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Determined to resume his mission to secure the homeland, Odysseus took leave of the beautiful goddess Circe who loved him passionately. She warned him: deadly perils lie between you and your homecoming. Deadliest of all were the Sirens, with their sweet, alluring, but fatal song. You could never reach the Sirens. The bones of those who had tried littered the rocks around them.

Before resuming their journey, Odysseus called his men together. "I do not think it right that only one or two should know, so I will tell you all, and when we all know, we may die or escape"[1] with our eyes open. Odysseus, the Sovereign, told them everything — well, almost everything. He omitted one small detail: in the end, only he would make it back alive.

As they approached the Sirens, Odysseus commanded his men — he was the unquestioned sovereign — his word, absolutely binding law. Put wax in your ears, but not in mine. Bind me to the mast, and row like hell. Whatever I might say under the influence of the Sirens, ignore it, and keep rowing. And "*if I implore you, and order you to set me free, you must tie me tighter.*"[2]

As predicted, the Sirens' call was overwhelming, and Odysseus strained at his ropes, begging his men to unplug their ears, untie him, and give in to the moment's temptation. I know what I told you before, but ignore it and do what I tell you now.[3]

He was bound, but they were in a bind; Odysseus' command was law. And now he was ordering them to unplug their ears, and untie him. Only by feeling bound by the *earlier* command, however, could they free themselves from fatal, collective self-destruction.

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1. HOMER, THE ODYSSEY 141 (W.H.D. Rouse trans., 1937).

2. *Id.* (emphasis added).

3. *See id.* at 141-42 ("So they sang in lovely tones. From the bottom of my heart I longed to listen, and I ordered the men to set me free, nodding my head and working my brows; but they simply went on pulling with a good swing.").

When the future became the present and the past still controlled, there, then, in that moment, constitutionalism was born.

Constitutionalism itself arises from the sacrifice of the *ad hoc* for the rule bound. Constitutionalism at its core essentially requires self-restraint. We who would enjoy the lasting benefits of a constitution must recognize at a rational moment that in the future, temptations will lead to actions which, if not fatal, we will live later to deeply regret. The great pragmatic constitutional challenge haunts us constantly: how can the sovereign effectively limit its own power consistent with a continuing command adequate to the perilous journey?

Time and space prohibit extended discussion here,[4] but let me suggest briefly some instances of Odysseus at the Mast: first as a snapshot of our basic constitutional structure; next as a metaphor for the dynamic tension between continuity and change in our system of government; and finally as a problem, if not a paradox, for today's world, struggling to stay the course of freedom and human dignity.

I. The Basic Constitutional Structure

In the United States, as in any real republic, Sovereign Power ultimately resides in the body of the People. But at a calm and rational moment, the People realize that they will be apt to get carried away at just those times when they can least afford — and will later most regret — it. So the People entrust power to their representatives, thereby placing it beyond their own control to dictate to

4. As students in my Constitutional History course will attest, I have been developing and teaching this metaphor in depth since 1978, each semester devoting a whole class to it. I originally prepared and delivered these comments in ignorance of, and independent of, a growing literature. Research, however, now reveals that others have subsequently developed this metaphor, often in substantially similar ways. Time pressure prohibits exhaustive search and quotation, but interested readers should consult the work principally of: Jon Elster, Ulysses and the Sirens: Studies in Rationality and Irrationality 93-96 (1979); and his later book Ulysses Unbound (2000), which includes a bibliography. Recent essays employing the metaphor and overlapping much of this talk are: Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 Tex. L. Rev. 1985 (2003); Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 Stan. L. Rev. 605 (2003); and Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 Nw. U. L. Rev. 500 (1997).

those representatives, and then divide that power in an Odysseus-like move between the legislative, judicial, and executive branches.

A. The Legislative Branch

"The Senate," Madison declared in the 63rd Federalist, "may be sometimes necessary as *a defense to the people against their own temporary errors and delusions.* As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail . . . so there are *particular moments . . . when the people, stimulated by some irregular passion . . . may call for measures which they themselves will afterwards be the most ready to lament and condemn.*"[5]

The Constitution — the creature of the people — must contain, in Madison's words "*a safeguard against the tyranny of their own passions.*"[6] How did we accomplish this? Most obviously by providing six-year terms for each elected Senator. These long terms were originally designed to insulate U.S. Senators from the state legislatures that selected them, and now from the very People each represents. Buttressing this insulation, the founding generation consciously rejected immediate past practice and placed it outside the electors' power to instruct their Senators to vote a certain way. Although the state legislatures which selected them might passionately desire a particular vote on a particular issue, Senators retain the power and acquire a responsibility to resist that pressure and instead to keep an eye on the long-term best interests of the People. The Founders also placed it outside the power of the People to recall the Senator from office, however furious they may be at this moment. Absent impeachment for a crime, the six-year term was simply fixed.

The Founders also decided to reject term limits, or "forced rotation" for members of Congress. On the one hand, periodically forcing out representatives would seem to return power closer to the People by ensuring fresh blood circulating in Congress, retarding an insular and aristocratic self-perpetuating ruling class, and forcing members to return to their lives as private citizens under

5. THE FEDERALIST NO. 63, at 384 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

6. *Id.*

the influence of the laws they had enacted. On the other hand, imposing term limits, as the more populist anti-federalists originally — but unsuccessfully — advocated and the amended Constitution now provides with the Executive, is an Odysseus-like move, placing it outside the power of the People to send whom they wish for as long as they wish to represent them.[7] To a lesser extent, the Founders also showed self-restraint in the House of Representatives with its shorter two-year term and, like the Senate, not subject to instruction or recall.

B. The Judicial Branch

By giving all federal court judges life tenure, the Founders consciously insulated them from the public passions of the moment. Although seemingly out of touch with popular "wisdom," the past reaches out to restrain the people.

Ultimately, however, not only do the People restrain themselves through the Court, but the Court too, must restrain itself. It must not "make law" by substituting its own views of good policy for those of the People's representatives. It must not strike down legislation as "unconstitutional" that seems stupid, offensive, or ineffective. In short, the Court must restrain its own passion.

In 1972, for example, a bare majority of Justices in *Furman v. Georgia*[8] outlawed the death penalty as applied across the United States by characterizing it as "cruel and unusual" and thus violative of the Eighth Amendment. Justice Blackmun, dissenting, revealed "an excruciating agony of the spirit," reiterating his own deep personal "distaste, antipathy, and, indeed, abhorrence, for the death penalty."[9] And although "personally . . . rejoic[ing] at the Court's result,"[10] conceding that as a legislator he would vote against the death penalty, and as a governor he would exercise executive clemency, the Justice voted to leave it to the states to decide for themselves. Restraining his own passion, he refused to invoke the Eighth Amendment: "We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste

7. *Cf.* Bybee, *supra* note 4, at 530-35.
8. 408 U.S. 238 (1972).
9. *Id.* at 405.
10. *Id.* at 414.

for such action, to guide our judicial decision . . . . The temptations to cross that policy line are very great. In fact, as today's decision reveals, they are almost irresistible."[11]

Justice Powell also dissented:

> *It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power,* and this precludes the Court's giving effect to its own notions of what is wise or politic. That *self-restraint is of the essence . . . of the judicial oath.*[12]

Thus, by giving the court lifetime tenure, the People at a rational moment placed it out of their own power to act on their anger and remove the judges from office. And only by giving federal judges lifetime tenure could We provide for its effective correlative: judicial review. We, the People, empower you, the judges, to nullify the expressed will even of our own representatives when you honestly discern that this momentary passion contradicts past, deeply-held, contrary assurances.

Perhaps Chief Justice Rehnquist in *Furman* summed it up best for the four dissenters who wrestled with "judicial review in a democratic society": "How can government . . . by the federal judiciary, whose members are constitutionally insulated from responsiveness to the popular will, declare invalid laws duly enacted by the popular branches of government?"[13] While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, "*the only check upon our own exercise of power is our own sense of self-restraint* . . . . Judicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review."[14]

In sum, the People restrained themselves, first by electing representatives, then empowering a life-tenured judiciary to check those representatives, and also to check themselves.

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11. *Furman*, 408 U.S. at 411.

12. *Id.* at 433 (quoting Trop v. Dulles, 356 U.S. 86, 119-20 (1958)) (emphasis added).

13. *Furman*, 408 U.S. at 466.

14. *Id.* at 467, 470 (emphasis added).

C. The Executive Branch

The Founders also empowered the Executive to restrain the Legislature by veto. The President, a single individual, trumps the representatives of a majority — even an overwhelming majority — and will be sustained by a small minority — 1/3 + 1 — of either house. In the selection of the President, the Founders, while generally adhering to popular sovereignty, nevertheless utilized an electoral college in an Odysseus-like decision again to insulate the selection from the popular will.

And, subsequently, we have also limited the Executive to two terms. Suppose we desperately need and overwhelmingly want our beloved Commander-in-Chief to continue as President during a time of crisis? Too bad. We see ourselves as too tempted to maintain the *status quo* and, thus, in a rational moment by Constitutional amendment, have placed the future-present outside our power to control.

II. Continuity And Change in a Democratic System

We pride ourselves as a maturing society, searching for human dignity; embracing evolving standards of decency; discovering, devising, expanding and sometimes even discarding rights. We feel challenged at once to grow and evolve, yet also continue at the core on a course we set long ago. Again, Odysseus at the Mast is the operative metaphor for this great dynamic tension. We can see in our system of government by our basic laws — i.e., the rights we take for granted, the method by which we amend those rights, and the rights we cannot amend, attempts to act freely in the present while being bound by the past.

A. Laws and Rights

A law — an authoritative rule which decides a case by criteria specified in advance — is itself an instance that shows an advanced commitment to sacrifice present inclination to a fixed and settled policy from the recent past. Representatives codify the majority's will, which articulates "good" public policy — good primarily because the majority desires it.

In the Odyssey, however, above and beyond ordinary law — Odysseus' present commands — there emerged a higher law: ig-

nore my command and keep on rowing. The need for higher law to restrain passions destructive of the common good, as Madison explained so brilliantly and clearly in the Federalist Papers,[15] comes from the tyrannical threat posed by the most dangerous faction of all — the majority.

Today, the vast majority of Americans may be in favor of rounding up all suspected terrorists and their supporters, holding them without warrants, torturing them for their information, and quietly killing those who would attack us. Perhaps a majority would support doing the same to those who rape and kill our children. The majority may also favor silencing the unpatriotic who, in times of great national tragedy, cheer the success of the enemy.

But rights are trumps, as Ronald Dworkin declares.[16] A defendant's constitutional right to a jury trial, or free speech, trumps the People's emotion of the moment. Rights are real, only if key actors in the system rationally commit themselves in advance to restrain passions of the moment, including their own.

Thus, for example, post-Saddam Iraq struggles to enact a constitutional republic, which can at once reflect majority status of the Shiites, while at the same time preserving the autonomy of the Sunnis and Kurds. Advocates of republican government search for a framework that will make a working reality of republicanism's essential credo: majority rule that respects minority rights.

But how can we guarantee that once the balance is struck, it will continue unchanged and yet adaptable to circumstances different from what gave it birth? What do we do with rights that no longer feel right, with restraints that no longer liberate?

B. The Amendment Process

Consider the amendment process itself: a process by which we revoke what we have initially guaranteed. But again the metaphor applies: we consciously make it cumbersome. In order to alter the Constitution, two-thirds of each branch of Congress must initiate the amendment and a majority of three-fourths of state legislatures must ratify it. Why can we not more easily translate our evolving

15. THE FEDERALIST NO. 10 (James Madison) (Clinton Rossiter ed., 1961).

16. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi (1977) ("Individual rights are political trumps when held by individuals.").

standards of decency, our growing wisdom, into Constitutional protection? Because we know ourselves. We know we will mistake momentary passion for permanent wisdom and insight. So we restrain our ability to change our collective mind.

But change, while cumbersome, is still possible. Some may see this as a modification, if not an outright rejection, of the mast metaphor.[17] I think it partakes of its spirit. Many years ago at the U.S. Naval Academy during a post-performance discussion of my anti-federalist monologue "Vote NO!", a faculty member suggested a different metaphor which better captures this sense of retardation short of absolute binding restraint: the Constitution, he said, is like a sea anchor. A sea anchor, as he explained, does not keep a boat absolutely fixed to a spot. Rather, during stormy weather, we intentionally drag it behind to stabilize us in rough waters. A sea anchor simply slows us down while keeping us more steadily, although more slowly, on course.

The Founders *did* attempt, however, to put one provision of the Constitution out of our own power forever to alter, much as Odysseus had attempted with the Sirens. Immediately following the amendment procedures, Article V itself concludes: "Provided . . . that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."[18]

Even this arguably fails as a pristine example: Odysseus sought to protect against any change in command even by unanimous consent, his own included. Whereas in the United States, it is conceivable that a momentary democratic fervor might move *all* fifty state legislatures — including the relatively unpopulated states — to surrender their own disproportionate influence and abolish equal representation in the Senate.

Furthermore, the deviously clever could object that Article V is itself, like any other clause of the Constitution, potentially subject to amendment. A determined supermajority short of unanimity

17. *Cf.* ELSTER, ULYSSES UNBOUND 92-94 (2000). Issacharoff also suggests, "Ulysses bound himself in such a way as to make it impossible for him to yield to the Sirens' song. By contrast, most constitutional constraints, such as the supermajority requirements of Article V, are designed to retard rather than prohibit the exercise of the popular will — the overeater who locks his refrigerator does not necessarily throw away the key." *See* Issacharoff, *supra* note 4, at 1992.

18. U.S. CONST. art. V.

could first amend Article V by removing the unanimity required to alter one-state one-vote, and then make the Senate proportionately representative.[19]

C. Unalienable Rights

Are there no limits to a determined supermajority's capacity to subvert substantive constitutional guarantees while at the same time strictly adhering to constitutional procedures? Is there no concept by which we can forever place it out of our power to violate human dignity even by constitutional formulae? Can rights be enshrined and protected even against a supermajority carried away by passionate desire to revoke them? Not strictly *within* a Constitutional framework, especially when the claim to continuity is stripped of moral obligation and invested solely by deep procedural necessity.[20] We are bound by the Original Understanding, the claim goes, only because we need to be bound by something and, although arbitrary at the beginning, time and success eventually convey legitimacy. It's a little like driving on the right side of the road and stopping at red lights. "Tradition," a philosopher once declared, "is the forgetting of Origins." Understood this way,[21] truly irreversible limits are impossible and unreal.

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19. In 1992, when Quebec looked like it was about to secede, political leaders in a "do-or-die" effort to preserve Canada's unity, offered constitutional changes including a House and Senate with a guarantee to Quebec that however its population may decline, "its overall parliamentary representation – Senate and House would NEVER drop below 25 percent." *See* Clyde H. Farnsworth, *Lawmakers Provide Plans on Constitutional Change in Keep Canada United*, N.Y. TIMES, August 23, 1992, at 14 (emphasis added). The present struggle over a provisional and now permanent Constitution for Iraq might well result in a similar provision and problem. *Cf.* ELSTER, ULYSSES UNBOUND 101-105 (2000) (discussing amendment procedures).

20. *See* OLIVER WENDELL HOLMES, *Learning and Science, in* COLLECTED LEGAL PAPERS 138, 139 (1920) ("The law . . . is indeed . . . the government of the living by the dead. To a very considerable extent no doubt it is inevitable that the living should be so governed. The past gives us our vocabulary and fixes the limits of our imagination; we cannot get away from it. There is, too, a peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before. But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity.").

21. Issacharoff mostly denies moral legitimacy of the Founding generation, and rests binding obligation of constitutional limits on a common recognition by those out of power — today's losers but potentially tomorrow's winners — that their turn in the future can be assured only if they respect present arrangements. It doesn't matter how

The American Revolution, however, supplies moral legitimacy to the Founding Generation above and beyond the happenstance that it designed and ratified the U.S. Constitution. The Declaration of Independence — our most sacred secular article of faith — is a prime instance of Odysseus at the Mast: "We hold these truths to be self-evident" — beyond disproof, beyond dispute — "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . ."[22] Unalienable rights — life, liberty, and the pursuit of happiness — are by definition rights that *cannot* be denied. By the Declaration of Independence, we fundamentally place it outside our own power, for example, to sell ourselves into slavery.[23]

Ironically then, those of us who, like Odysseus, allow the past to bind the future when it becomes the present, must disagree with Jefferson, the Declaration's principal author, who elsewhere declared the earth belongs entirely to the living, to each generation "during its course, fully, and in their own right."[24] Thus, "no society can make a perpetual constitution, or even a perpetual law."[25] For Jefferson, then, "the dead have neither powers nor rights over it."[26] Constitutionalists instead would side with Madison who countered his dear friend and insisted that, "the improvements made by the dead form a charge against the living who take the benefit of them. This charge can no otherwise be satisfied than by executing the will of the dead."[27] Perhaps Edmund Burke best characterized "the great primeval contract of eternal society" as "a partnership

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we do it, as long as we do it by accepted — if arbitrary — rules. For the ancient Greeks, long accepted conventions — *nomos in physis* — acquired a near natural status. An Originalist, however, seeks legitimacy beneath the accident of the Founders being the initial designer.

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

23. *See* ELSTER, ULYSSES UNBOUND 102 (2000) ("Some constitutions offer absolute entrenchment of rights. Art. 79(3) of the German constitution says that the basic rights are immune to revision. Similarly, Article 57 of the Bulgarian constitution says that fundamental rights are irrevocable."). In a footnote, however, Elster suggests that Article 158 in the Bulgarian constitution implies that Article 57 is itself amendable.

24. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *available at* http://www.juntosociety.com/i_documents/tj_jm.htm (last visited Dec. 28, 2004).

25. *Id.*

26. *Id.*

27. Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), *available at* http://www.juntosociety.com/i_documents/jm_tj.htm (last visited Dec. 28, 2004).

not only between those who are living, but between those who are living, those who are dead, and those who are about to be born."[28]

Originalists who feel bound by the dead hand of the Founders confront the great paradox that only because the Founding Generation fashioned, fought, and won the American Revolution — fundamentally changing government — did they acquire the moral legitimacy essentially to bind us to continue their understanding and forever, even by revolution, place it out of our own power to reject human dignity — life, liberty, equality, and individual happiness.

III. Problems and Paradoxes of the Mast

In its dynamic application to real life situations, the metaphor seems increasingly problematic and paradoxical if not downright self-contradictory.

A. Life Without Parole

In his Second Treatise on Civil Government, John Locke defined "political power" as "a right of making laws with Penalties of Death, and consequently all lesser Penalties."[29]

Of course in designing and inflicting punishment, the People and their representatives must restrain their own passions. An especially brutal crime might stoke our passion, and our urge to punish might be misdirected at the innocent or fail to take into account mitigating circumstances. Thus, we have forced restraint upon ourselves by requiring due process, circumscribing trials through jury selection that excludes those who cannot be dispassionate or compassionate. We also adopt and apply rules that exclude evidence if its prejudicial effect outweighs its probative value, and we require a jury to find guilt only when they are convinced beyond a reasonable doubt. And even then, we provide for appeals.

These devices and others essentially cabin our urge to act immediately by restraining passion long enough to investigate and deliberate. To be reliably and fairly administered, the death penalty

28. Edmund Burke, Reflections on the Revolution in France 110 (Dolphin ed. 1961) (1790).

29. John E. Locke, Second Treatise on Civil Government (1690). Our founders embraced this essay as the philosophical justification for America's revolution.

must operate as a deliberate product of a deliberative process. All this is well established, but obscured perhaps is the committment underlying life without parole — the penultimate punishment that most death penalty opponents view as the only moral alternative.

By this ultimate exercise of Sovereign power short of death itself, We, the living, presently so attuned to this vicious killer's evil that we *feel certain* — now and for always — that however much he may grow or be transformed as a human being, he must be confined for life. Regardless of whether the convict is now fully rehabilitated, we irrevocably pledge and bind ourselves: This convicted killer shall never be set free.

In meting out Life Without Parole ("LWOP"), we guard against the future passion not of rage and disgust that presently move us, but against the rationally anticipated decay of anger and the sense of forgiveness or mercy that will replace it someday when we would focus exclusively on the living criminal and forget the victim of the past. How can it serve human dignity to continue to cage a changed, non-threatening, harmless person, who seems genuinely to regret his mistakes?

But we have made a covenant with *that* past — that we shall not forget nor forgive; neither review nor revise — a covenant which we bind ourselves to keep. Thus we reject the problematic question, "What good will it do?" and instead continue to focus on the bad that has been done.

Perhaps LWOP, then, is not so much the Odysseus-like past reason protecting against present passion, as a punishment that depends on present passion protecting against future passion;[30] or perhaps it is present, engaged, and informed emotion protecting against a future, detached rationality — rejecting forever the cost-

30. *See* ELSTER, ULYSSES UNBOUND 19 (2000) ("Sometimes, people precommit themselves in a moment of passion to prevent themselves from yielding to another passion at a later time."). Although he does not apply the metaphor to our collective choice of life without parole, ultimately confining it to individuals, Elster does cite Racine's Andromaque where a rejected lover calls for the immediate death of her exparamour. "While he still lives, fear lest I pardon him. Suspect my wavering anger till his death. Tomorrow I may love him if today he dies not." *Id.* at 20 (emphasis added). "We may use a precommitment device to prevent a change in preferences, or at least to disable ourselves from acting on changed preferences." *Id.* at 57. Elster comes close to the insight that life without parole provides, suggesting an addict's strategy of "throwing away the key" to disable himself. *Id.* at 64.

benefit analysis that asks, "what good can it do to continue this punishment?"[31] I have visited with these murderers, sometimes decades after their dastardly deeds, and too often, hearing their gentle sighs and genuine regrets, I too cannot help but wonder "what is the point of punishing these lifers until death?" Thus, while we have bound ourselves to continue to punish until death, we cannot help but wonder sometimes why?

Whatever it is, LWOP is ultimately Odysseus-like because it creates a binding commitment at this moment not to think differently or feel different when the future becomes the present and the present is the past.[32]

B. The Boundary Problem

These fairly brief comments only begin to scratch the surface and hardly exhaust the potential reach and power of the metaphor to illuminate diverse realms, such as the necessity for, and limits to, openness in government: recall, the wise Odysseus shared with his men, the perils that faced them. He told his men the truth — almost. The metaphor also introduces a distinction between the Sovereign in his or her private and public capacity. Privately, Odysseus is a weak man subject to and driven by passion, but in his public capacity, he is a wise man governed and restrained by reason. A growing literature must reveal other dimensions to this metaphor.

In closing, however, let's return to the action, with Odysseus bound to the mast, desperately struggling to annul his earlier command: "From the bottom of my heart I longed to listen, and I ordered the men to set me free."[33] I tried to say untie me to the crew, "nodding my head and working my brows, but they went on pulling . . . the oars . . . and put more ropes round me and fastened me tighter."[34]

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31. *See* ELSTER, ULYSSES UNBOUND 24 (2000) (briefly extending the standard metaphor of reason constraining passion to "cases of a passionate agent precommitting himself against dispassionateness" and also to the "case of a rational agent pre-committing himself against [future contrary] rationality").

32. Of course even here we back off from absolutely binding commitments although death penalty abolitionists rarely acknowledge it. The governor — the Executive — may pardon or commute a life without parole sentence to make parole available.

33. HOMER, *supra* note 1, at 141-42.

34. *Id.* at 142.

So far so good: Reason has triumphed. Notice, however, that the ending is flawed in a way which Homer failed to consider and continues to challenge us today: *"But when we had gone a long way past the Sirens, so that we could hear them no longer*, my companions took out the wax from their ears and untied my ropes."[35]

We could no longer hear them? His men never heard the Sirens at all. Consider that moment when Odysseus alone could still hear, but only faintly, their alluring call. Presumably the Sirens' destructive power diminishes with the square of the hearer's distance from them. A clever Odysseus, no longer so out of control as to evidence his madness, but still under their spell, could scheme his way to the Sirens by going limp at the mast. His men would then take the wax out of their ears, mistakenly relying on his assurance — his apparent return to rationality — that the danger had passed. Then, together having heard the Sirens faintly, they would vainly seek to reach them, and all would die in the attempt.

Wisdom of the ages informs us that no person should judge his own case. Yet who else *could* police that evanescent boundary between ordinary times and emergency situations?

Self-reference remains a deep, paradoxical, constitutional flaw. In considering a controversy between the Executive & the Legislative, the Court decides its own jurisdiction: the Court must not take jurisdiction where it has none, but it alone decides whether it may decide. The national government in a federal republic must police the boundary between its own and local power. The President may, but must not, pardon himself. The House must impeach its own and the Senate remove its own offending member. "This statement is false" — is true only if it's false and false only if it's true. Constitutional self-reference is part, perhaps the heart, of the boundary problem, which remains as insoluble in politics as it has been in mathematics.

C. Emergencies and Prerogative

At its core, Odysseus at the Mast stands for the pragmatic necessity to suspend the ordinary rule and substitute emergency mea-

35. HOMER, *supra* note 1, at 142 (emphasis added).

sures.[36] And when the emergency has passed, again to resume the ordinary course. But how do we know when the emergency is over? Odysseus was forced to judge when the danger had passed and his own rationality had returned.[37] Very troubling, but then, who else could have been relied upon to make that decision?

Extraordinary times call for extraordinary measures — sometimes.

Locke himself, the great revolutionary, called for the exercise of executive prerogative *within* a well-working constitutional plan. As he defined it, prerogative was the right to go outside the rules in an emergency for the good of the whole, later to be confirmed by the whole.[38]

Executive prerogative is, and has been a great challenge to republican government. In the *Ship's Money Case*[39] — probably the most complete attempt to wrestle with this difficult issue in Anglo-American jurisprudence — English judges were forced to consider whether King Charles I had claimed a continuing, extended threat where none in fact existed in order to circumvent legislative control over war funding and foreign policy. Centuries later in the U.S., the War Powers Resolution controversy between successive Presidents and Congress, and the Iran/Contra affair also challenged us to define, apply, and rightfully limit executive prerogative.

Now, in this post 9/11 world, the Executive response to international terrorism, including the reach of the USA Patriot Act, the use of torture in interrogation, and special tribunals outside the confines of ordinary constitutional due process similarly challenge us.

If the Executive exercises prerogative too often, especially by pretextually claiming emergency where there is none, and resting that claim on secret information, the Constitution as a restraining force will be corroded from within. It will be a Constitution in

36. Again, perhaps the metaphor has been inverted. Odysseus exercised his prerogative by turning over power temporarily to his men, whereas today, in emergency situations, the Executive does not relinquish but assumes greater power.

37. While to the best of my knowledge the literature is silent on this flaw, *Cf.* Posner & Vermeule, *supra* note 4, at 638 (discussing of fear and panic, and addressing the problem of whether a once irrational agent can be relied upon to judge that he or she has regained rationality).

38. *See* LOCKE, *supra* note 29.

39. 3 How. St. Tr. 825 (1637).

name only.[40] On the other hand, if the Executive ignores vital necessity and fails to exercise prerogative, the entire constitutional republic may be suddenly and irrevocably destroyed from without.

We want the truth, but can we handle it? We want to hear the Sirens but should we? Has the emergency passed? Is it time to take the wax out of our ears, to unbind Congress, and reassess? Can we afford to? Can we afford not to?

IV. Conclusion

The story of Odysseus at the Mast teaches us that the earth does not belong entirely to the living. It is, as Burke declared, a covenant between the living, the dead, and the not yet born. Thus, the metaphor stands profoundly for making and keeping covenants with the dead: in constitutional interpretation, the sea anchor of Original Intent; in the ultimate exercise of domestic sovereign power, punishment with retribution as its primary justification.[41]

Ultimately, the metaphor suggests that unless we allow the past to bind us, the future may never become the present.

Or at least not one in which we would choose to live.

40. Sometimes the Executive itself, in Odysseus-like fashion, takes the lead in restricting its own prerogative. Elizabeth I, for example, who by later consensus, had used executive prerogative rightly in combating the Spanish Armada, also inserted a "continuall charge to her justices . . . not therefore cease to doe right in any point" even if it meant ignoring her specific commands under seal. Faith Thompson, Magna Carta: Its role in the Making of the English Constitution 1300-1629 244 (1948). Elster cites Spinoza's example of the Persians who worshipped their kings as gods, yet felt bound by the fundamental laws of the kingdom "as the king's permanent decrees, so that his ministers render him complete obedience in refusing to execute any command of his which contravenes them." Spinoza himself cited Ulysses "whose comrades did execute his command in refusing, in spite of all his orders and threats, to untie him." *See* Elster, Ulysses Unbound 88 (2000). After the Phillipines terminated the Marcos dictatorship, President Corazon Aquino, possessed of nearly unlimited power, appointed a Commission to draw up a Constitution and declared, "Nobody, not even I your President, can overrule you." *See* Seth Mydans, *Aquino Asks Penal to 'Be Quick' in Preparing a New Constitution*, N.Y. Times, June 3, 1986, at D26.

41. Although the literature is silent, Originalism and Retributivism are deeply connected — psychologically, if not philosophically.