

# “The chains of the Constitution” Foundations of American Constitutionalism

## Chapter I The Lessons of History

Tyranny is tyranny, no matter what its form; the free man will resist it if his courage serves. But let him beware that in his rebellion he may lay hold of some affirmation of his spirit. There may be a heavy price for him and there will certainly be for the community in which he lives, if he succeeds in drawing along others with him.

*Judge Learned Hand, Is There A Common Will, 1929*

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**The Political Association** There is no human institution more pervasive and less escapable than the state. We are social animals, destined to live together and to form groups for physical and emotional sustenance. The most powerful such group is the state, to which we grant, explicitly and implicitly, willingly and unwillingly, powers that affect every aspect of our lives. History shows that when the state exercises its coercive powers without restraint we have little choice about this grant, and we may find ourselves with hardly anything beyond the hope for survival. In such circumstances, on infrequent occasions made memorable by the sacrifices associated with them, we may succeed in resisting and changing the state. The issue, then, is to forestall government from acting without restraint, to prevent the birth of tyranny, to avoid finding ourselves with no choices except suffering oppression or rebelling against it.

In happier times, when we do not speak of life and death but of quality of life, we accept some measure of constraint in return for the security and the opportunity to lead a fruitful life that a just government can provide. In all cases, to one degree or another, we inescapably experience the regulation of our private and public affairs. Wouldn't it be good to start from scratch, to avoid tyranny right at the beginning, and to decide what tradeoffs to make between constraints and security?

At the founding of America, a people, for the first time, decided to design their own government to suit themselves, to build a government much as an adventurous architect would design a building, even to the extent of using old materials in new ways and modifying traditional construction methods. Never before had the representatives of a people assembled in convention to determine for themselves the framework of their state, to find the best form of government for themselves, to put forward for popular debate and ratification a written constitution that would be the fundamental law of their own land. The founding of America was a risk: the nation would be a republic. Could a people establish a representative form of government that would actually work? Could stability and equity be maintained with the power of government in the hands of the people and not in those of an aristocracy, a dictator, or an oligarchy? Could self-government and self-control triumph over factionalism and greed when conventional wisdom pointed out a long history of failures? Was it really sensible to plan, from the outset, a government that would be constitutionally prohibited from the unrestrained exercise of its powers?

Government requires the exercise of power. Alexander Hamilton addressed that in the most blunt terms in the Federalist No. 15:

**Government implies the power of making laws. It is essential to the**

Government implies the power of making laws. It is essential to the idea of a law that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation.

James Madison, too, left no doubt about his viewpoint:

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A sanction is essential to the law, as coercion is to that of Government. ... If the laws of the States were merely recommendatory to their citizens, or if they were to be rejudged by County authorities, what security, what probability would exist, that they would be carried into execution?

*Madison, addressing the deficiencies of the Confederation, in Vices of the Political System of the United States, April 1787*

Was it really sensible to plan, from the outset, a government that would be constitutionally prohibited from the unrestrained exercise of its powers?

This new government was a risk, but not a Utopian one without awareness of human nature. Madison, in the Federalist No. 51, said in his usual, prudent way:

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. What is government itself but the greatest of all reflections of human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

Thomas Jefferson held this same acerbic view of human nature. He, just as Madison, spoke of government not as something abstract and remote, but as constituted of people endowed with considerable power. Objecting to the Alien and Sedition laws in 1798, and using a style more confrontational and less abstract than Madison's, Jefferson said:

... confidence is everywhere the parent of despotism – free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which, and no further, our confidence may go ... In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.

When Abraham Lincoln spoke of "government of the people, by the people, and for the people," he condensed these thoughts of Madison and Jefferson into the precise phrase that remains the measure, at least in principle, of the American way of government. Lincoln's contemporary, the great iconoclast Walt Whitman, carried on with Jefferson's jealous defense of individual rights in "A Song for Occupations",

The President is there in the White House for you,  
it is not you who are here for him,  
The Secretaries act in their bureaus for you, not you here for them,  
The Congress convenes every Twelfth-month for you,  
Laws, courts, the forming of States, the charters of cities,  
the going and coming of commerce and mails, are all for you.

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The stubborn and argumentative refrain that government is here for the people -- that government is not some sort of gift descending from on high but rather that a reciprocal relationship exists between government and the people -- runs through our political history. Muted at times, subdued on occasion by disinterest or demagoguery, this call serves well as the basis for our Constitution, and continues to remind us of the ongoing contention between government and the governed.

We Americans take pride in having established a robust and long-lasting government founded upon a written constitution that sets out a framework to limit government, to establish and protect the political and property rights of individuals, and to provide the governed with the ability, at least in principle, to control those who govern. We built a government based upon law. Accordingly, the rule of law constrains the actions of government -- to the extent that those who govern refrain, or are restrained, from "mischief." The rule of law, however, is double-edged. Laws and regulations can be the excuse of those who carry them

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out, who hide behind them and exploit them. The rule of law can be manipulated to turn the actions of government to serve the purposes of "rulers," be they petty functionaries or grand public figures. In the last analysis, the immense coercive power of government is no more than the sum of the actions of individuals, the actions of "those whom we are obliged to trust with power." Jefferson and Madison, Lincoln and Whitman have all enjoined us as citizens of this land to be jealous of our freedom and not pledge our confidence without limit.

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**A National Habit** Points of law and equity may occupy the courts, but principles are the gist of public issues and pronouncements. Advocates and opponents of an enormous range of political and social issues daily raise the Constitution or the Bill of Rights in their public statements. Even before our nationhood was established, the people of these Colonies appealed habitually to principle in political arguments. Edmund Burke commented upon this habit in 1775, in the Parliament of King George III, when advocating conciliation with the American colonies:

In other countries, the people, more simple and of a less mercurial cast, judge of an ill principle in government only by an actual grievance; here they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance; and snuff the approach of tyranny in every tainted breeze.

While politics is not constitutional law and the study of politics is not the study of constitutionalism, this national habit of appealing to principle weds politics to constitutionalism with no possibility of divorce. Repeatedly, the judiciary, the executive, and the legislative branches ground their arguments and decisions on principles based upon interpretations of the Constitution, often going back to the notes of the Founders, the Federalist Papers, or other related sources to find justification for their varied viewpoints.

The Supreme Court case of *Wallace v. Jaffree* shows how members of the highest court not only use the same sources to justify contrary opinions, but even replays arguments that took place two hundred years ago. In this 1985 case, an Alabama law authorizing a daily period of silence for meditation or voluntary prayer in public schools was declared to be unconstitutional. The majority opinion, delivered by Justice John Stevens, as well as the dissenting opinion of Justice William Rehnquist, cited the writings of Madison, although using them to support contrary conclusions. Madison, not being available to defend his reasoning, apparently was seen to be a fair target for both sides, and arguments in this case could hardly avoid Jefferson's phrase that the First Amendment was intended to "create a wall of separation between church and State." Justice Rehnquist attempted to reduce Jefferson's opinions to irrelevance by claiming that, since Jefferson was in France at the time the Constitution was framed and also later when the Bill of Rights was ratified by the States, "[Jefferson] would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment." A similar use, or misuse, of Jefferson's name arose during the Virginia Convention on ratification of the proposed Constitution, in 1788, when the dogged Patrick Henry co-opted the name of

name arose during the Virginia Convention on ratification of the proposed Constitution, in 1788, when the dogged Patrick Henry co-opted the name of Jefferson onto the side of the opposition. Madison, who had maintained a correspondence with Jefferson during the Federal Convention, testily responded, "When the name of this distinguished character was introduced, I was much surprised. Is it come to this, then, that we are not to follow our own reason? ... Are we, who (in the honorable gentleman's opinion) are not to be governed by an erring world, now to submit to the opinion of a citizen beyond the Atlantic?" This was not to disqualify Jefferson because of his absence, for Madison went on to say, "I believe that, were that gentleman now on this floor, he would be for adoption of this Constitution ... It is not right for me to unfold what he has informed me; but I will venture to assert that the clause now discussed [on the power of the central government to tax] is not objected to by Mr. Jefferson." Madison was angered by Henry's rhetorical tactics, not by any fault or inadequacy, or the location, of Jefferson. So here we are, two hundred or so years later, seeing the same confounding of rhetoric and logic, as well as the same deference to and appropriation of authorities.

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The Justices of the Supreme Court express different views not only towards the meaning of the Constitution, but also regarding the use of the writings of the Framers and even the dependability of contemporaries who played critical roles in the formation of the Union. How, then, is it possible for a lay person, a "mere citizen" so to speak, to make sense of the Constitution and the principles that underlie it? One way is to select quotations to opportunistically justify a position. Another is to understand these principles, to see how they developed, and from whence they came.

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**Principles of Constitutionalism** A constitution is not the origin of political liberty; that role is reserved for the human spirit. But when the spirit takes a stand, a constitutional government can be liberty's guarantor.

Our constitution has proven robust and has withstood both internal and external assault. Brief yet comprehensive, it allows an orderly process for clarification and amendment. But what is a constitution? There have been hundreds -- in some sense every state can be said to have one, written or not -- and of such variety of form and content that they might appear not to satisfy any uniform criteria. Beyond that, how does one distinguish between "good" and "bad" constitutions? These are not new questions. Over two thousand years ago, the Athenian philosopher, Aristotle, provided a definition of a constitution, and as we shall see, a way to distinguish between good and bad constitutions. In his treatise, *Politics*, he said a constitution, is

An organization of offices of a state, by which the method of their distribution is fixed, the sovereign authority is determined, and the nature of the end to be pursued by the association and all its members is prescribed.

*Aristotle, Politics, 4.1*

Our Constitution describes the organization of the branches of the national government, the elective offices, and briefly, the appointive judiciary, as well as the elective process, although leaving suffrage qualifications to the States. The Preamble, brief, elegant and ambiguous, describes the nature of the ends to be pursued by the nation, although it has taken a century of interpretations of the Bill of Rights to put those ends into concrete terms, and that process continues. The Constitution is a modern document, not presuming to identify state with society, departing from Aristotle's definition by avoiding any statement of the ends that "all its members," that is, individual citizens, pursue. The Preamble lays out a compact between the people and their government, delegating sovereignty but requiring that government provide the conditions for attaining happiness and a good life. The Preamble is not merely an adjunct to the Constitution; rather, the two are inseparable. The first defines a compact; the second contains within itself the process for continuous, orderly change, which allows the compact to be peaceably enforced.

Aristotle provided a way to distinguish between good and bad constitutions, modern or ancient, when he said:

Those constitutions which consider the common interest are right constitutions ... Those constitutions which consider only the

constitutions ... Those constitutions which consider only the personal interests of the rulers are all wrong constitutions, or perversions of the right forms.

*Aristotle, Politics, 3.6*

In the midst of human imperfection, these words written two thousand three hundred years ago stand as a tenet of American belief continuing to demand our energy: this nation of ours exists not to elevate a particular segment of the population as rulers, but to attempt to bring the blessings of liberty to all, even if imperfectly and incompletely. The democracy of ancient Athens was imperfect and flawed, containing within itself the contradictions of slavery and limited citizenship. Athens was, nevertheless, the source of present-day principles of constitutional government. And so, too, slavery and limited political rights became part of our country's history.

Another contribution to the development of constitutionalism was made in the

twelfth through the fourteenth centuries in northern Italy, among the cities in Lombardy and Tuscany. Here were city-republics trapped in the intrigues and power plays between the Papacy to the south, the German imperialist empire to the north, and the emerging nationalism of France to the west. In the Federalist No. 9, Hamilton accurately said that these city-states were "continually agitated [with] distractions." They were torn by self-defeating factionalism, yet determined to maintain their independence (even though this might appear more as anarchy, it was, after all, their own). Marsiglio of Padua, in 1324, based his writings on Aristotle, and went a step beyond to incorporate the "will of the subjects" in the definition of good government:

There are two genera of ruling parts or governments, one well tempered, the other diseased. With Aristotle in the "Politics" I call that genus "well-tempered" in which the ruler governs for the common benefit, in accordance with the will of the subjects; while the "diseased" genus is that which is deficient in this respect.

*Gewirth*

Marsiglio, being more pragmatic than theoretical, avoided discussing constitutionalism and went directly to the nature of good and bad governments. Nevertheless, the issue at its root is the same that Aristotle treated: what is the concept of which a particular constitution is a realization? What is "constitutionalism"? We will see that the process of obtaining an answer leads to other answers -- the determination of which persons are citizens, the criteria for good and bad constitutions, the rights inherent to citizens, the source of the right to alter government, and other matters of critical importance to the continuing existence of our form of government.

The Virginia Declaration of Rights, published June 12, 1776, provides a provisional response to the question of what is constitutionalism. Authored by Madison, this precursor to the Declaration of Independence stated the following principles:

All power is vested in, and consequently derived from, the people. Magistrates are their trustees and servants, and at all times amenable to them.

Of all the various modes and forms of Government that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration ... Whenever any government shall be found inadequate or contrary to these purposes, a majority of the community has an indubitable, inalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged

community has an indubitable, inalienable, and inderogable right, to reform, alter, or abolish it, in such manner as shall be judged conducive to the public weal.

All men are by nature equally free and independent and have certain inherent [and inalienable] rights ... namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Close attention shows the word "sovereignty" to be the key to stating the principles of American constitutionalism succinctly; without its use, a terse statement of principles is difficult to make. Four hundred years ago, one of the leading political theorists in Europe, Jean Bodin, could say sovereignty was "the supreme power over citizens and subjects, unrestricted by law."<sup>1</sup> While he would have been contested in this absoluteness, he would also have found many people to support him. This statement would hardly have been acceptable to the Americans of Revolutionary times, yet sovereignty does describe the power of the state over the



individual. Modern usage, stemming from seventeenth century England and becoming unequivocal in Revolutionary America, insists on that power being lawful and legitimate. The word "legitimate" that must be combined with "power" and given the shorthand "sovereignty": we can now derive the four principles of American constitutionalism from Madison's Declaration of Rights:

- ? The People are the source of sovereignty
- ? The People may delegate, but not alienate their sovereignty
- ? The People have the right to reform Government
- ? The people are by nature equally free and independent with certain inalienable rights

Principles are idealizations; no government, present or past, has ever achieved a complete realization of this particular set of principles. In our American form of government, sovereignty may well reside in the people as a last resort, but we are a society with a complex, many-layered government that makes the identification of sovereignty difficult at best.

"Alienation" occupies an important role in this litany of constitutional principles. Saying that the people cannot alienate its sovereignty means this: no generation has the right to deny to succeeding generations any part of the legitimate source of the power to govern. In some countries we see the people acquiescing to, or being forced to accept, one fashion or another of diminished sovereignty. In some ultimate sense we, the people, cannot alienate our sovereignty, but we do endow the various governmental units with enormous powers and find it a never-ending process to remind government of the source of those powers. The compact established at America's founding legitimizes the right of a generation to reclaim sovereignty by reforming government if some measure of sovereignty has been lost.

Those rights that are inalienable, the Bill of Rights notwithstanding, are not absolute. They change as legislatures and courts interpret them and as society changes. Even with a written Bill of Rights there have been many instances when the agencies of our government have forcefully suppressed those who held unpopular opinions, had the wrong color skin, or occupied land coveted for expansion.

With the exception of one bloody civil war, we have exercised our right to reform government through means that have been, more often than not, peaceable and

with the exception of one bloody civil war, we have exercised our right to reform government through means that have been, more often than not, peaceable and majoritarian, though not without the dedicated effort and personal sacrifice of many individuals. We have found confrontation possible without the necessity to be violent. We need only read the daily papers to see how rare and precious this moderation is, and how destructive of life and property the alternatives can be. We continually struggle with secrecy, graft, greed, corruption, incompetence, and all the other human frailties and failings, although these aspects of human nature are independent of the form of government. Our system of elections has evolved to be closely tied to two political parties and our votes are often for the party rather than for the candidate. In recent years, the costs of elections at the national, state and sometimes the local levels, have become so immense that party membership and conformance to party discipline are often necessary if only to obtain funding. Directly connected with this high cost is the fact that in the House and Senate, incumbents have a commanding advantage over challengers, which brings into serious question the extent to which our elected representatives do, indeed,

represent the electorate.

Regardless of how comprehensively or vaguely the principles of constitutionalism are stated, the exercise of power is a matter of practicalities. Such issues as the separation of powers and election to office for limited terms, which are also addressed in the Virginia Declaration of Rights, are not at the level of principle; they are, so to speak, means for implementation. During his presidency, Jefferson said,

What is practicable must often control what is pure theory; and the habits of the governed determine in a great degree what is practicable. Hence the same general principles, modified in practice according to the different habits of different nations, present governments of very different aspects.

*Jefferson to P. S. Dupont, January 18, 1802.*

In the Federalist No. 9, Hamilton summarized the current status of republican political processes in Europe:

The science of politics ... like most other sciences, has received great improvement. The efficiency of various principles is now well-understood, which were either not known at all, or imperfectly known to the ancients. The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding office during good behavior; the representation of the people in the legislature by deputies of their own election: these are wholly new discoveries, or have made their principal progress towards perfection in modern times. They are the means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided.

Means may vary between times and places, but they must remain true to the principles they are intended to support if freedom's blessings are to be retained.

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**Confederation To Federation** Our country did not rush towards this Constitution we now have. Developing a sense of an American nation different from a union of independent States with independent, parochial interests took time. During the Revolutionary War the States showed little interest in getting out from under Great Britain only to slip into a tight federation. There had been, in effect, fourteen armies: one of each colony and one Continental Army. Each of these armies had different pay scales, enrollment periods, and so on, usually to the advantage of those in the army of a colony. From 1781 until the Constitution was ratified in 1789, the States were loosely bound together by the Articles of Confederation. Debate and argument over the Articles began in 1777 and lasted five years. The Articles were finally accepted only seven months before Cornwallis surrendered at Yorktown. Prior to the Confederation, starting in 1774, there had simply been a Continental Congress.

In many ways the Confederation appeared to be the embodiment of the Revolution, concentrating legislative power in the individual States, rejecting the claims of a central government to tax and regulate commerce, and requiring unanimity for the passage of any amendment to the Articles of Confederation. This was the realization of the words of the Declaration of Independence, "that these United Colonies are, and of Right ought to be, Free and Independent States ... [having] full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." This form of government was not at all like that of England. Here was an experiment in a loose federal union, and a break with the ways that were familiar to the former colonists.

The years after the Revolutionary War were a difficult time in America. The War had ended but debts were owed to a multitude of people who needed the cash from loans that had paid for the Revolution. The economy was in the midst of a dislocation, confronting what we today call post-war demobilization, and the individual States had changed from being colonies of a major trading nation to being on their own. The adoption of the Articles of Confederation was an important step, if an uncertain one, towards bringing political order to the newly independent States.

The Confederation did work, but not well. The thirteen States frequently acted in their individual, sovereign and independent ways. The Articles of Confederation permitted State governments almost complete independence of the central government. Suffrage qualifications were determined by each State. The central government had no executive branch and no judiciary, only a single-chamber legislature. When the Continental Congress was not in session, a committee of the

government had no executive branch and no judiciary, only a single-chamber legislature. When the Continental Congress was not in session, a committee of the States exercised limited power. This committee had a president, but his term was limited to no more than one year in three. The committee could act only on what had been expressly delegated to it; otherwise, issues had to wait for action by the Congress. The Continental Congress had no power to levy taxes and no power over commerce; all decisions required approval of nine States, and each State had one vote, irrespective of population. There were boundary disputes, protective tariffs, aggressive acts by their navies (nine had their own), and disarray in such limited relations as they had with foreign nations. Short terms of office of the legislators of most States led to confused and inconsistent laws. Most indicative of the nature of the Confederation was that any change to the Articles of Confederation required a unanimous vote of the States. Size, population, wealth meant nothing; here was "one State, one vote," distilled, and unanimity was hard to come by. Hamilton hammered upon the ineptness of this arrangement in the Federalist No. 15:

... the concurrence of thirteen distinct sovereign wills is requisite, under the Confederation, to the complete execution of every important measure that proceeds from the Union. It has happened as was to have been foreseen. The measures of the Union have not been executed; the delinquencies of the States have, step by step, matured themselves to an extreme, which has, at length, arrested all the wheels of the national government, and brought them to an awful stand. Congress at this time scarcely possess the means of keeping up the forms of administration, till the States can have time to agree upon a more substantial substitute for the present shadow of a federal government.

Hamilton, it should be kept in mind, was not at all timid in stating his opinions, nor was he averse to the idea of even a dictatorial government. In 1780 he had written of the need for a coercive government that would exercise control over the entire thirteen states.<sup>2</sup> Hamilton's more subdued tone in the Federalist Papers should not be permitted to entirely mask his penchant for authoritative forms of government.

Jefferson was suspicious of a strong central government, nevertheless he was critical of the weakness of the Confederation. He wrote in his autobiography, in 1821:

Among the debilities of the government of the Confederation, no one was more distinguished or more distressing than the utter impossibility of obtaining, from the states, the money necessary for the payment of debts, or even for the ordinary expenses of government. Some contributed a little, some less, & some nothing, and the last furnished at length an excuse for the first to do nothing also.

Jefferson was not merely taking advantage of hindsight, for in 1785, from his diplomatic post in Paris, he had written to a London correspondent:

The want of power in the federal head was early perceived, and foreseen to be the flaw in our constitution which might endanger its destruction. I have the pleasure to inform you that when I left America in July the people were becoming universally sensible of this, and a spirit to enlarge the powers of Congress was becoming general. Letters and other information recently received shew that this has continued to increase, and that they are likely to remedy this evil effectually. ...

*Jefferson to Richard Price, February 1, 1785. In the same letter, and with an*

*Jefferson to Richard Price, February 1, 1785. In the same letter, and with an accuracy confirmed nearly a century later, he continued,*

I doubt still whether in this moment they will enlarge those powers in Congress which are necessary to keep the peace among the States. I think it possible that this may be suffered to lie till some two States commit hostilities on each other, but in that moment the hand of the union will be lifted up and interposed, and the people will themselves demand a general concession from Congress of means to prevent similar mischiefs.

Madison was one of Virginia's five delegates to the Continental Congress for almost four years beginning in 1779, prior to the Articles of Confederation. His first-hand experience led him to write from the Congress in 1780, in a tone of desperation unusual for him:



Our army [is] threatened with an immediate alternative of disbanding or living on free quarter; the public treasury empty; public credit exhausted, nay the private credit of purchasing agents employed, I am told, as far as it will bear; Congress complaining of the extortion of the people; the people of the improvidence of Congress; and the army of both; ... Congress, from a defect of adequate statesmen more likely to fall into wrong measures and of less weight to enforce right ones, [is] recommending plans to the several States for execution, and the States separately rejudging the expediency of such plans ...

*March 27, 1780*

The inability to act Madison complained of in 1780 continued into the years of the Articles of Confederation. This presented a political problem requiring a political solution. Late in 1785, the proponents of change, with Madison and Hamilton among their leaders, began a series of maneuvers directed at achieving this solution. A meeting in Annapolis, supposedly directed to resolving problems mainly having to do with trade and commerce, was called by Virginia. Representatives from only five States attended: Delaware, New Jersey, New York, Pennsylvania, and Virginia. Maryland, due to disagreements between its lower and upper legislative houses, did not send delegates

At this meeting in September 1786, they drew up a plan for a Convention of the States. Their actual intermediate goal was attained in February of 1787: the Continental Congress called a Convention according to this resolution:

Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a convention of delegates who shall have been appointed by the several States be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.

*Continental Congress, 21 February 1787*

In May 1787, the Federal Convention convened and as it progressed, inhibitions against recommending an entirely new Constitution were overcome by the weight of the arguments put forward by the delegates who had arrived already favoring a strong federation. Yet, whatever the Convention recommended, the States would have to ratify, the people to agree. There is, by the way, the legal principle that a body such as a constitutional convention can go beyond its mandate as long as the

nave to ratify, the people to agree. There is, by the way, the legal principle that a body such as a constitutional convention can go beyond its mandate as long as the source of power, in this case, the people, ratifies the results. This "open-endedness," already exercised at the founding of our nation, lies at the heart of the wide-spread resistance to calling a present-day constitutional convention, even if that convention was convened presumably to address specific issues.

Madison's experience with the impending failure of a powerless Confederation prompted him to state the agenda for the new Constitution in his "Vices of the Political System of the United States", written in April 1787. There he listed eleven failures of the Confederation, presaging his contributions to the Convention as well as to the Federalist Papers.

- 1) failure of the States to comply with the constitutional requisitions;
- 2) encroachments by the States on the federal authority; 3) violations of the law of nations and of treaties; 4) trespasses of the States on the rights of each other; 5) want of concert in matters

where common interest requires it; 6) want of guaranty to the States of their constitutions & laws against internal violence; 7) want of sanction to the laws, and of coercion in the government of the Confederacy; 8) want of ratification by the people of the Articles of Confederation; 9) multiplicity of laws in the several States; 10) mutability of the laws of the States; and 11) injustice of the laws of the States.

The Confederation, he maintained, was not acting in the common good. "How much," he asked, "has the national dignity, interest, and revenue suffered from this cause?" Madison was hardly alone in these opinions. Edmund Randolph of Virginia, at the opening the Federal Convention on May 29, 1787, arguing the "nationalist" agenda, therein bluntly enumerates a list of the defects of the Confederacy. The Federalist agenda was ready and waiting, and even though Madison and other strongly Federalist delegates would be overruled on several important matters, the overall course of the Convention was determined.

There was, however, hardly uniformity of thought at the Federal Convention – "Framers" they might be, but in two camps. One was composed of men like Elbridge Gerry and George Mason (and also Samuel Adams and Patrick Henry, neither of whom were at the Federal Convention), who favored a central government dependent upon the relatively independent States that would compose the new union. The other camp, with men such as James Madison, George Washington, Alexander Hamilton and Gouverneur Morris, were in favor of a strong national government that included executive and judicial branches capable of acting as checks on the legislatures of the States. By an appropriation of language the agenda of the latter camp took on the name "federalist," but might as well be described as "nationalist," in the sense of foreseeing a new, unified nation with a strong central government.

Madison reports that the elderly and frail Benjamin Franklin dealt with this new nationhood metaphorically:

Whilst the last members were signing it Doctr. Franklin, looking towards the Presidents Chair, at the back of which a rising sun happened to be painted, observed to a few members near him, that Painters had found it difficult to distinguish in their art a rising from a setting sun. I have, said he, often and often in the course of the Session, and the vicissitudes of my hopes and fears as to its issue, looked at that behind the President without being able to tell whether it was rising or setting: But now at length I have the happiness to know that it is a rising and not a setting Sun.

happiness to know that it is a rising and not a setting Sun.  
*Madison, Notes of the Federal Convention, at the signing of the Constitution,  
September 17, 1787.*

One month after the Convention, in his selling of the new Constitution, Hamilton expressed this self-consciousness in the Federalist No. 1, where he spoke of a high purpose:

It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political institutions on accident and force.

Hamilton was more emphatic and overtly jingoistic in No. 11:

Let Americans disdain to be the instruments of European greatness! Let the thirteen States, bound together in a strict and indissoluble Union, concur in erecting one great American system superior to the control of all transatlantic force or influence and able to dictate the terms of the connection between the old and the new world!

Continuing his arguments for a strong federal government with broad authority to raise funds through taxation, Hamilton, in No. 34, put emphasis on what the future might hold rather than, as was typical of European politics, on retaining what already existed. This was the idea of progress distilled to a most potent brew:

In pursuing this inquiry, we must bear in mind that we are not to confine our view to the present period, but to look forward to remote futurity. Constitutions of civil government are not to be framed upon a calculation of existing exigencies, but upon a combination of those with the probable exigencies of ages, according to the natural and tried course of human affairs.

The Philadelphia Convention produced a republic embodying a strong central government and a potentially powerful executive. The Confederation of largely independent States gave way to a nation, a federal union. To many the new plan of union appeared less democratic than had been the Confederation, since power would move away from the States toward the national government. This new plan was, indeed, more like the British model than like the Confederation. In order to win acceptance and ratification, particularly since British rule and the Revolutionary War had been experienced first-hand by many still in politics, advocates of the new constitution had two battles to fight. First, practical concerns about the potential for unrest presented by any change of such magnitude had to be addressed. The proposed federal union could not be forced upon the people; there had to be agreement to it. Second, the new federation had to incorporate acknowledged principles of constitutionalism that already existed as part of State constitutions, several of which had Bills of Rights. The fact that George Washington, a national hero, participated in the Convention, and the near certainty that he would become the first President, made it possible to work around fears of enhanced executive powers.

The Delegates had taken upon themselves to go beyond their mandate and replace a confederation agreed to by States with a federal union built upon a republican framework. Sovereignty, that is, the source of the new nation's power over its citizens, would reside in the agreement of the people and be expressed through representative institutions. For centuries of European history, government was

representative institutions. For centuries of European history, government was thought of and acted as a gift from rulers to the people, but that was changing. Sovereignty was becoming legitimacy, a legitimacy based on a compact between the people and their government. Government was bound by its Constitution to provide the people with the conditions for happiness, and the people would retain the right for the continuous and orderly reform of government to see that this promise was kept.

The form for ratification of the new Constitution was no minor issue. The Articles of Confederation had been written by Congress and ratified by the States; the British model was of a legislature meting out the law, encumbered by tradition but able, in principle, to alter its mandate and extend its power without recourse to the citizenry -- what process for ratification would this new nation adopt?. The United States of America would be a representative democracy where issues were formulated and debated in elected assemblies, but there was a wide range of opinions on the ratification process, which was debated on several days during the

Federal Convention. On June 5, Madison stated the view that ultimately prevailed, "the new Constitution should ... be ratified by the supreme authority of the People themselves." On September 13, the final wording was arrived at, reading, "[The Constitution should] be submitted to a Convention of Delegates chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent & ratification ...". There would not be a popular referendum not because communication and travel were difficult, but because direct democracy was suspect of wild results. And there was a further filtering of delegates through their nomination by the State legislatures. This was a cautious step into representative democracy; a step that proved successful and irretrievable.

Winning acceptance of the proposed constitution by the State ratification conventions would be difficult. Rhode Island had not sent delegates to the Convention. The divided New York delegation stopped casting votes on July 11, although Hamilton, attending intermittently, continued his contributions to the debates. At the end of those four months of demanding work there were those who had reservations about the final outcome of the Convention, and would not sign Gouverneur Morris' final draft of the Constitution. Present at the closing ceremony, but not signing, were the distinguished participants Edmund Randolph and George Mason of Virginia, and Elbridge Gerry of Massachusetts.

Ratification of the Constitution required agreement by nine of the thirteen States. This was achieved with dispatch in June 1788, but unanimous approval took a good deal longer. Virginia and New York were critically important States; together their population was nearly one-third that of the entire thirteen. Virginia followed quickly as the tenth State, but the vote of the Virginia convention was 89 to 79. Virginia's cooperation was a necessity; its size (Kentucky and West Virginia were soon to be derived from it) as well as its tradition of political leadership made a union without it meaningless. In complicated political maneuvering, Patrick Henry's forces demanded that a Declaration of Rights -- later realized as the Bill of Rights -- be attached to the Constitution. New York was also essential; it was a trading center for the New England and Middle Atlantic States, and its geographical position would split the country in two. In July the vote in the State of New York was a close 30 to 27.

Not until May, 1790, did all thirteen states ratify the Constitution. Stubborn Rhode Island, occupied by internal problems, was last and voted for ratification only by 34 to 32 in its convention. The new Constitution promised stability and the security of the principles of constitutionalism through a dynamic tension between government, with its ability to coerce, and the people, in whom sovereignty is presumed to reside. The Constitution took shape through many important

presumed to reside. The Constitution took shape through many important compromises, not always settling the underlying disagreements but permitting the process of governance to continue. It incorporated an orderly process of change which continues to provide for resolving conflicting interests without destroying the underlying structure. That the Bill of Rights exists at all, and at that as a series of amendments, is further indication of this tension and of the robustness of the mechanisms for resolving conflicting interests.

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**Compromises and Concerns** The Constitution incorporates into itself a deep-seated suspicion of the concentration of power: the power to rule is divided and segmented. This suspicion extends even into a distrust of direct democracy. The Senate gives each State an equal weight in voting and originally its members were not elected directly by the people but by the State Legislatures. The House gives weight on the basis of population and is directly elected, but its term is one-third that of the Senate and the entire membership is up for re-election together. The different methods of electing our bicameral legislature gives some degree of assurance that no single point of view can easily become ascendant. That this particular assurance is less than perfectly realized was demonstrated only a few decades ago in the time of the demagoguery of Senator Joe McCarthy. During that time both Houses of the national Legislature proved temporarily helpless to act to protect individual rights, and even cooperated in abusing them; but the nation survived and reached equilibrium again.

A further example of this suspicion of power is embodied in the Bill of Rights. The Federal Convention, as well some of the State conventions, saw arguments that no guarantees of specific rights were needed since, presumably, the new federal government had only those powers explicitly given it in the Constitution. Hamilton supported this view of enumerated powers when, in the Federalist No. 84, he said in essence, "trust the government":

It is evident that ... [bills of rights] have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing: and as they retain everything they have no need of particular reservations.

Following this remarkable statement, he undoes his argument that the people "retain everything" by admitting that the government would be able "to claim more than were granted" to it:

I go further and affirm that bills of rights ... are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.

Hamilton's self-contradictory arguments strike the core of the issue of constitutional guarantees of individual rights: how are these rights to be clearly delineated and defined? Despite the "quiet Amendment," Article IX of the Bill of Rights, which attempts to codify the "retain everything" approach, we find ourselves two hundred

defined: Despite the "quiet Amendment," Article IX of the Bill of Rights, which attempts to codify the "retain everything" approach, we find ourselves two hundred years later still arguing the issue of the rights we retain as individuals.

The transition from the Articles of Confederation to a federal union raised concerns not only about the rights of individuals, but about the power of the individual States over their own affairs. Many delegates were concerned that the more populous States might dominate the smaller, coercing them through votes in a national legislature where representation was based on population. Early in the Federal Convention, Madison stated in a speech to the Committee of the Whole,

**The great difficulty lies in the affair of Representation; and if this could be adjusted, all others would be surmountable.**

*Madison, Notes, June 19, 1787. The reader is referred to Thoughts on Government, a brief essay written by John Adams around 1776, for some earlier and highly parallel remarks.*

Of course, representation was "adjusted," in what has come to be called the Great Compromise. On July 5, the proposal was put forward that there would be a popularly elected House with representation based on population (including slaves to be counted at three-fifths their actual number), and an indirectly elected Senate where every State would have the same number of votes. A compromise had settled the issue of representation, but the national government quickly took upon itself greater powers than many imagined it would: In 1823, Jefferson looked back to make the point that Madison's evaluation had not anticipated what might occur after a federal union had been created:

[I ask] if a single State of our Union would have agreed to the Constitution, had it given all the powers to the General Government? If the whole opposition to it did not proceed from the jealousy and fear of every State, of being subjected to the other States in matters merely its own?

Some forty years later, this country fought its terrible civil war, the scars of which are still not entirely healed. To a large degree, that war was an angry confrontation over what Jefferson had stated; a war that also began to bring closure to the moral issue left unfinished at the Convention: the political compromise over slavery.

There had been considerable feeling at the Convention in favor of a strong central government; Hamilton was hardly alone as a proponent of a government more on the lines of that of Great Britain, even to the extent of hereditary offices. This competition between a sovereign people -- with the consequent necessity of defining just who those people may be -- and the pragmatics of the exercise of power and preservation of privilege, lies at the heart of the right of suffrage.

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## Who Is A Citizen?

The definition of the right of suffrage is very justly regarded as a fundamental article of republican government.

*James Madison Federalist No. 52*

From the very beginning of our federal union there has been the recognition that the people are the source of the government's power and legitimacy, yet the question, "Who is a citizen?", is still with us. This concerned Aristotle in the time of the Athenian democracy, and he provided a clear answer that is still appropriate in our time:

A citizen is one who shares in the administration of justice and in the holding of office.

*Aristotle, Politics 3.1*

Aristotle's definition of citizenship distinguishes between true representative constitutions and those governments that claim to be of the people, when in fact they permit meaningful participation only by a self-perpetuating segment of the population. Aristotle expected participation of citizens, feeling that citizenship remains only a theoretical right until exercised. He expected that the benefits of citizenship would in some way be proportionate to the constructive participation of the individual in "administration of justice and in the holding of office." Aristotle made a distinction between membership and citizenship: a member could participate in the defense of the state and receive such benefits of the state as safety and security, but only a citizen could actually participate in the process of governance. Today, we understand that participation in the welfare of the state extends beyond only direct involvement in the political process; it includes, for example, participation in the nation's economic and social well-being. But the political process remains the most immediate determinant of the nature of the state, and the distinction between member and citizen remains with us in subtle and unsubtle ways. We also understand the nature of the power of money and the subtle and overt ways in which the political process can be manipulated.

In terms more specific to our way of government, a citizen is one who has the right to participate fully in any of the three branches of government, legislative, executive, and judicial, and at any level, federal, state, and local. Some persons, by conviction for criminal acts or from incapacity, are restricted from these rights; some are restricted due to the actions of governmental bodies or social forces. These persons, while subject to the laws of the state, are less than full citizens.

The right of participation lies dormant until exercised; it is passive and accordingly,

The right of participation lies dormant until exercised; it is passive and accordingly, by itself is not much more than a slogan. There must also be another, active, aspect of citizenship, and that is actual participation in government. Practically, participation in the daily machinery of government is a full-time task. We delegate governance to our elected officials and through them to the bureaucrats and others who have become the necessary cogs in modern government's complex mechanisms. Our representative form of government makes it important for we citizens to understand the necessity of Jefferson's "jealousy," and important for us to maintain control over the coercive force that government wields. It is only too easy for government, local and national, to construct effective barriers to public view, and for our representatives to act on their own agendas, which may be hidden and not in the long-term public interest. We, as citizens from whom sovereignty is derived, must "oblige [government] to control itself."

One form of active participation is to vote, and that raises the question, in what

manner is the vote of one person to make itself a determinant of the legitimate actions of the state? Part of the answer to this lies in the proposition that no natural difference exists between rulers and ruled, that rulers and ruled must from time to time exchange places. The American Constitution, as it was ratified in 1789, did not expressly guarantee the right to vote or to hold office. These questions were left to be determined by the individual States, a political decision that would only delay eventual federal intervention.

In the eighteenth century, and the two prior millennia, Western political practice reserved the right of suffrage, when it existed at all, to white males and almost always had additional qualifications regarding wealth and parentage. Disputes about enlarging the franchise rotated around wealth, property and birth qualifications. A recognition of the "equal humanity" of women and persons of other races, and an according grant of suffrage, did not generally take place until the twentieth century. Nevertheless, historical arguments about the significance of suffrage retain their vitality and importance.

Suffrage and its companion, the right to hold office, determines in a practical sense who may take part in the act of governing. Anyone can be ruled, but who can be among the rulers? Suffrage is a litmus test of adherence to principle, the realization of Lincoln's "of, by and for."

Late in his life, Madison had this to say, requiring that some criteria for suffrage exist:

*[It is] proper to embrace in the partnership of power, every description of citizen having a sufficient stake in the public order, and the stable administration of the laws; and particularly the House keepers & Heads of families; most of whom "having given hostages to fortune," will have given them to their Country also.  
Note During the Convention for Amending the Constitution of Virginia,  
December 1829.*

Here Madison was at his most democratic, intending to open the governance of the state to all those (white males) who had an interest in the state's well-being, not merely to those who owned property. Traditional thought, inherited from the Continent and well-enshrined in America, maintained that some minimal ownership of property, or at least some cash income, distinguished those who could be trusted with the right to vote.

Jefferson, consistent advocate of republicanism, showed an uncertain approach to suffrage. He favored indirect election of the Senate and the President, but direct

suffrage. He favored indirect election of the Senate and the President, but direct election of Representatives. He maintained a life-long commitment to an enlarged electorate. In 1776, writing of the Virginia Constitution, he said,

I was for extending the right of suffrage [in election of the representative house] (or in other words the rights of a citizen) to all who had a permanent intention of living in the country. Take what circumstances you please as evidence of this, either the having resided a certain time, or having a family, or having property, any or all of them. Whoever intends to live in a country must wish that country well, & has a natural right of assisting in the preservation of it.

*Jefferson to Edmund Pendleton, August 26, 1776.*

In the same letter, arguing that the Senate should be chosen by the Representatives, he showed the suspicion that the public interest could be manipulated. He



apparently felt that given the proper guidance, the public could reach a good decision:

I have ever observed that a choice by the people themselves is not generally distinguished for it's [sic] wisdom. This first selection from them is usually crude and heterogeneous. But give to those so chosen by the people a second choice themselves, & they generally will choose wise men.

Later, in 1816, Jefferson wrote in the republican tone which by that time had become more prevalent:

The true foundation of republican government is the equal right of every citizen, in his person and property, and in their management ... Let every man who fights or pays, exercise his just and equal right in [electing the legislature].  
*Jefferson to Samuel Kercheval, July 12, 1816.*

Regardless what might have been said later, in 1787 broad-based democracy was an experiment, and a deep concern existed that it could lead to an unbridled tyranny of the majority potentially endangering the rights of minorities. The House of Representatives was to be popularly elected, as were various State legislatures. Could these become platforms for populist demagoguery? Bluntly put, property holders were concerned they would become a minority of the electorate as the nation became more urban and industrialized, and that they would be put upon by the less well-off, who would make up the majority. Madison wrote to Jefferson,

On what principle is it that the voice of the majority binds the minority? It does not result, I conceive, from a law of nature, but from compact founded on utility.  
*February 4, 1790.*

Contradictory attitudes, at once trusting and mistrusting the mass of the people, underlay the issue of suffrage. Not only did the work of the Federal Convention leave the determination of qualifications to the individual States but the Constitution specifically stipulated that only the House of Representatives should be popularly elected. Direct election of the Senate by the people was not guaranteed until 1913, when the Seventeenth Amendment was ratified. Beginning that same year and extending until 1971, four Amendments (the Fifteenth, Nineteenth, Twenty-fourth and Twenty-sixth) were ratified which extended the protection of the right to vote against abridgment on the grounds of race, sex, and payment of poll taxes, and set a uniform voting age.

payment of poll taxes, and set a uniform voting age.

Even now the President and Vice-President are not directly elected. The highest elective offices in the government are chosen by the Electors of the individual States, whose ballots are forwarded to the Congress where the final determination is made. The number of Electors of each State is not proportional to population; it is the number of Representatives plus the number of Senators. One reason for this arrangement was to provide the smaller States with more confidence that their interests would be properly weighted against those of the larger States. The States are left to determine the way in which these Electors are chosen, and they have at times taken remarkable approaches departing far from democratic principles. There is no legal binding of the Electors to cast their votes as determined by the popular vote; the enormous pressure of public opinion provides the requisite force, but there have been a small number of exceptions. The ultimate forum for election of the President is the House of Representatives, where there is a one-State, one-vote process if the Electoral College does not yield a conclusive result. The action

of the Federal Convention to create an Electoral College appears as a pragmatic, if oddly unfinished solution designed for completion by future generations.

In 1787, in every State, the right to vote was restricted by some sort of property or wealth qualification and was the prerogative only of white males. Pennsylvania, which in a number of matters was the most democratic of the States, required merely that public taxes of any amount had been paid; South Carolina required a religious testament as well as a substantial property holding. On the whole, there was little change in the matter of suffrage brought about by the Revolution or the new Constitution, which continued to leave matters in the hands of the States.

Broadening the right of suffrage has taken many years and the efforts of many individuals within and outside the government. This was achieved through changes in attitude that have found expression in legislation, Constitutional amendment and judicial interpretation. Judicial review played a critical role in bringing about changes that might otherwise have been impossible or much delayed.

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## Judicial Review

Experience must be our only guide. Reason may mislead us. It was not Reason that discovered the singular & admirable mechanism of the English Constitution. It was not Reason that discovered or ever could have discovered the odd & in the eye of those who are governed by reason, the absurd mode of trial by Jury. Accidents probably produced these discoveries, and experience has given a sanction to them.

*Reported by Madison in Notes of the Debates on the Federal Convention*

Even after the Constitution was finally ratified by the States, a basic feature of what we now recognize as American constitutionalism was still missing: the extraordinary power and position of the judiciary. Chief Justice John Marshall caused this to be added fourteen years after ratification, in the third administration of the new government, nearly single-handedly, and without any vote by State, citizenry or representative. Marshall's long tenure as Chief Justice, from 1803 to 1835, his commanding intelligence and consistent message cemented judicial review in place.

The principle of judicial review gives the Supreme Court "the power to expound the Constitution, and, in so doing, to invalidate those actions of Congress, the executive, and the states that are, in its estimation, contrary to the Constitution".<sup>3</sup> Put another way, judicial review is the power to "interpret with finality." Judicial review is not explicitly expressed in the federal Constitution but is implicitly based upon the general agreement of the people and the other two branches of government. The courts do not initiate review nor do they reach out to grasp legislation for judgement. However, once a case has been accepted the power of the courts is surely great. The specific action of nullifying legislation, while of great importance, has been rather infrequent. The power of the federal courts has been extended more through the judiciary's role as interpreter of legislation and, certainly since the Warren court, by the judiciary requiring specific actions by state and local authorities. The power of the federal courts has served to ensure that the federal Constitution is the law of the land.

Ways in which each branch might exert its powers to bring another branch into line were discussed during the Federal Convention. The proposed Constitution provided the basis for the contract between the people and their government, and the Constitution could not be altered except by the amendment process defined in Article Five. But what if the Executive overstepped its powers, or the Legislature enacted laws contrary to the Constitution? What could be done to correct the

enacted laws contrary to the Constitution? What could be done to correct the abuse? Was there a role for the Judiciary here?

The earnest positions which were expressed in answer to these questions during the Federal Convention were so disparate that no consensus could be achieved. The Constitution speaks to this lack of closure with silence: there is much less said about the judicial branch than about the executive or legislative. Articles I and II, dealing with first the executive and then the legislative, are longer and more detailed than Article III, which deals with the judiciary. The judiciary of the new nation would be independent; there was no doubt about that -- the traditions of English jurisprudence of the Elizabethan period, when the judiciary had an independence they later lost to Parliament, were part of the education of pre-Revolutionary American lawyers. The powers of the judiciary, however, were not clear. Details for establishing the federal judiciary were not provided until the Federal Judiciary Act of 1789, and those were altered some twenty years later in Jefferson's administration.

Marshall did not invent judicial review, even though he did ultimately create a new power. Matters of constitutionality had been addressed in State courts even prior to the new union, and the matter of resolving constitutional conflicts had been argued, inconclusively, in the Federal Convention. As much as the Framers considered that the separation of powers and checks and balances were essential to the success of our government, and as reasonable and "natural" as it might seem today, nothing in the Constitution or in the Amendments authorizes the courts to nullify acts of the legislative branch or actions of the executive. Judicial review permits members of the federal judiciary, who are appointed for life and not directly responsive to the electorate, not to merely refuse to recognize, but actually to set aside, to declare null and void, the acts of elected representatives. This challenges the simple notion that we have a representative government composed of three co-equal branches and shows the play of principle against pragmatism.

The Federalist Papers, particularly Hamilton's contribution of No. 78, contains a discussion of the role of the judiciary in acting as "an intermediate body between the people and the legislature so as, among other things, to keep the latter within the limits assigned [by the Constitution] to their authority." "No legislative act," Hamilton wrote, "contrary to the Constitution, can be valid." There was broad agreement to this principle among the Framers regardless of their beliefs in the degree of strength of the national government. What was arguable was the method of determining "contrariness" and what was to be done to set things right. Hamilton directly addressed the concern that the judiciary might wield unchecked powers and make arbitrary decisions as to the meaning of the Constitution, saying in the Federalist No. 78:

The judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution ... [it] has no influence over either the sword or the purse ... It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

The judiciary has no armed force to summon; it cannot pass legislation; it has no power of granting or withholding money. Its decisions ultimately must be enforced by the executive branch or made concrete by the legislative branch. Its power is based upon the general agreement that the best interests of the nation are served by affording such a position to the courts.

Judicial review became part of our constitutional tradition by way of a decision of the Supreme Court one that raised no effective or sustained objection from either

Judicial review became part of our constitutional tradition by way of a decision of the Supreme Court, one that raised no effective or sustained objection from either the Executive or the Legislature. The case, *Marbury v. Madison*, is intriguing because of its circumstances, but in itself is of no special significance. Briefly, the Federalist Party had been swept out of existence in the "Jeffersonian Revolution" of 1800, when Jefferson was elected to his first term as President. As one of the last acts of his administration, John Adams attempted to make certain that the federal judiciary would be occupied by judges of a Federalist stamp (a not unfamiliar strategy in recent times). In doing so, Adams prepared several appointments that did not receive final authorization. Jefferson, acting through Madison who was his Secretary of State, denied these would-be judges their positions. Four of these men sued, claiming that the withholding of their appointments was contrary to the Judiciary Act of 1789, and thus came *Marbury v. Madison* to the Supreme Court. This was a matter concerning the judiciary that had been arguably handled by the executive, and it hardly appeared some great principle was being contested.

John Marshall of Virginia had been appointed to a fortuitously open position on the



Supreme Court by President John Adams as the existence of the Federalist Party came to its end. Marshall was politically and philosophically committed to a strong national government; the extent of this is clear from the invectives he exchanged with Jefferson. For a month Marshall held two offices, Secretary of State and Justice of the Supreme Court, and although he was personally involved in the appointment of Marbury, chose to participate in the case. Marshall, as Chief Justice, delivered his opinion in *Marbury v. Madison* in 1803.

The decision in *Marbury v. Madison*, obtuse, indirect and depending on easily questionable reasoning, reads like an answer waiting for a question. The matter of the case itself was of little importance; Marshall's establishment of the Supreme Court's power to interpret the Constitution and declare acts of the other two branches null and void were important. In the course of his written opinion, Marshall decided in favor of Marbury except for one key issue, that Congress, in the Judiciary Act of 1789, had attempted to expand the Supreme Court's authority beyond its constitutional limits. Obscure as this may be, and though it seems that Marbury won the battles and lost the war, Marshall established judicial review. "It was Chief Justice Marshall's achievement that in doubtful circumstances and an awkward position he carried the day for the device which, though questioned, has expanded and become solidified at the core of constitutional jurisprudence".<sup>4</sup> The logic of such a method for preventing abuses of the Constitution was difficult to fault, and the full significance of the process did not become apparent until the 1857 *Dred Scott* case, twenty years after Marshall's death. The 1803 decision did provoke the anger of Jefferson and many Southern lawyers and politicians who saw the process, although not the decision, as strengthening the power of the national government at the expense of the individual States. However, no-one, except perhaps Marshall, saw that decision at the time as being pivotal to the nature of the union.

A few days after Marshall's death in 1835, and leaving little doubt as to the political agenda of which Marshall's decision was a part, John Quincy Adams wrote in his diary:

Marshall, by the ascendancy of his genius, by the amenity of his deportment, and by the imperturbable command of his temper, has given a permanent and systematic character to the decisions of the Court, and settled many great constitutional questions favorably to the continuance of the Union. Marshall has cemented the Union which the crafty and quixotic democracy of Jefferson had a perpetual tendency to dissolve. Jefferson hated and dreaded him ...

Madison's involvement in this incorporation of judicial review into American tradition is somewhat ironic. Marshall chose *Madison v. Marbury* to establish judicial review, but Madison was not consistently in favor of this principle. Madison had expressed support of this power residing in the judiciary in the Federalist Papers Nos. 39 and 44, but later altered his position. In 1788, after drafting the new national Constitution, Madison was asked to give advice on a constitution for the prospective State of Kentucky. He answered by criticizing Jefferson's 1783 draft of a constitution for Virginia.

In the State Constitutions & indeed in the Federal one also, no provision is made for the case of a disagreement in expounding them; and as the Courts are generally the last in making the decision, it results to them by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Department paramount in fact to the Legislature, which was never

intended and can never be proper.

*Remarks on Mr. Jefferson's Draught of a Constitution, October 1788*

Some thirty years later, Madison continued in the same vein:

It is to be regretted that the Court is so much in the practice of mingling with their judgments pronounced, comments & reasonings of a scope beyond them ... In expounding the Constitution the Court seems not insensible that the intention of the parties ought to be kept in view; and that as far as the language of the instrument will permit, this intention ought to be traced in the contemporaneous expositions. But is the Court as prompt and careful in citing and following this evidence, when against the federal authority as when against that of the States?

*Madison to Judge Roane, May 6, 1821.*

There was a great contrast between the process of establishing judicial review and that followed in establishing the Bill of Rights. Both of these in actuality were the exercise of the principle that a free people may alter its constitution. Inclusion into the Constitution of the protection of specific rights of individuals had been discussed from the time of the Constitutional Convention and had already been effected, albeit unevenly, in some State constitutions prior to 1787. Federalists and Anti-Federalists understood that such protections would be proposed as amendments to the Constitution, although just how this would be accomplished was subject to extensive political battles as the States were considering ratification.

Principal among these battles was that led by Patrick Henry during the Virginia Convention held in June, 1788. At the Convention, Madison held that the Federal government had no powers except those expressly authorized by the Constitution, so that there was no need for the protection of specific rights. During that month Henry's brilliant, if irritating orations exposed the inadequacies of Madison's position. Henry argued against ratification, but lacking that, maneuvered the pro-ratification forces into agreeing to insist that a Bill of Rights be adopted once the first Congress met. Amendments protecting rights were later argued individually by that first Congress, and the resulting ten Amendments were submitted to the States for their ratification in accordance with Article V of the Constitution, which devolves the authority for ratification to the people, or at least to the State legislatures. In contrast, judicial review, essential as it has become, was established by the judicial branch, and neither the legislative nor the executive did anything effective to raise a challenge. The Constitution was modified, but not by any of the mechanisms provided for by the Founders.

Marshall's arguments in *Marbury v. Madison* are based on inferences, as he himself makes clear in his written decision, and his logic is easily disputed. The full effects of his decision were not played out until decades later, although not without early but ineffective suspicions by Jefferson and the Republican party that the decision was not in the best interests of democracy. Now, judicial review is an honored pillar of our constitutional system. This decision of Marshall's and its consequences have had a profound effect upon our way of government. The conclusion that judicial review was introduced into American constitutionalism by judicial interpretation is hard to escape. Many of the present-day arguments about "judicial activism" and "interpretation" can be heard as echoes, albeit faint, of those original events. These arguments remain as much in the political realm as they initially were, as matters of ideology, not logic.

Our constitutional system retains its balance: the decisions of the Court are, in fact, ultimately reviewable by the people or their representatives. Congress may clarify

and restate legislation and the Constitution may be amended. The 11th, 14th, 16th, 24th and 26th Amendments were in response to popular dissatisfaction with Court decisions. Former judicial decisions are honored, but they are not immutable. The Court does change its decisions, however gradually, as its composition and the times change, as illustrated in recent decades by the decisions concerning racial discrimination and abortion rights. The continued enlargement of the Court's power since the years of the New Deal by liberals and conservatives alike have brought the Court into a new era, and we see that all too frequently the political leanings of candidates for the Supreme Court have proven more decisive in their nomination and approval than their judicial qualifications.

In 1823, Madison wrote to Jefferson concerning the "boundary between the General & State Govts." He made one of his characteristic summaries, combining a firmly held viewpoint with the desire for domestic peace:

I am not unaware that the Judiciary career has not corresponded with what was anticipated. At one point the Judges perverted the Bench of Justice into a rostrum for partisan harangues. And latterly the Court, by some of its decisions, still more by extrajudicial reasonings & dicta, has manifested a propensity to enlarge the general authority in derogation of the local, and to amplify its own jurisdiction, which has incurred the public censure. But the abuse of a trust does not disprove its existence. And if no remedy of the abuse be practicable under the forms of the Constitution, I should prefer a resort to the Nation for an Amendment of the Tribunal itself, to continual appeals from its controverted decisions to that Ultimate Arbiter.

Judicial review has become necessary for our governmental process, but not an immutable characteristic of all successful representative governments. In Switzerland's federal form of government, the judiciary is expressly forbidden judicial review. The Swiss judiciary has no means itself for enforcing its decisions, and depends on the cantonal governments or ultimately upon the Federal Council. In France, the judiciary is seen as a branch of the executive; a Constitutional Council, entirely apart from the judiciary, reviews legislation prior to its promulgation, although the exact procedure appears somewhat indefinite. As Jefferson pointed out, differing habits lead to differing methods.

Judicial review is full of contradiction and compromise on philosophic and pragmatic levels. Established by the judiciary as a change, or one might say, a clarification, of the mechanisms of government laid out in the Constitution, judicial review continues to provide an alternative to the process of amendment for

...ment, or the movement of government and within the Constitution, judicial review continues to provide an alternative to the process of amendment for clarifying and making changes in the way the Constitution is actually applied. The Supreme Court is, thus, "an ongoing Constitutional Convention." The effect of judicial review in strengthening the national government, far from being strictly judicial, was political in nature. The necessity and effectiveness of judicial review are peculiar to our nation, and the general agreement to it remains a tribute to the prudence and good will of our people.

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**The Right To Revolt** Let us consider one last example of our debt to the past, one which lies in the substance of the Declaration of Independence, where the right to revolt against an unjust ruler is taken for granted. This right was accepted dogma in eighteenth century Europe and America; but at the time of the Reformation, two centuries before, it presented a profound dilemma.

The problem originated in the New Testament, Romans 13:1-7, which begins in the Revised Standard translation: "Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. Therefore he who resists the authorities resists what God has appointed, and those who resist will incur judgment. For rulers are not a terror to good conduct, but to bad. Would you have no fear of him who is in authority? Then do what is good, and you will receive his approval." Contrast this with the statement accompanying Virginia's ratification of the Constitution, "the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive to the good and happiness of mankind."

The blunt remonstrance to avoid revolt and obey whatever laws existed met with convoluted responses from the Protestants of Europe and England, who were confronted with institutionalized hostility and frequent bloody oppression by their governments. Not until the civil and religious wars in France had reached their brutal heights, in the 1570s, did the resolution of this issue begin to become clear. The Huguenot philosopher Francois Hotman, with Aristotle as one of his sources, said in 1573:

As the ward is not created for the sake of the guardian, nor the ship for the captain, nor the army for the general, but the latter for the former, so a people is not sought and procured for a king, but a king for the people. For a people can exist without a king, by following its own counsel or that of its elders, whereas a king without a people cannot even be imagined.

*Francogallia*

Two hundred years later, Jefferson expressed this in the more enlightened and democratic terms into which this concept had evolved:

Necessities which dissolve a government do not convey its authority to an oligarchy or monarchy. They throw back, into the hands of the people, the powers they had delegated, and leave them as individuals to shift for themselves.

*Notes on the State of Virginia* , 13.6

The legitimacy of revolt continues to be held in suspicion in our own time, for there is a natural fear of strife and we look on violence as a last resort. The periodic urges to command the demonstration of loyalty through oaths, pledges, and so on are nothing new or novel. They merely repeat the command of Romans 13 to obey "the governing authorities," while forgetting the history of the Reformation.

It is worth noting that the American Revolution had almost nothing to do with religious matters. The English did not oppress the Colonies for religious expressions; there is not a word concerning any interference with the practice of religion in the Declaration of Independence. The anti-Catholic feelings, and the intolerance and persecution that existed in the Colonies were local or at most regional, and not fostered by England, at least not any more than they were in the mother country. Edmund Burke, defending his conciliatory Resolution in Parliament, assured his listeners that the Americans were of a traditional, if stubborn, religious bent:



The people are Protestants: and of that kind which is the most adverse to all implicit submission of mind and opinion. This is a persuasion not only favorable to liberty, but built upon it... This religion, under a variety of denominations, agreeing in nothing but in the communion of the spirit of liberty, is predominant in most of the northern provinces; where the church of England, notwithstanding its legal rights, is in reality no more than a sort of private sect, not composing most probably the tenth of the people...

Regardless of various colonial and thereafter State practices, the Revolution was a secular affair. While God's blessing was recruited, there was no cloaking this break with British authority in religious terms. The basis for revolution was a mixture of self-interest and political principle, much as the English Glorious Revolution had been in 1688.

Later, during the framing of the Constitution, there was a continuation of this secular view. The Constitution itself is silent on religion -- except for the prohibition in Article VI of religious tests for holding federal office -- not even including an appeal to heaven for blessing. During the Federal Convention, Benjamin Franklin adjured his fellow delegates to open every morning session with a prayer delivered by "one or more of the Clergy of this City." In his Convention Notes of July 28, Madison reports some desultory discussion of this proposal, the final result being adjournment without any vote on the motion. The lessons of the religious wars of Europe, where institutionalized intolerance and hatred were manipulated to the cause of mutual destruction, were not lost upon the Framers: religion divided states and became the basis for injustice and conflict. History showed that as long as religion and political power went hand in hand, there would be demagoguery, dissension and turmoil feeding on doctrinal arguments, and intolerance would be institutionalized. Religion and government in this new national government were to be separate. The States were left to do as they wished, subject to constitutional restrictions.

The Declaration of Independence, written in such stressful and turbulent times, appeals to the reason of those who would listen. For the form of that Declaration we owe another debt, although the Framers, especially Jefferson, appear to have been stubbornly opposed to admitting this connection. The form of that noble document was taken from an earlier "revolution," one that culminated in 1688 to clarify the division of authority between the English Crown and Parliament. Here, too, was a strong appeal to reason after a time of conflict. Had it not been for this English Glorious Revolution, our Revolution would likely have been far more anguished and would perhaps have led to a country ordered in a way less

English Glorious Revolution, our Revolution would likely have been far more anguished and would perhaps have led to a country ordered in a way less beneficent to the growth of democracy. We need only to recall the French Revolution, a mere thirteen years after ours, to see how reason was temporarily lost; how class turned against class, and balance, constraint, and justice were cast away for a brief, bloody period.

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**The Lessons Of History** America of the eighteenth and nineteenth centuries, when there was still room to expand, was a place with different problems and opportunities than the America of today. The intrusion of government into private life and the effectiveness of coercion by government have always been features of American life, but new situations have arisen which make this intrusion and coercion far greater than they were in the eighteenth century. We now have government through regulatory authority; maintenance of a costly armed force; provision of extensive welfare benefits; the enormous cost of political campaigns; large legislative staffs at the federal level and the consequent origin of legislation by persons not directly responsible to the electorate; the influence of lobbyists, and so on. The government now has the ability, through access to electronic records, to learn the details of our private lives, with whom we associate, where we travel, and on and on. No-one in the 1700s could have foreseen the extent to which changes have occurred.

Since those early days the policies of Jeffersonians and Federalists have been well mixed and many originally contradictory ideas have been amalgamated. The nature of the federal system has changed greatly. From a weak national government having a limited impact upon the States, we have developed a strong national government that impacts all of us individually and collectively. This in itself is reason to become familiar with the past, from which we may learn what to preserve and what signals danger. Of course, power has its way now just as power had its way in times past, but that doesn't mean that the individual is helpless. Justice Learned Hand put it in these words: "In any society, I submit, the aggressive and insistent will have disproportionate power ... In a world where the stronger have always had their way, I am glad if I can keep them from having it without stint".<sup>5</sup>

The American spirit is palpable and compelling the moment one sets foot in Jefferson's Monticello; there comes together a feeling of a time, a place and a people. The eighteenth century was a time when political self-determination had become an unstoppable force. The place, to these Europeans and immediate descendants of Europeans, was a new and vast continent, sparsely settled, requiring and rewarding independent action. The people had experienced the rewards of their own work, tasted freedom and oppression, knew the toll exacted by persecution and arbitrary power, and refused to go back to the old, unsatisfactory conditions.

Neither hindsight nor foresight shows any direct path linking past to present; no infallible vision sees beyond culture and tradition, not any more today than yesterday. Yet the past has indelible lessons for us. The following pages will

inhabitable vision sees beyond culture and tradition, not any more today than yesterday. Yet the past has indelible lessons for us. The following pages will explore a selection of times to which we owe debts, seeing each in its own setting and what each has given to us.

Let us begin this odyssey from past to present starting with ancient Greece, for there the principles of constitutionalism were laid down by Aristotle in the Politics.

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