

“The chains of the Constitution”

Foundations of American Constitutionalism

INTRODUCTION

[The] object of the Declaration of Independence [was] not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are compelled to take. Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, in printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, &c.

Thomas Jefferson May 8, 1825 in a letter to Henry Lee, commenting on the inception of the Declaration of Independence and the Virginia State Constitution

... no human purpose possesses itself so completely in advance as to admit of final definition. Life overflows its moulds and the will outstrips its own universals. Men cannot know their own meaning till the variety of its manifestations is disclosed in its final impacts, and the full content of no design is grasped till it has got beyond its general formulation and been differentiated in its last incidence ...

Courage and insight alone can in the end win confidence and power. Democracy must learn to value and to trust such qualities or democracy cannot disentangle its true purposes and realize its vaguely formed ideals; but democracy is quick to understand those who respond to its fundamental feelings, and ruthless in casting aside those who seek cover behind the protection of the written word, for which it may, and even in the same breath, itself profess reverence.

Judge Learned Hand (1872-1961), The Speech of Justice, 1916

In writing [about] a work of political philosophy there is a temptation to attribute more importance to the work in question than it can properly claim.

Donald Nicholl, Dante: Monarchy and Three Political Letters, 1947

Winter of 1989-90 was carnival time in eastern Europe. One people after another declared themselves for self-government, demanded their totalitarian states become open to political diversity, tore down barriers and "threw out the rascals." All but a few of these countries have found it easier to revolt than to organize and govern. They are bedeviled by economic hardship, ethnic conflict and the weight of decades of repressive government; in some cases they had never known political self-determination. They were embarking on a difficult journey of trial and discovery.

The experiences of these peoples, featured daily in our newspapers, show what we Americans sometimes forget, that building a government from scratch is no easy task. Our country undertook such a task two hundred years ago, wrested its independence from a governing power -- one much less intrusive than the totalitarian states of modern times -- and confronted the opportunity to shape its political future. For the first time, a nation reflected upon the purposes of government and with deliberation attempted to build its political institutions to suit its character. For the first time, there was an opportunity for a nation to ask the question, "What are the aims of government when the people have decided to govern themselves?"

The Preamble to our Constitution clearly states the aims of our government:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Two of these are bound to protecting citizens from violence and disorder; that, however, was hardly enough. From the founding of this country, Americans felt there were further legitimate aims of government, including ensuring justice and liberty, and providing for the prosperity of the present and following generations.

The Preamble contains within it a basic human conflict. The government we seek must be based upon law, for law, at least in principle, is at the heart of establishing justice and protecting citizens from physical and economic abuse. However, if there is law there must also be a way to enforce it and penalties to pay when going against it. If we insist upon a government based on law, we also insist upon a government capable of enforcing the law, one capable of applying sanctions. Government is not merely an empty shell into which laws are poured; it must be able to exercise coercive power to enforce the law. James Madison put it this way: "A sanction is essential to the idea of law, as coercion is to that of Government." We try to keep these sanctions in hand by speaking of a lawful state that must assure us "a systematic and orderly application of that force so that it is uniform, equal, and predictable, and proceeds from reason and upon understood grounds rather than from caprice or impulse or without full and fair hearing of all affected and understanding of the facts on which official action is taken" (Roscoe Pound, The Development of Constitutional Guarantees of Liberty [Yale Univ. Press, 1957]). Put another way, law is not merely a gift of government provided to the citizenry; the government, as well as citizens, must be subject to law. The human conflict emerges as this: the innate desire for the liberty promised by the Preamble must coexist with a government possessing, and exercising, coercive power. How are liberty and coercive power to coexist?

It is easy to see examples when that coexistence has been destroyed. The Nazi government was lawful, and it certainly did enforce sanctions. But the code of law,

as well as the judiciary and the police powers, had been pre-empted by the political leadership. Even though the law was written, it was interpreted as the Nazi party said it was and it served political ends. The judiciary made its decisions according to the law, even though legal decisions were political decision as well. The police, controlled by the political leadership, enforced the law, using methods that brutalized their victims as well as themselves. The Nazi state had as its basic, underlying assumption the achievement of its political ends, and all laws were to be interpreted as subordinate to those ends, regardless of how the laws might be written. With deliberate purpose, the coercive power of that state was not responsible to anyone except the political leadership. Through controlling both politics and the economy, the fascist state claimed to promote the general welfare, and in the course of this obliterated any possibility for liberty. To be lawful is not enough; a government must also be responsible to its citizenry.

Government has two faces. One is theoretical, something to be philosophized about, a body of ideas and ideals, even if sometimes mundane; this is the government's constitution, even as a person has a constitution, which may be robust or suspect, healthy or sickly. Whether or not a written document exists, it is always possible to look at the way a government acts and discern its constitution. The other face is substantial, a body of persons creating and executing laws and regulations; the inner workings of government could well remain mysterious and remote, secretive and arbitrary, without compass or limit, but they must ultimately become tangible. All the aspects of government are concrete compared to the abstractions we expect it to protect; there is no absolute justice nor any complete liberty, but there are courts and police, laws and regulations. The very terms are hard to define: liberty to one may be licentiousness to another, justice may appear as coercion, and freedom no more than ignorance. There must be some measure for government, some way to speak at once of abstractions as well as of tangible acts. I submit that government find its measure, and its limits, in the constitutional principles on which it is based.

Principles are idealizations; the degree to which they are achieved is a measure of the success of the actual in realizing the ideal. The idealizations we carry within us are conditioned by our personal and cultural frames of reference, and we measure society's actual achievements against our subjective pictures. Stating principles and understanding them, even though it may not be possible to see how they could be completely achieved, at least encourages some degree of objectivity in the analysis of progress toward the ideal. Knowledge of the development of the principles of American constitutionalism provides a context for what otherwise might be superficial arguments about our political freedoms. Each person, no matter how well educated or well read, has the time to discover or verify only so much, whether it be in philosophy, religion or a way to make a living. We must rely on the words of others and we must learn to subject these words to effective analysis. When these words apply to government, to political issues, a knowledge of the principles underlying American constitutionalism provides a grounding to help disentangle the unwise, opportunistic or demagogic from what may be of lasting value.

Constitutional principles do not rise up from nothing, full-grown. They slowly evolve and go through many hands and many generations before they prove themselves fundamental. Practical issues in ancient Greece were far different from those in Europe of the seventeenth century, and both those times even farther different from ours, yet the principles to which we are benefit were shaped in those times and places. It was those far-away people who gave vitality and substance to popular sovereignty, the political rights to life and liberty, and the right to reform government in an orderly fashion. Statements of principle today would be nothing

but empty words if they had not been preceded by a long history that shaped them and made them meaningful.

The object of this book is to show some aspects of the development of the principles underlying American constitutional government. My intent is to show the trial and error that has been so much a part of this uncertain but stubborn process and demonstrate as well that the effort to secure political freedom is never at an end. I will attempt to keep away from the over-simplifications and sloganeering the English historian, Christopher Haigh, described, saying, "To avoid the anguish and responsibility of independent thought, we explain the past with historical clichés, we play with labels rather than grapple with the complexities of details." You will find here extracts from the writings of the past not, I hope, overburdened with interpretations. In the introduction to Sources of the Political Thought of James Madison (rev. ed., Univ. Press of New England, 1981) Marvin Meyers observes, "the curious student of the American past who wishes to recapture the original qualities of the first generation, especially the qualities of mind, does well to begin at the sources ... So every [person] who reads, carefully and critically, can dare to be his own historian ..." This applies as well to the works of times farther in the past, times that have direct bearing on the history of political freedom in our country. It is true that many of the statements that have come down to us were made for public consumption and consequently can be very misleading. The crux of the matter lies in each individual reading "carefully and critically". It is either that or give up responsibility for our own decision-making to those who would gladly assume it for themselves.

People in times past did not see their world the same as we see ours; they did not respond to problems in the same frame of mind as we might. Past values were not the same as ours; past efforts were not consciously moving towards the goals that happen to occupy us today. Nevertheless, while semantics and culture are not static over the ages, there are common human concerns. In this spirit, the quotations that I will bring together are not intended to bear precisely upon identical subjects but to resonate, to sound in sympathetic vibration, based upon their common underlying human concerns. Some quotations will show agreement, others will show conflict: all the better to illustrate the ongoing process of the definition and guarantee of our political freedoms.

We present-day Americans are generally poorly informed about the background of our form of government, about the history of the ideas and principles that form its foundation. Much of history taught in high schools and survey classes in colleges that attempts to illuminate the actions of the Framers of our Constitution is directed at the study of the middle and later 1700s, or perhaps the charters and constitutions of the Colonies, with an occasional nod to such European thinkers as Hume, Hobbes and Locke. This gives the impression that American political history is somehow isolated from its more remote past, as though something entirely new spontaneously developed in a vacuum created by the ocean between America and England. This would have been ridiculous to such men as Thomas Jefferson, John Adams and James Madison, who along with their fellow Colonials active in politics, were well educated in the tradition of English schools and who regularly referred to European authors, contemporary and classical, to validate their own propositions.

The framers of our Constitution were developing political solutions to political problems. They were not so much throwing out past principles and creating new ones as they were reaffirming, clarifying and making more workable what they considered rightfully theirs already. Edmund Burke, when he presented his "Resolution for Conciliation with America" in Parliament, March 22, 1775 (which

lost resoundingly, 270 to 78), said this:

The people of the colonies are descendants of Englishmen. England, Sir, is a nation, which still I hope respects, and formerly adored, her freedom. The colonists emigrated from you, when this part of your character was most predominant ... They are therefore not only devoted to liberty, but to liberty according to English ideas, and on English principles.

The wording and form of our Constitution, Bill of Rights and Declaration of Independence are derived from past documents. Few new principles were put forth at the founding of our nation; old principles, some obscured and unevenly applied, were restated and endowed with a new vitality. This is what was new: a pragmatic approach to the problems and opportunities raised in the European settlement of this vast territory, to making it safe, productive, rewarding and politically stable. New methods and means were devised to secure a government of law that would assure personal and political liberties, and to construct a political association that would realize the principles of a constitutional government.

In order to show the state of political thought at the founding of our nation, I will use extensive quotations from Jefferson and Madison and some of their contemporaries, among them Ben Franklin, John Adams and George Mason. I will also use the Federalist Papers, which were published as a series in several New York newspapers after the Federal Convention. These eighty-five articles were authored over a period of ten months primarily by James Madison and Alexander Hamilton. A minority were written by John Jay, whose poor health prevented more extensive participation. The Papers were published under the pseudonym of Publius, a Roman hero who had established a stable republican government in Rome. The Papers are a brilliant series of arguments for federalism and are part of the foundation of American political thought; they undoubtedly convinced many a voter that the new government could work well. Oddly enough, Madison and Hamilton became political opponents, and the federalism they espoused was replaced with Jeffersonian egalitarianism in the election of 1800. This replacement would be only temporary, and the nation would soon return to the path of a strong central government.

The correspondence and public papers of Jefferson and Madison are particularly apt sources because both men were prolific writers, and also because they ranged knowledgeably over a wide variety of topics and had carefully developed positions on many issues of critical importance during the founding of our nation. Of course, both men were intimately involved with actual events from Revolutionary times through the early eighteenth century. While usually in agreement concerning republican principles their opinions were sufficiently different, and their involvement with events sufficiently diverse, that they present a broad base for characterizing events from well before the Revolution to after the turn of the century.

Jefferson and Madison present two contrasting personalities. Jefferson was tendentious, argumentative, quick to take offense, dedicated to principle and always ready with a grand phrase. Madison was firm but open to argument, he wanted the nation to become a safe and stable republic, and within the limits of his dedication to that end was willing to seek and agree to compromise. Madison's writings were thorough and of a careful, lawyerly phrasing. Jefferson was the author of the Declaration of Independence, where he used his literary skills so well, but he was absent in France during the crafting and ratification of the Constitution. Madison was one of the small group of Federalists responsible for the three

masterful political acts that led to our federal union: authorization of the Federal Convention, setting its agenda and effecting key compromises, and shepherding its ratification by the states. The two men were close friends from before the years of the Revolutionary War, Jefferson being eight years the senior, and both were Virginians; they remained friends throughout their lives. Four months before his death in 1826, Jefferson wrote to Madison, saying, "Take care of me when dead, and be assured that I shall leave you with my last affections." Madison lived another decade, last of the Framers of the Constitution to die.

Marvin Meyers summarizes the two friends in Sources of the Political Thought of James Madison:

Their differences of political style and temper, within the bounds of shared belief, might well have been the most powerful link of all. Although Jefferson was no mere ideologue, his mind seemed to find its full powers in the eloquent expression of grand principles: the Declaration of Independence is the true Jefferson, or at least the key to his unique identity. On the other side, Madison was no mere technician; yet his mind leaped forward when he faced the hard questions of political architecture: the "Federalist" is the true Madison.

During their presidencies both Jefferson and Madison occasionally departed from the democratic principles they advocated. Two instances of this occurred during Jefferson's second term: the stubborn prosecution of Aaron Burr for his bungling conspiracy and the enforcement of the trade embargo so damaging to New England. In each of these the reverse side of Jefferson's ideological, suspicious attitudes, frequently mobilized in defense of democratic ideals, became visible as antithetical to popular government. Similarly, Madison, as President, struggled with trying to manage what could be called a third-rate nation in its dealings with the military powers of Europe. During his second term the United States succeeded in extending its control over East and West Florida (what is now southernmost America from the Mississippi to the Atlantic) by outright aggression, in alliance with the despot Napoleon, from whom Europe was trying to free itself. These instances provide all the more reason to attend to the admonitions of both Jefferson and Madison to be suspicious of the abuse of power, and to build into the workings of government the means to control such abuses.

The eighteenth-century American genius was to lay a political foundation based upon such principles that government would be essentially and unavoidably responsible to the people. This book will first state the principles of American constitutionalism derived from basic documents of the colonial and revolutionary periods, and discuss the nature of the relationship between government and the people. Following that, I will present the political thought of different historical periods. The Framers had no end of references to Classical Greece and Rome, to Hume, Locke, Montesquieu, and many others. The intellectual habit of that time was to look for paradigms rather than carry out political or economic analyses, but that is still the habit of politicians. In contrast to this opportunism, the examples I have chosen offer particularly immediate insights into the foundations of constitutionalism and demonstrate a connection spanning two thousand years.

First, we will visit the lifetime of Aristotle, during the apogee of democratic Athens some two thousand three hundred years ago, to see the clear definition of who is a citizen and what distinguishes between good and bad governments. Aristotle was deeply concerned with the nature of government, with the ways to achieve peace and stability and to permit the individual to live a good and full life. He laid out in

no uncertain terms the need for ethics in government, a need that present-day politicians seem to occasionally rediscover as though its existence and nature were some great surprise. Athens, within a period of roughly three hundred years had known extreme democracy and repressive oligarchy; disgrace brought about through factionalism and demagoguery, and honor resulting from a self-sacrificing citizenry; concentration of property in the hands of the few with the oppression and enslavement of the many, and peaceful revision of the laws to ensure fairness and safety of person. Athens and its neighbors rose high and fell far and fast; there is much to learn from these successes and failures.

Second will be northern Italy, particularly Florence and the cities of Lombardy from the twelfth through the middle of the fourteenth century. There, city-republics emerged from the disintegration of Roman society and the onslaught of barbarian invasions to display independence and a love of liberty. This time was the Middle Ages, an age of faith, authority and raw power, an age of great change. The brittle structure of feudalism was cracking, nationalism and the modern state were emerging and the relation of Church and State was being redefined. Aristotle was rediscovered and his works had a profound impact on political thought. Out of this convoluted mass awkwardly rose the doctrine of popular sovereignty that we prize so highly. Those city-republics lost their independence; they were incapable of resolving the conflicts, internal and external, that drained them of strength, and they chose to accept dictatorships in order to gain peace. By the time their arguments for self-government were committed to writing there were few of those city-republics left.

Third, we will visit the dismal years of the religious and civil wars of sixteenth century Europe, following the Reformation. The Reformation began not with the overt attempt to form a new Church but to reform the existing Catholic Church. This movement of religious reform quickly became part of a much broader struggle for political power. Within only a few years, Protestants were confronted with a conundrum: the Bible appeared to mandate obedience to the authority of the state whether the rulers were just or unjust, and the coercive power of the state was frequently turned to the murderous repression of those who held dissenting religious opinions. The resolution of this problem was not at all simple, and many attempts failed. We will look at the Huguenot writer Francois Hotman, who began to resolve this conundrum by seeing its solution in the realm of politics, not religion, and who, if somewhat inconsistently, advocated the right to revolt against unjust government.

The concept of political rights changed in important ways from the time of ancient Greece to the time of Revolutionary America. In Greece, it was assumed that the political association and the customary rights of citizens had arisen together; citizen and government were integral parts of a seamless society. There was no consideration of right nor liberty in the abstract; custom determined rights and legitimate governments naturally had the right to rule as well as regulate the social and private lives of citizens. It was not until the sixteenth century that the modern state with its elaborate administrative machinery and its own "sovereign rights," not the least being that of taxation, came into existence. The early modern state stood, as it were, in two camps: one where custom and tradition, obligating rulers and the ruled, formed the basis for what was "right"; another where the raw power of rulers could easily be used to demonstrate that might made right. The transition to the framework of the later eighteenth century, recognizing abstract liberty and the political right of citizens to alter or abolish unjust governments, was long and slow.

In the eighteenth century a crucial question remained to be answered: could a republic be established that could govern itself successfully or would some sort of

"top down" control prove necessary? The city-states of ancient Greece and of Italy of the late Middle Ages literally threw away their independence in the lives and fortunes wasted fighting among themselves. The civil and religious wars in France were between people of common heritage. Factionalism, anarchy and civil war overwhelmed political freedom.

The following chapters will give you the opportunity to form your opinions regarding the origins and development of the principles underlying American constitutionalism. It is my hope you will agree these processes remain ongoing and the participation of each generation is needed to continue their development.