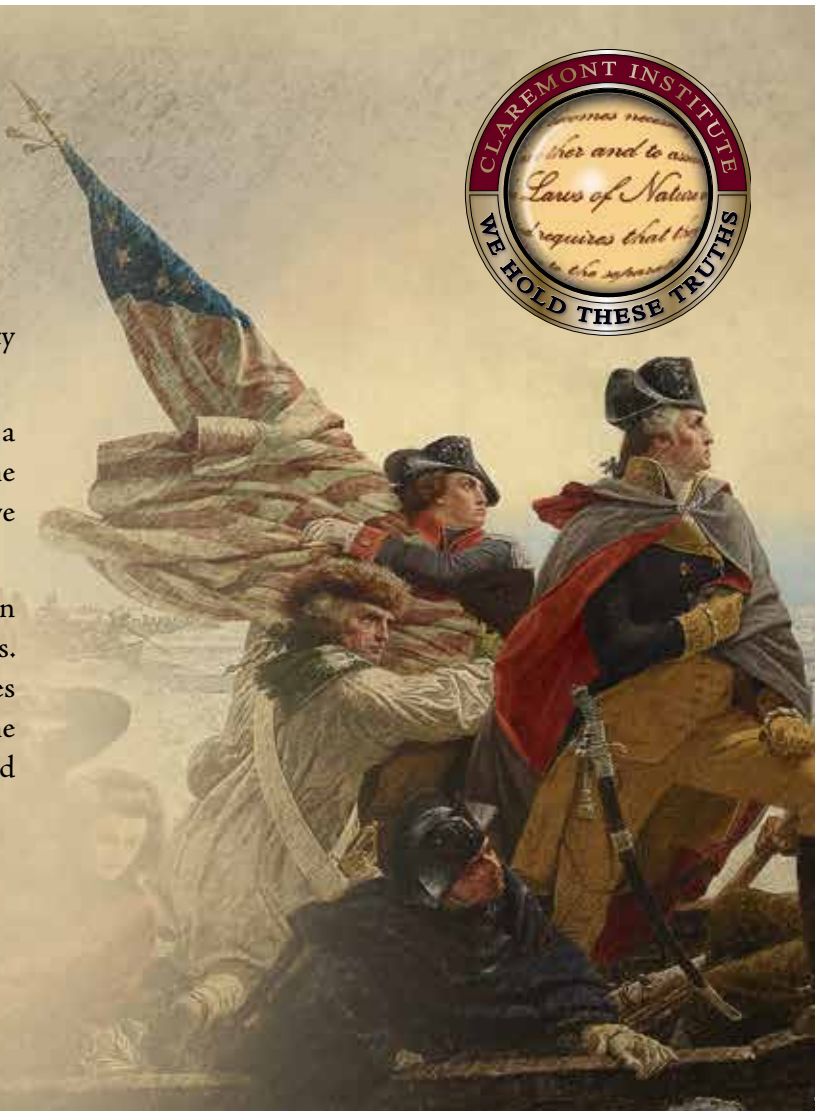

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