

Constitutional Literacy Reader

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Foreword

Our Constitution is a magnificent invention that provides special challenges for our public leaders. Its designers thoughtfully constructed a governmental framework that seeks to ensure that individuals are free to hold, express, and publish diverse opinions; and, at the same time, they presented us with a government that was deliberately inefficient so that these freedoms would be protected. Consequently, public service leaders today have an obligation to ensure our leadership is not regarded as an intention to run a government that would honor the fortunes and respectability of the well-born few while oppressing the rights of the greater community. For this reason, a foundation in the historical, social, and political issues of the period in which the government was first formed is critical to understanding the values inherent in the Constitution that we must uphold in the execution of our responsibilities today. If we use the tools available to us to understand our political heritage, we are better prepared to lead a government free from oppression. The Constitutional Literacy Reader is an essential tool that provides us, the government's career executives, with the knowledge and skills necessary to grasp the spirit of the Constitution and to successfully manage the affairs of the nation.

Barbara Garvin-Kester
Director
Federal Executive Institute

Preface

The United States Constitution is a living document, intended to endure for the ages and to be adapted to the felt needs of the times. It is an extraordinary document, widely emulated by other nations seeking to achieve what American government has.

Through Constitutional interpretation, the document has been kept abreast of contemporary demands, used to guide the Nation through the day-to-day and its many crises. It is common to view that interpretation as falling exclusively within the province of the courts, for in matters of legal controversy the buck does stop there. The Congress and the President, however, have also taken oaths to support the document and have important roles in its interpretation and implementation. Indeed, major media and public attention is properly devoted to these major institutions of government. But usually forgotten in the process is the central role of the public administration in the interpretation of the document.

Much of the success of our system of government may properly be attributed to the Nation's civil service and its management. More than the Congress, the President, and the Courts, most Constitutional interpretation and implementation is in fact undertaken by Federal managers. They interpret and reinterpret the document every day, contributing in very substantive ways to the Nation's well-being.

It is, therefore, surprising to learn how few Federal managers make the connection between their decisions and the Constitution. On the one hand, that is a tribute to the inculcation of Constitutional values into their decision-making, but on the other it marks a gap in their training and education. Everything that is done in government has Constitutional underpinnings and understanding of that only enhances the public administration and the quality of its decisions. It should not be left to chance.

The Framers of the Constitution were well aware of the importance of public administration and knew that their work would be of little avail if not faithfully executed. Of course, they had no idea of what public administration today is - indeed, no idea of what it would or will become - but the principle was clear to them: good government under the Constitution would occur only with a dedicated public administration. To insure conformance and as a condition of employment, they therefore wrote into Article VI of the Constitution a requirement that all public employees take an oath to support it.

Few public employees, however, have more than perfunctory understanding of it, having devoted themselves to other affairs. Geologists, hydrologists, economists, and sociologists have different

interests from lawyers and students of public policy. Yet the public, their employer, reasonably requires more, for in their day-to-day decision-making, public administrators affect the Constitutional rights of the body politic.

The Constitution is central to the public administration: the public administration works hand in glove with the American Constitution. Good public administration means good constitutionalism. Every public manager who understands not only the importance of the Constitution, but also what it means, improves his or her effectiveness. Society can count on its government when all observe the Constitutional rules of the game. In this Nation, the public good is determined by a commitment to the processes defined by the Constitution, not by the strong.

The Nation and its Constitution fail without a public administration dedicated to the processes which make the system work. And public administration works within an exceedingly complex structure, one wildly different from that found in most other organizations and dictated by the strictures of a separation of powers system of government.

The Reader is directed at the Federal manager. It is intended to be an educational supplement to what is offered in the "Leadership for a Democratic Society" seminars and to provide an introduction to some of the substance of the Constitution. It is organized into eight sections and an Appendix.

Section 1 is the Constitution itself. It is short, concise, extraordinary. It is the very purpose of this Reader and worthy of study. Section 2 includes several of the most important Federalist Papers which were written to woo the support of New York voters in the ratification struggles after the convention in Philadelphia. Each is prefaced with a brief explanatory statement. The Federalist Papers are among the greatest theoretical treatises on republicanism and serve the Nation today much as they did in 1787. Section 3 is an essay interpreting the why of the Constitution and Section 4 is directed at Anti-Federalist arguments against it. The Constitution is for the most part silent on the protection of civil rights and liberties and Section 5, consequently, addresses some of the issues surrounding our history in this arena.

Section 6 includes several of the most important Supreme Court cases, each a major precedent in our history. A brief introduction offers insight into each case and is intended to induce a reading of the case at hand. Section 7 is an essay on the importance of the Constitution to the public administration. And the final section adds the subject of ethics within the framework of the Constitution for the public administrator.

The Appendix includes the two most important national documents in the Nation's pre-Constitutional period, the Declaration of Independence with a brief explanatory essay and the Articles of Confederation with a critique by Alexander Hamilton.

Several members of the FEI faculty and staff were involved in the creation of this Reader. A.E. Dick Howard offered valuable insights into what was being attempted. John Johns and Robert Maranto contributed not only their advice but valuable portions of the final document. Terry Newell coordinated all that went into creating this supplement to the classroom with a patience and skill that inspires. Curt Smith, a former FEI Director, stood behind this at every step of the way. Finally, a great debt is due the FEI support staff, especially Kelly Gobble and Holly Newman, without whose care the preparation of this text would not have been possible.

R. Bruce Carroll, Editor

I. The Constitution

THE CONSTITUTION OF THE UNITED STATES

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, 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.

Article I

Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. [1] The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

[2] No person shall be a Representative who shall not have attained to the age of twenty five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

[3] Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each state shall have at least one Representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[4] When vacancies happen in the Representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

[5] The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

Section 3. [1] The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

[2] Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

[3] No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

[4] The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

[5] The Senate shall choose their other officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

[6] The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the Concurrence of two thirds of the Members present.

[7] Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

Section 4. [1] The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

[2] The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Section 5. [1] Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

[2] Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

[3] Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.

[4] Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

Section 6. [1] The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

[2] No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time: and no person holding any office under the United States, shall be a member of either House during his continuance in office.

Section 7. [1] All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

[2] Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

[3] Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Section 8. [1] The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

[2] To borrow money on the credit of the United States;

[3] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

[4] To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

[5] To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

[6] To provide for the punishment of counterfeiting the securities and current coin of the United States;

[7] To establish post offices and post roads;

[8] To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

[9] To constitute tribunals inferior to the Supreme Court;

[10] To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

[11] To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

[12] To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

[13] To provide and maintain a navy;

[14] To make rules for the government and regulation of the land and naval forces;

[15] To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

[16] To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

[17] To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;--And

[18] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Section 9. [1] The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

[2] The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

[3] No bill of attainder or ex post facto Law shall be passed.

[4] No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

[5] No tax or duty shall be laid on articles exported from any state.

[6] No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear or pay duties in another.

[7] No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of receipts and expenditures of all public money shall be published from time to time.

[8] No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

Section 10. [1] No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

[2] No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

[3] No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

Article II

Section 1. [1] The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

[2] Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[3] The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each state having one vote; A quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.

[4] The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

[5] No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen Years a resident within the United States.

[6] In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

[7] The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

[8] Before he enter on the execution of his office, he shall take the following oath or affirmation:--"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

Section 2. [1] The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

[2] He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

[3] The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

Section 3. He shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Section 4. The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

Article III

Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. [1] The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall

be a party;--to controversies between two or more states;--between a state and citizens of another state;-- between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

[2] In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

[3] The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Section 3. [1] Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

[2] The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

Article IV

Section 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Section 2. [1] The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

[2] A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

[3] No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Section 3. [1] New states may be admitted by the Congress into this union; but no new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.

[2] The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

Section 4. The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

Article V

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

Article VI

[1] All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2] This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

[3] The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

Article VII

The ratification of the conventions of nine States, shall be sufficient for the establishment of this Constitution between the States so ratifying the Same.

Done in convention by the unanimous consent of the states present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty seven and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our Names,

Go. Washington Presid't. and deputy from Virginia
Attest William Jackson Secretary

New Hampshire

John Langdon

Nicholas Gilman

Massachusetts

Nathaniel Gorham

Rufus King

Connecticut

Wm. Saml. Johnson

Roger Sherman

New York

Alexander Hamilton

New Jersey

Wil: Livingston

Wm. Paterson

David Brearley

Jona: Dayton

Pennsylvania

B. Franklin

Thos. FitzSimons

Thomas Mifflin

Jared Ingersoll

Robt Morris

James Wilson

Geo. Clymer

Gouv Morris

Delaware

Geo: Read

Richard Bassett

Gunning Bedford jun

Jaco: Broom

John Dickinson

Maryland

James McHenry

Danl Carroll

Dan of St. Thos. Jenifer

Virginia

John Blair

James Madison Jr.

North Carolina

Wm. Blount

Hu Williamson

Richd. Dobbs Spaight

South Carolina

J. Rutledge

Charles Pinckney

Charles Cotesworth Pinckney

Pierce Butler

Georgia
William Few
Abr Baldwin

Amendments to the Constitution of the United States

Amendment I (1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment II (1791)

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Amendment III (1791)

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV (1791)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V (1791)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI (1791)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII (1791)

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment VIII (1791)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX (1791)

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X (1791)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Amendment XI (1798)

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Amendment XII (1804)

The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;--The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;--the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII (1865)

Section 1.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV (1868)

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV (1870)

Section 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

Section 2.

The Congress shall have power to enforce this article by appropriate legislation.

Amendment XVI (1913)

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census of enumeration.

Amendment XVII (1913)

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII (1919)

Section 1.

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2.

The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

Section 3.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

Amendment XIX (1920)

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XX (1933)

Section 1.

The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which

such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2.

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3.

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4.

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5.

Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several states within seven years from the date of its submission.

Amendment XXI (1933)

Section 1.

The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2.

The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

Amendment XXII (1951)

Section 1.

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than

once. But this article shall not apply to any person holding the office of President when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several states within seven years from the date of its submission to the states by the Congress.

Amendment XXIII (1961)

Section 1.

The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2.

The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV (1964)

Section 1.

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax.

Section 2.

The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV (1967)

Section 1.

In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2.

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3.

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4.

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI (1971)**Section 1.**

The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.

Section 2.

The Congress shall have the power to enforce this article by appropriate legislation.

Amendment XXVII

No law varying the compensation for the services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened.

II. The Federalist Papers

Federalist #1

Alexander Hamilton

As part of the Anti-Federalist movement, Cato (probably then governor Clinton of New York) wrote a serious attack on the proposed new Constitution. In response, Publius (Hamilton) joined the fray, introducing this first of his proposed series explaining the new Constitution and calling for citizens to join in this experiment in free government.

AFTER an unequivocal experience of the inefficacy of the subsisting federal government, you are called upon to deliberate on a new Constitution for the United States of America. The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world. 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 constitutions on accident and force. If there be any truth in the remark, the crisis at which we are arrived may with propriety be regarded as the era in which that decision is to be made; and a wrong election of the part we shall act may, in this view, deserve to be considered as the general misfortune of mankind.

This idea will add the inducements of philanthropy to those of patriotism, to heighten the solicitude which all considerate and good men must feel for the event. Happy will it be if our choice should be directed by a judicious estimate of our true interests, unperplexed and unbiased by considerations not connected with the public good. But this is a thing more ardently to be wished than seriously to be expected. The plan offered to our deliberations affects too many particular interests, innovates upon too many local institutions, not to involve in its discussion a variety of objects foreign to its merits, and of views, passions, and prejudices little favorable to the discovery of truth.

Among the most formidable of the obstacles which the new Constitution will have to encounter may readily be distinguished the obvious interest of a certain class of men in every State to resist all changes which may hazard a diminution of the power, emolument, and consequence of the offices they hold under the State establishments; and the perverted ambition of another class of men, who will either hope to aggrandize themselves by the confusions of their country, or will flatter themselves with fairer prospects of elevation from the subdivision of the empire into several partial confederacies than from its union under one government.

It is not, however, my design to dwell upon observations of this nature. I am well aware that it would be disingenuous to resolve indiscriminately the opposition of any set of men (merely because their situations might subject them to suspicion) into interested or ambitious views. Candor will oblige us to admit that even such men may be actuated by upright intentions; and it cannot be doubted that much of the opposition which has made its appearance, or may hereafter make its appearance, will spring from sources, blameless at least if not respectable—the honest errors of minds led astray by preconceived jealousies and fears. So numerous indeed and so powerful are the causes which serve to give a false bias to the judgment, that we, upon many occasions, see wise and good men on the wrong as well as on the right side of questions of the first magnitude to society. This circumstance, if duly attended to, would furnish a lesson of moderation to those who are ever so thoroughly persuaded of their being in the right in any controversy. And a further, reason for caution, in this respect, might be drawn from the reflection that we are not always sure that those who advocate the truth are influenced by purer principles than their antagonists. Ambition, avarice, personal animosity, party opposition, and many other motives not more laudable than these, are apt to operate as well upon those who support as those who oppose the right side of a question. Were there not even these inducements to moderation, nothing could be more ill-judged than that intolerant spirit which has at all times characterized political parties. For in politics, as in religion, it is equally absurd to aim at making proselytes by fire and sword. Heresies in either can rarely be cured by persecution.

And yet, however just these sentiments will be allowed to be, we have already sufficient indications that it will happen in this as in all former cases of great national discussion. A torrent of angry and malignant passions will be let loose. To judge from the conduct of the opposite parties, we shall be led to conclude that they will mutually hope to evince the justness of their opinions, and to increase the number of their converts by the loudness of their declamations and by the bitterness of their invectives. An enlightened zeal for the energy and efficiency of government will be stigmatized as the offspring of a temper fond of despotic power and hostile to the principles, of liberty. An over-scrupulous jealousy of danger to the rights of the people, which is more commonly the fault of the head than of the heart, will be represented as mere pretense, and artifice, the stale bait for popularity at the expense of public good. It will be forgotten, on the one hand, that jealousy is the usual concomitant of violent love, and that the noble enthusiasm of liberty is too apt to be infected with a spirit of narrow and illiberal distrust. On the other hand, it will be equally forgotten that the vigor of government is essential to the security of liberty; that, in the contemplation of a sound and well-informed judgment, their interests can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidding appearance of zeal for the firmness and efficiency of government. History will teach us that the former has been found a much more certain road to the introduction of despotism than the latter, and that of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people, commencing demagogues and ending tyrants.

In the course of the preceding observations, I have had an eye, my fellow-citizens, to putting you upon your guard against all attempts, from whatever quarter, to influence your decision in a matter of the utmost moment to your welfare by any impressions other than those which may result from the evidence of truth. You will, no doubt, at the same time have collected from the general scope of them that they proceed from a source not unfriendly to the new Constitution. Yes, my countrymen, I own to you that after having given it an attentive consideration, I am clearly of opinion it is your interest to adopt it. I am convinced that this is the safest course for your liberty, your dignity, and your happiness. I affect not reserves which I do not feel. I will not

amuse you with an appearance of deliberation when I have decided. I frankly acknowledge to you my convictions, and I will freely lay before you the reasons on which they are founded. The consciousness of good intentions disdains ambiguity. I shall not, however, multiply professions on this head. My motives must remain in the depository of my own breast. My arguments will be open to all and may be judged of by all. They shall at least be offered in a spirit which will not disgrace the cause of truth.

I propose, in a series of papers, to discuss the following interesting particulars: *-The utility of the UNION to your political prosperity-The insufficiency of the present Confederation to preserve that Union-The necessity of a government at least equally energetic with the one proposed, to the attainment of this object-The conformity of the proposed Constitution to the true principles of republican government-Its analogy to your own State constitution-and lastly, The additional security which its adoption will afford to the preservation of that species of government, to liberty, and to property.*

In the progress of this discussion I shall endeavor to give a satisfactory answer to all the objections which shall have made their appearance, that may seem to have any claim to your attention.

It may perhaps be thought superfluous to offer arguments to prove the utility of the UNION, a point, no doubt, deeply engraved on the hearts of the great body of the people in every State, and one which, it may be imagined, has no adversaries. But the fact is that we already hear it whispered in the private circles of those who oppose the new Constitution, that the thirteen States are of too great extent for any general system, and that we must of necessity resort to separate confederacies of distinct portions of the whole.* This doctrine will, in all probability, be gradually propagated, till it has votaries enough to countenance an open avowal of it. For nothing can be more evident to those who are able to take an enlarged view of the subject than the alternative of an adoption of the new Constitution or a dismemberment of the Union. It will therefore be of use to begin by examining the advantages of that Union, the certain evils, and the probable dangers, to which every State will be exposed from its dissolution. This shall accordingly constitute the subject of my next address.

PUBLIUS

*The same idea, tracing the arguments to their consequences, is held out in several of the late publications against the new Constitution.

Federalist #10

James Madison

In perhaps the most famous of the papers, Publius (Madison's first essay) explains the dangers of factions and how the large territory and the representative system of government proposed in the new Constitution will mitigate those dangers.

AMONG the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of fraction. The friend of popular governments never finds himself so much alarmed for their character and fate as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice, and confusion introduced into the public councils have, in truth, been the mortal diseases under which popular governments have everywhere perished, as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations. The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality to contend that they have as effectually obviated the danger on this side, as was wished and expected. Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true. It will be found, indeed, on a candid review of our situation, that some of the distresses under which we labor have been erroneously charged on the operation of our governments; but it will be found, at the same time, that other causes will not alone account for many of our heaviest misfortunes; and, particularly, for that prevailing and increasing distrust of public engagements and alarm for private rights which are echoed from one end of the continent to the other. These must be chiefly, if not wholly, effects of the unsteadiness and injustice with which a factious spirit has tainted our public administration.

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent aggregate interests of the community.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could

not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities that where no substantial occasion presents itself the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of party and faction in the necessary and ordinary operations of government.

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or in other words, the most powerful faction must be expected to prevail. Shall domestic manufacturers be encouraged, and in what degree, by restrictions on foreign manufacturers? are questions which would be differently decided by the landed and the manufacturing classes, and probably by neither with a sole regard to justice and the public good. The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to

trample on the rules of justice. Every shilling with which they overburden the inferior number is a shilling saved to their own pockets.

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.

The inference to which we are brought is that the causes of faction cannot be removed and that relief is only to be sought in the means of controlling its *effects*.

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum by which alone this form of government can be rescued from the opprobrium under which it has so long labored and be recommended to the esteem and adoption of mankind.

By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together, that is, in proportion as their efficacy becomes needful.

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who, have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would at the same time be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens and greater sphere of country over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people. The question resulting is, whether small or extensive republics are most favorable to the election of proper guardians of the public weal; and it is clearly decided in favor of the latter by two obvious considerations.

In the first place it is to be remarked that however small the republic may be the representatives must be raised to a certain number in order to guard against the cabals of a few; and that however large it may be they must be limited to a certain number in order to guard against the confusion of a multitude. Hence, the number of representatives in the two cases not being in proportion to that of the constituents, and being proportionally greatest in the small republic, it follows that if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice.

In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to center on men who possess the most attractive merit and the most diffusive and established characters.

It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representative too little acquainted with all their local circumstances and lesser interests; as by reducing it too much. You render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.

The other point of difference is the greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will

be more difficult for all who feel it to discover their own strength and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.

Hence, it clearly appears that the same advantage which a republic has over a democracy in controlling the effects of faction is enjoyed by a large over a small republic-is enjoyed by the Union over the States composing it. Does this advantage consist in the substitution of representatives, whose enlightened views and virtuous sentiments render them superior to local prejudices and to schemes of injustice? It will not be denied that the representation of the Union will be most likely to possess these requisite endowments. Does it consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest? In an equal degree does the increased variety of parties comprised within the Union increase this security. Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here again the extent of the Union gives it the most palpable advantage.

The influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is more likely to taint a particular county or district than an entire State.

In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans ought to be our zeal in cherishing the spirit and supporting the character of federalists.

PUBLIUS

Federalist #45

James Madison

The dangers of a central government to the states will not be significant because the states will have the greater influence with the people. The powers delegated to the new government are fewer than those reserved to the states.

HAVING shown that no one of the powers transferred to the federal government is unnecessary or improper, the next question to be considered is whether the whole mass of them will be dangerous to the portion of authority left in the several States.

The adversaries to the plan of the convention, instead of considering in the first place what degree of power was absolutely necessary for the purposes of the federal government, have exhausted themselves in a secondary inquiry into the possible consequences of the proposed degree of power to the governments of the particular States. But if the Union, as has been shown, be essential to the security of the people of America against foreign danger; if it be essential to their security against contentions and wars among the different States; if it be essential to guard them against those violent and oppressive factions which embitter the blessings of liberty and against those military establishments which must gradually poison its very fountain; if, in a word, the Union be essential to the happiness of the people of America, is it not preposterous to urge as an objection to a government, without which the objects of the Union cannot be attained, that such a government may derogate from the importance of the governments of the individual States? Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the governments of the individual States, that particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty? We have heard of the impious doctrine in the old world, that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the new, in another shape, that the solid happiness of the people is to be sacrificed to the views of political institutions of a different form? It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object. Were the plan of the convention adverse to the public happiness, my voice would be, Reject the plan. Were the Union itself inconsistent with the public happiness, it would be, Abolish the Union. In like manner, as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter. How far the sacrifice is necessary has been shown. How far the unsacrificed residue will be endangered is the question before us.

Several important considerations have been touched in the course of these papers, which discountenance the supposition that the operation of the federal government will by degrees prove fatal to the State governments. The more I revolve the subject, the more fully I am persuaded that the balance is much more likely to be disturbed by the preponderancy of the last than of the first scale.

We have seen, in all the examples of ancient and modern confederacies, the strongest tendency continually betraying itself in the members to despoil the general government of its authorities, with a very ineffectual capacity in the latter to defend itself against the encroachments. Although, in most of these examples, the system has been so dissimilar from that under consideration as greatly to weaken any inference concerning the latter from the fate of the former, yet, as the States will retain under the proposed Constitution a very extensive portion of active sovereignty, the inference ought not to be wholly disregarded. In the Achaean league it is probable that the federal head had a degree and species of power which gave it a considerable likeness to the government framed by the convention. The Lycian Confederacy, as far as its principles and form are transmitted, must have borne a still greater analogy to it. Yet history does not inform us that either of them ever degenerated, or tended to degenerate, into one consolidated government. On the contrary, we know that the ruin of one of them proceeded from the incapacity of the federal authority to prevent the dissensions, and finally the disunion, of the subordinate authorities. These cases are the more worthy of our attention as the external causes by which the component parts were pressed together were much more numerous and powerful than in our case; and consequently less powerful ligaments within would be sufficient to bind the members to the head and to each other.

In the feudal system, we have seen a similar propensity exemplified. Notwithstanding the want of proper sympathy in every instance between the local sovereigns and the people, and the sympathy in some instances between the general sovereign and the latter, it usually happened that the local sovereigns prevailed in the rivalry for encroachments. Had no external dangers enforced internal harmony and subordination, and particularly, had the local sovereigns possessed the affections of the people, the great kingdoms in Europe would at this time consist of as many independent princes as there were formerly feudatory barons.

The State governments will have the advantage of the federal government, whether we compare them in respect to the immediate dependence of the one on the other; to the weight of personal influence which each side will possess; to the powers respectively vested in them; to the predilection and probable support of the people; to the disposition and faculty of resisting and frustrating the measures of each other.

The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former. Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment and will, perhaps, in most cases, of themselves determine it. The Senate will be elected absolutely and exclusively by the State legislatures. Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men whose influence over the people obtains for themselves an election into the State legislatures. Thus, each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them. On the other side, the component parts of the State governments will in no instance be indebted for their appointment to the direct agency of the federal government, and very little, if at all, to the local influence of its members.

The number of individuals employed under the Constitution of the United States will be much smaller than the number employed under the particular States. There will consequently be less of

personal influence on the side of the former than of the latter. The members of the legislative, executive, and judiciary departments of thirteen and more States, the justices of peace, officers of militia, ministerial officers of justice, with all the county, corporation, and town officers, for three millions and more of people, intermixed and having particular acquaintance with every class and circle of people must exceed, beyond all proportion, both in number and influence, those of every description who will be employed in the administration of the federal system. Compare the members of the three great departments of the thirteen States, excluding from the judiciary department the justices of peace, with the members of the corresponding departments of the single government of the Union; compare the militia officers of three millions of people with the military and marine officers of any establishment which is within the compass of probability, or, I may add, of possibility, and in this view alone, we may pronounce the advantage of the States to be decisive. If the federal government is to have collectors of revenue, the State governments will have theirs also. And as those of the former will be principally on the seacoast, and not very numerous, whilst those of the latter will be spread over the face of the country, and will be very numerous, the advantage in this view also lies on the same side. It is true that the Confederacy is to possess, and may exercise, the power of collecting internal as well as external taxes throughout the States; but it is probable that this power will not be resorted to, except for supplemental purposes of revenue; that an option will then be given to the States to supply their quotas by previous collections of their own; and that the eventual collection, under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States. Indeed it is extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the States will be clothed with the correspondent authority of the Union. Should it happen, however, that separate collectors of internal revenue should be appointed under the federal government, the influence of the whole number would not bear a comparison with that of the multitude of State officers in the opposite scale. Within every district to which a federal collector would be allotted, there would not be less than thirty or forty, or even more, officers of different descriptions, and many of them persons of character and weight whose influence would lie on the side of the State.

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State governments will here enjoy another advantage over the federal government. The more adequate, indeed, the federal powers may be rendered to the national defense, the less frequent will be those scenes of danger which might favor their ascendancy over the governments of the particular States.

If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose and from which no apprehensions are entertained. The powers relating to war and peace, armies and fleets, treaties and finance, with

the other more considerable powers, are all vested in the existing Congress by the Articles of Confederation. The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them. The change relating to taxation may be regarded as the most important; and yet the present Congress have as complete authority to REQUIRE of the States indefinite supplies of money for the common defense and general welfare as the future Congress will have to require them of individual citizens; and the latter will be no more bound than the States themselves have been to pay the quotas respectively taxed on them. Had the States complied punctually with the Articles of Confederation, or could their compliance have been enforced by as peaceable means as may be used with success towards single persons, our past experience is very far from countenancing an opinion that the State governments would have lost their constitutional powers, and have gradually undergone an entire consolidation. To maintain that such an event would have ensued would be to say at once that the existence of the State governments is incompatible with any system whatever that accomplishes the essential purposes of the Union.

PUBLIUS

Federalist #46

James Madison

Attempting to allay concerns about the new central government, Madison asserts the allegiance of the people will first be to the states which will consequently be the more powerful of the two levels of government.

RESUMING the subject of the last paper, I proceed to inquire whether the federal government or the State governments will have the advantage with regard to the predilection and support of the people. Notwithstanding the different modes in which they are appointed, we must consider both of them as substantially dependent on the great body of the citizens of the United States. I assume this position here as it respects the first, reserving the proofs for another place. The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other. Truth, no less than decency, requires that the event in every case should be supposed to depend on the sentiments and sanction of their common constituents.

Many considerations, besides those suggested on a former occasion, seem to place it beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States. Into the administration of these a greater number of individuals will expect to rise. From the gift of these a greater number of offices and emoluments will flow. By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of these, the people will be more familiarly and minutely conversant. And with the members of these will a greater proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments; on the side of these, therefore, the popular bias may well be expected most strongly to incline.

Experience speaks the same language in this case. The federal administration, though hitherto very defective in comparison with what may be hoped under a better system, had, during the war, and particularly whilst the independent fund of paper emissions was in credit, an activity and importance as great as it can well have in any future circumstances whatever. It was engaged, too, in a course of measures which had for their object the protection of everything that was dear, and the acquisition of everything that could be desirable to the people at large. It was, nevertheless, invariably found, after the transient enthusiasm for the early Congresses was over, that the attention and attachment of the people were turned anew to their own particular governments; that the federal council was at no time the idol of popular favor; and that opposition to proposed enlargements of its powers and importance was the side usually taken by the men who wished to build their political consequence on the prepossessions of their fellow-citizens.

If, therefore, as has been elsewhere remarked, the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due; but even in that case the State governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered.

The remaining points on which I propose to compare the federal and State governments are the disposition and the faculty they may respectively possess to resist and frustrate the measures of each other.

It has been already proved that the members of the federal will be more dependent on the members of the State governments than the latter will be on the former. It has appeared also that the prepossessions of the people, on whom both will depend, will be more on the side of the State governments than of the federal government. So far as the disposition of each towards the other may be influenced by these causes, the State governments must clearly have the advantage. But in a distinct and very important point of view, the advantage will be on the same side. The prepossessions, which the members themselves will carry into the federal government., will generally be favorable to the States; whilst it will rarely happen that the members of the State governments will carry into the public councils a bias in favor of the general government. A local spirit will infallibly prevail much more in the members of Congress than a national spirit will prevail in the legislatures of the particular States. Everyone knows that a great proportion of the errors committed by the State legislatures proceeds from the disposition of the members to sacrifice the comprehensive and permanent interest of the State to the particular and separate views of the counties or districts in which they reside. And if they do not sufficiently enlarge their policy to embrace the collective welfare of their particular State, how can it be imagined that they will make the aggregate prosperity of the Union, and the dignity and respectability of its government, the objects of their affections and consultations? For the same reason that the members of the State legislatures will be unlikely to attach themselves sufficiently to national objects, the members of the federal legislature will be likely to attach themselves too much to local objects. The States will be to the latter what counties and towns are to the former. Measures will too often be decided according to their probable effect, not on the national prosperity and happiness, but on the prejudices, interests, and pursuits of the governments and people of the individual States. What is the spirit that has in general characterized the proceedings of Congress? A perusal of their journals, as well as the candid acknowledgments of such as have had a seat in that assembly, will inform us that the members have but too frequently displayed the character rather of partisans of their respective States than of impartial guardians of a common interest; that where on one occasion improper sacrifices have been made of local considerations to the aggrandizement of the federal government, the great interests of the nation have suffered on a hundred from an undue attention to the local prejudices, interests, and views of the particular States. I mean not by these reflections to insinuate that the new federal government will not embrace a more enlarged plan of policy than the existing government may have pursued; much less that its views will be as confined as those of the State legislatures; but only that it will partake sufficiently of the spirit of both to be disinclined to invade the rights of the individual States, or the prerogatives of their governments. The motives on the part of the State governments to augment their prerogatives by defalcations, from the federal government will be overruled by no reciprocal predispositions in the members.

Were it admitted, however, that the federal government may feel an equal disposition with the State governments to extend its power beyond the due limits, the latter would still have the advantage in the means of defeating, such encroachments. If an act of a particular State, though unfriendly to the national government, be generally popular in that State, and should not too grossly violate the oaths of the State officers, it is executed immediately and, of course, by means on the spot and depending on the State alone. The opposition of the federal government, or the interposition of federal officers, would but inflame the zeal of all parties on the side of the State, and the evil could not be prevented or repaired, if at all, without the employment of means which must always be resorted to with reluctance and difficulty. On the other hand, should an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to co-operate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.

But ambitious encroachments of the federal government on the authority of the State governments would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combinations, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case as was made in the other. But what degree of madness could ever drive the federal government to such an extremity? In the contest with Great Britain, one part of the empire was employed against the other. The more numerous part invaded the rights of the less numerous part. The attempt was unjust and unwise; but it was not in speculation absolutely chimerical. But what would be the contest in the case we are supposing? Who would be the parties? A few representatives of the people would be opposed to the people themselves; or rather one set of representatives would be contending against thirteen sets of representatives, with the whole body of their common constituents on the side of the latter.

The only refuge left for those who prophesy the downfall of the State governments is the visionary supposition that the federal government may previously accumulate a military force for the projects of ambition. The reasonings contained in these papers must have been employed to little purpose indeed, if it could be necessary now to disprove the reality of this danger. That the people and the States should, for a sufficient period of time, elect an uninterrupted succession of men ready to betray both; that the traitors should, throughout this period, uniformly and systematically pursue some fixed plan for the extension of the military establishment; that the governments and the people of the States should silently and patiently behold the gathering stormbound continue to supply the materials until it should be prepared to burst on their own heads must appear to everyone more like the incoherent dreams of a delirious jealousy, or the misjudged exaggerations of a counterfeit zeal, than like the sober apprehensions of genuine patriotism. Extravagant as the supposition is, let it, however, be made. Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government: still it would not be going too far to say that the State governments with the

people on their side would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country does not exceed one hundredth part of the whole number of souls, or one twenty-fifth part of the number able to bear arms.

This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the late successful resistance of this country against the British arms will be most inclined to deny the possibility of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain that with this aid alone they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will and direct the national force, and of officers appointed out of the militia by these governments and attached both to them and to the militia, it may be affirmed with the greatest assurance that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it. Let us not insult the free and gallant citizens of America with the suspicion that they would be less able to defend the rights of which they would be in actual possession than the debased subjects of arbitrary power would be to rescue theirs from the hands of their oppressors. Let us rather no longer insult them with the supposition that they can ever reduce themselves to the necessity of making the experiment by a blind and tame submission to the long train of insidious measures which must precede and produce it.

The argument under the present head may be put into a very concise form, which appears altogether conclusive. Either the mode in which the federal government is to be constructed will render it sufficiently dependent on the people, or it will not. On the first supposition, it will be restrained by that dependence from forming schemes obnoxious to their constituents. On the other supposition, it will not possess the confidence of the people, and its schemes of usurpation will be easily defeated by the State governments, who will be supported by the people.

On summing up the considerations stated in this and the last paper, they seem to amount to the most convincing evidence that the powers proposed to be lodged in the federal government are as little formidable to those reserved to the individual States as they are indispensably necessary to accomplish the purposes of the Union; and that all those alarms which have been sounded of a meditated and consequential annihilation of the State governments must, on the most favorable interpretation, be ascribed to the chimerical fears of the authors of them.

PUBLIUS

Federalist #47

James Madison

This is the first of five papers in which Publius (Madison) analyzes the structure of the new government. This one examines the maxim that there should be separate departments in the new government, including discussion of Montesquieu's views.

HAVING reviewed the general form of the proposed government and the general mass of power allotted to it, I proceed to examine the particular structure of this government, and the distribution of this mass of power among its constituent parts.

One of the principal objections inculcated by the more respectable adversaries to the Constitution is its supposed violation of the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct. In the structure of the federal government no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. The several departments of power are distributed and blended in such a manner as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to everyone that the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.

The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavor, in the first place, to ascertain his meaning on this point.

The British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal bard as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged, so this great political critic appears to have viewed the Constitution of England, and as the standard, or to use his own expression, as the mirror of political liberty, and to have delivered, in the form of elementary truths, the several characteristic principles of that particular system. That we may be sure, then, not to mistake his meaning in this case, let us recur to the source from which the maxim was drawn.

On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns which, when made, have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him, can be removed by him on the address of the two Houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also a great constitutional council to the executive chief, as, on another hand, it is the sole depositary of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The judges, again, are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote.

From these facts, by which Montesquieu was guided, it may clearly be inferred that in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no control over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted. This would have been the case in the constitution examined by him, if the king, who is the sole executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body had possessed the supreme judiciary, or the supreme executive authority. This, however, is not among the vices of that constitution. The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department.

The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*." Some of these reasons are more fully explained in other passages; but briefly stated as they are here they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.

If we look into the constitutions of the several States we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept

absolutely separate and distinct. New Hampshire, whose constitution was the last formed, seems to have been fully aware of the impossibility and inexpediency of avoiding any mixture whatever of these departments, and has qualified the doctrine by declaring "that the legislative, executive, and judiciary powers ought to be kept as separate from, and independent of, each other *as the nature of a free government will admit; or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity.*" Her constitution accordingly mixes these departments in several respects. The Senate, which is a branch of the legislative department, is also a judicial tribunal for the trial of impeachments. The President, who is the head of the executive department, is the presiding member also of the Senate; and, besides an equal vote in all cases, has a casting vote in case of a tie. The executive head is himself eventually elective every year by the legislative department, and his council is every year chosen by and from the members of the same department. Several of the officers of state are also appointed by the legislature. And the members of the judiciary department are appointed by the executive department.

The constitution of Massachusetts has observed a sufficient though less pointed caution in expressing this fundamental article of liberty. It declares "that the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them." This declaration corresponds precisely with the doctrine of Montesquieu, as it has been explained, and is not in a single point violated by the plan of the convention. It goes no farther than to prohibit any one of the entire departments from exercising the powers of another department. In the very Constitution to which it is prefixed, a partial mixture of powers has been admitted. The executive magistrate has a qualified negative on the legislative body, and the Senate, which is a part of the legislature, is a court of impeachment for members both of the executive and judiciary departments. The members of the judiciary department, again, are appointable by the executive department, and removable by the same authority on the address of the two legislative branches. Lastly, a number of the officers of government are annually appointed by the legislative department. As the appointment to offices, particularly executive offices, is in its nature an executive function, the compilers of the Constitution have, in this last point at least,, violated the rule established by themselves.

I pass over the constitutions of Rhode Island and Connecticut, because they were formed prior to the Revolution and even before the principle under examination had become an object of political attention.

The constitution of New York contains no declaration on this subject, but appears very clearly to have been framed with an eye to the danger of improperly blending the different departments. It gives, nevertheless, to the executive magistrate, a partial control over the legislative department; and, what is more, gives a like control to the judiciary department; and even blends the executive and judiciary departments in the exercise of this control. In its council of appointment members of the legislative are associated with the executive authority, in the appointment of officers, both executive and judiciary. And its court for the trial of impeachments and correction of errors is to consist of one branch of the legislature and the principal members of the judiciary department.

The constitution of New Jersey has blended the different powers of government more than any of the preceding. The governor, who is the executive magistrate, is appointed by the legislature; is chancellor and ordinary, or surrogate of the State; is a member of the Supreme

Court of Appeals, and president, with a casting vote, of one of the legislative branches. The same legislative branch acts again as executive council to the governor, and with him constitutes the Court of Appeals. The members of the judiciary department are appointed by the legislative department, and removable by one branch of it, on the impeachment of the other.

According to the constitution of Pennsylvania, the president, who is the head of the executive department, is annually elected by a vote in which the legislative department predominates. In conjunction with an executive council, he appoints the members of the judiciary department and forms a court of impeachment for trial of all officers, judiciary as well as executive. The judges of the Supreme Court and justices of the peace, seem also to be removable by the legislature; and the executive power of pardoning, in certain cases, to be referred to the same department. The members of the executive council are made EX OFFICIO justices of peace throughout the State.

In Delaware, the chief executive magistrate is annually elected by the legislative department. The speakers of the two legislative branches are vice-presidents in the executive department. The executive chief, with six others appointed, three by each of the legislative branches, constitutes the Supreme Court of Appeals; he is joined with the legislative department in the appointment of the other judges. Throughout the States it appears that the members of the legislature may at the same time be justices of the peace; in this State, the members of one branch of it are EX OFFICIO justices of the peace; as are also the members of the executive council. The principal officers of the executive department are appointed by the legislative; and one branch of the latter forms a court of impeachments. All officers may be removed on address of the legislature.

Maryland has adopted the maxim in the most unqualified terms; declaring that the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other. Her constitution, notwithstanding, makes the executive magistrate appointable by the legislative department; and the members of the judiciary by the executive department.

The language of Virginia is still more pointed on this subject. Her constitution declares "that the legislative, executive, and judiciary departments shall be separate and distinct; so that neither exercises the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time, except that the justices of county courts shall be eligible to either House of Assembly." Yet we find not only this express exception with respect to the members of the inferior courts, but that the chief magistrate, with his executive council, are appointable by the legislature; that two members of the latter are triennially displaced at the pleasure of the legislature; and that all the principal offices, both executive and judiciary, are filled by the same department. The executive prerogative of pardon, also, is in one case vested in the legislative department.

The constitution of North Carolina, which declares "that the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other," refers, at the same time, to the legislative department, the appointment not only of the executive chief, but all the principal officers within both that and the judiciary department.

In South Carolina, the constitution makes the executive magistracy eligible by the legislative department. It gives to the latter, also, the appointment of the members of the judiciary department, including even justices of the peace and sheriffs; and the appointment of officers in the executive department, down to captains in the army and navy of the State.

In the constitution of Georgia where it is declared "that the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other," we find that the executive department is to be filled by appointments of the legislature; and the executive prerogative of pardon to be finally exercised by the same authority. Even justices of the peace are to be appointed by the legislature.

In citing these cases, in which the legislative, executive, and judiciary departments have not been kept totally separate and distinct, I wish not to be regarded as an advocate for the particular organizations of the several State governments. I am fully aware that among the many excellent principles which they exemplify they carry strong marks of the haste, and still stronger of the inexperience, under which they were framed. It is but too obvious that in some instances the fundamental principle under consideration has been violated by too great a mixture, and even an actual consolidation of the different powers; and that in no instance has a competent provision been made for maintaining in practice the separation delineated on paper. What I have wished to evince is that the charge brought against the proposed Constitution of violating the sacred maxim of free government is warranted neither by the real meaning annexed to that maxim by its author, nor by the sense in which it has hitherto been understood in America. This interesting subject will be resumed in the ensuing paper.

PUBLIUS

Federalist #48

James Madison

Checks and balances as a means of guarding against the concentration of power in one branch are explained. Madison notes the movement of power to the legislature and the necessity of guarding against it.

IT WAS shown in the last paper that the political apothegm there examined does not, require that the legislative, executive, and judiciary departments should be wholly unconnected with each other. I shall undertake, in the next place, to show that unless these departments be so far connected and blended as to give to each a constitutional, control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.

It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be is the great problem to be solved.

Will it be sufficient to mark, with precision, the boundaries of these departments in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble against the more powerful members of the government. The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.

The founders of our republics have so much merit for the wisdom which they have displayed that no task can be less pleasing than that of pointing out the errors into which they have fallen. A respect for truth, however, obliges us to remark that they seem never for a moment to have turned their eyes from the danger, to liberty, from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hand, must be lead to the same tyranny as is threatened by executive usurpations.

In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire. In a democracy, where a multitude of people exercise in person the legislative functions and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency, to

start up in the same quarter. But in a representative republic where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves. Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.

I have appealed to our own experience for the truth of what I advance on this subject. Were it necessary to verify this experience by particular proofs, they might be multiplied without end. I might collect vouchers in abundance from the records and archives of every State in the Union. But as a more concise and at the same time equally satisfactory evidence, I will refer to the example of two States, attested by two unexceptionable authorities.

The first example is that of Virginia, a State which, as we have seen, has expressly declared in its constitution that the three great departments ought not to be intermixed. The authority in support of it is Mr. Jefferson, who, besides his other advantages for remarking the operation of the government, was himself the chief magistrate of it. In order to convey fully the ideas with which his experience had impressed him on this subject, it will be necessary to quote a passage of some length from his very interesting *Notes on the State of Virginia*, p. 195. "All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those who doubt it turn their eyes on the republic of Venice. As little will it avail us that they are chosen by ourselves. An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others. For this reason that convention which passed the ordinance of government laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. *But no barrier was provided between these several powers.* The judiciary and the executive members were left dependent on the legislative for their subsistence in office, and some of them for their

continuance in it. If, therefore, the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can be effectual; because in that case they may put their proceedings into the form of acts of Assembly, which will render them obligatory on the other branches. They have accordingly, *in many instances, decided rights* which should have been left to *judiciary controversy*, and *the direction of the executive, during the whole time of their session, is becoming habitual and familiar.*"

The other State which I shall have for an example is Pennsylvania; and the other authority, the Council of Censors, which assembled in the years 1783 and 1784. A part of the duty of this body, as marked out by the Constitution, was "to inquire whether the Constitution had been preserved inviolate in every part; and whether the legislative and executive branches of government had performed their duty as guardians of the people, or assumed to themselves, or exercised, other or greater powers than they are entitled to by the Constitution." In the execution of this trust, the council were necessarily led to a comparison of both the legislative and executive proceedings with the constitutional powers of these departments; and from the facts enumerated, and to the truth of most of which both sides in the council subscribed, it appears that the Constitution had been flagrantly violated by the legislature in a variety of important instances.

A great number of laws had been passed violating, without any apparent necessity, the rule requiring that all bills of a public nature shall be previously printed for the consideration of the people; although this is one of the precautions chiefly relied on by the Constitution against improper acts of the legislature.

The constitutional trial by jury had been violated and powers assumed which had not been delegated by the Constitution.

Executive powers had been usurped.

The salaries of the judges, which the Constitution expressly requires to be fixed, had been occasionally varied; and cases belonging to the judiciary department frequently drawn within legislative cognizance and determination.

Those who wish to see the several particulars falling under each of these heads may consult the journals of the council which are in print. Some of them, it will be found, may be imputable to peculiar circumstances connected with the war; but the greater part of them may be considered as the spontaneous shoots of an ill-constituted government.

It appears, also, that the executive department had not been innocent of frequent breaches of the Constitution. There are three observations, however, which ought to be made on this head: *first*, a great proportion of the instances were either immediately produced by the necessities of the war, or recommended by Congress or the commander-in-chief; *second*, in most of the other instances they conformed either to the declared or the known sentiments of the legislative department; *third*, the executive department of Pennsylvania is distinguished from that of the other States by the number of members composing it. In this respect, it has as much affinity to a legislative assembly as to an executive council. And being at once exempt from the restraint of an individual responsibility for the acts of the body, and deriving confidence from mutual example and joint influence, unauthorized measures would, of course, be more freely hazarded, than where the executive department is administered by a single hand, or by a few hands.

The conclusion which I am warranted in drawing from these observations is that a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration Of all the powers of government in the same hands.

PUBLIUS

Federalist #49

James Madison

The people may occasionally, but emphatically not frequently, be consulted as a check on concentration of power. Direct democracy is raised as dangerous to liberty.

THE author of the *Notes on the State of Virginia*, quoted in the last paper, has subjoined to that valuable work the draught of a constitution, which had been prepared in order to be laid before a convention expected to be called in 1783, by the legislature, for the establishment of a constitution for that commonwealth. The plan, like everything from the same pen, marks a turn of thinking, original, comprehensive, and accurate; and is the more worthy of attention as it equally displays a fervent attachment to republican government and an enlightened view of the dangerous propensities against which it ought to be guarded. One of the precautions which he proposes, and on which he appears ultimately to rely as a palladium to the weaker departments of power against the invasions of the stronger, is perhaps altogether his own, and as it immediately relates to the subject of our present inquiry, ought not to be overlooked.

His proposition is "that whenever any two of the three branches of government shall concur in opinion, each by the voices of two thirds of their whole number, that a convention is necessary for altering the Constitution, or *correcting breaches of it*, a convention shall be called for the purpose."

As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches- of government hold their power, is derived, it seems strictly consonant to the republican theory to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of government, but also whenever any one of the departments may commit encroachments on the chartered authorities of the others. The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers; and how are the encroachments of the stronger to be prevented, or the wrongs of the weaker to be redressed, without an appeal to the people themselves, who, as the grantors of the commission, can alone declare its true meaning, and enforce its observance?

There is certainly great force in this reasoning, and it must be allowed to prove that a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions. But there appear to be insuperable objections against the proposed recurrence to the people, as a provision in all cases for keeping the several departments of power within their constitutional limits.

In the first place, the provision does not reach the case of a combination of two of the departments against the third. If the legislative authority, which possesses so many means of operating on the motives of the other departments, should be able to gain to its interest either of the others, or even, one third of its members, the remaining department could derive no advantage from this remedial provision. I do not dwell, however, on this objection, because it may be thought to lie rather against the modification of the principle, than against the principle itself.

In the next place, it may be considered as an objection inherent in the principle that as every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability. If it be true that all governments rest on opinion, it is no less true that the strength of opinion in each individual, and its practical influence on his conduct, depend much on the number which he supposes to have entertained the same opinion. The reason of man, like man himself, is timid and cautious when left alone, and acquires firmness and confidence in proportion to the number with which it is associated. When the examples which fortify opinion are *ancient* as well as *numerous*, they are known to have a double effect. In a nation of philosophers, this consideration ought to be disregarded. A reverence for the laws would be sufficiently inculcated by the voice of an enlightened reason. But a nation of philosophers is as little to be expected as the philosophical race of kings wished for by Plato. And in every other nation, the most rational government will not find it a superfluous advantage to have the prejudices of the community on its side.

The danger of disturbing the public tranquillity by interesting too strongly the public passions is a still more serious objection against a frequent reference of constitutional questions to the decision of the whole society. Notwithstanding the success which has attended the revisions of our established forms of government and which does so much honor to the virtue and intelligence of the people of America, it must be confessed that the experiments are of too ticklish a nature to be unnecessarily multiplied. We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the ancient government; and whilst no spirit of party connected with the changes to be made, or the abuses to be reformed, could mingle its leaven in the operation. The future situations in which we must expect to be usually placed do not present any equivalent security against the danger which is apprehended.

But the greatest objection of all is that the decisions which would probably result from such appeals would not answer the purpose of maintaining the constitutional equilibrium of the government. We have seen that the tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments. The appeals to the people, therefore, would usually be made by the executive and judiciary departments. But whether made by one side or the other, would each side enjoy equal advantages on the trial? Let us view their different situations. The members of the executive and judiciary departments are few in number, and can be personally known to a small part only of the people. The latter, by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossessions. The former are generally the objects of jealousy and their administration is always liable to be discolored and rendered unpopular. The members of the legislative department, on the other hand, are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship, and of acquaintance embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people. With these advantages it can hardly be supposed that the adverse party would have an equal chance for a favorable issue.

But the legislative party would not only be able to plead their cause most successfully with the people. They would probably be constituted themselves the judges. The same influence which had gained them an election into the legislature would gain them a seat in the convention. If this should not be the case with all, it would probably be the case with many, and pretty certainly with those leading characters, on whom everything depends in such bodies. The convention, in short, would be composed chiefly of men who had been, who actually were, or who expected to be, members of the department whose conduct was arraigned. They would consequently be parties to the very question to be decided by them.

It might, however, sometimes happen, that appeals would be made under circumstances less adverse to the executive and judiciary departments. The usurpations of the legislature might be so flagrant and so sudden, as to admit of no specious coloring. A strong party among themselves might take side with the other branches. The executive power might be in the hands of a peculiar favorite of the people. In such a posture of things, the public decision might be less swayed by prepossessions in favor of the legislative party. But still it could never be expected to turn on the true merits of the question. It would inevitably be connected with the spirit of pre-existing parties, or of parties springing out of the question itself. It would be connected with persons of distinguished character and extensive influence in the community. It would be pronounced by the very men who had been agents in, or opponents of, the measures to which the decision would relate. The passions, therefore, not the reason, of the public would sit in judgment. But it is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government.

We found in the last paper that mere declarations in the written Constitution are not sufficient to restrain the several departments within their legal rights. It appears in this that occasional appeals to the people would be neither a proper nor an effectual provision for that purpose. How far the provisions of a different nature contained in the plan above quoted might be adequate I do not examine. Some of them are unquestionably founded on sound political principals, and all of them are framed with singular ingenuity and precision.

PUBLIUS

Federalist #51

James Madison

Publius (Madison) continues his discussion in Federalist #10, noting that ordered liberty will be furthered by the proposed system of separation of powers and checks and balances. If men were angels, no government would be necessary, but as they are not this system will best protect liberty.

TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments as laid down in the Constitution? The only answer that can be given is that as all these exterior provisions are found to be inadequate the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea I will hazard a few general observations which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; second, because the permanent tenure by which the appointments are held in that department must soon destroy all sense of dependence on the authority conferring them.

It is equally evident that the members of each department should be as little dependent as possible on those of the others for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.

But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the mail must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the

greatest of all reflections on 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 over 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. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute, negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department?

If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion to the several State constitutions, and to the federal Constitution, it will be found that if the latter does not perfectly correspond with them, the former are infinitely less able to bear such a test.

There are, moreover, two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view.

First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority—that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States, oppressive combinations of a majority will be facilitated; the best security, under the republican forms, for the rights of every class of citizen, will be diminished; and consequently the stability and independence of some member of the government, the only other security, must be proportionally increased. Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful. It can be little doubted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practicable sphere, the more dully capable it will be of self-government. And happily for the *republican cause*, the practicable sphere may be carried to a very great extent by a judicious modification and mixture of the *federal principle*.

PUBLIUS

Federalist #78

Alexander Hamilton

The first of six papers on the judiciary in which Publius (Hamilton) deals with judicial review in the face of the silence of the Constitution on this extraordinary power. "Whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former."

WE PROCEED now to an examination of the judiciary department of the proposed government.

In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged as the propriety of the institution in the abstract is not disputed; the only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points, therefore, our observations shall be confined.

The manner of constituting it seems to embrace these several objects: 1st. The mode of appointing the judges. 2nd. The tenure by which they are to hold their places. 3rd. The partition of the judiciary authority between different courts and their relations to each other.

First. As to the mode of appointing the judges: this is the same with that of appointing the officers of the Union in general and has been so fully discussed in the two last numbers that nothing can be said here which would not be useless repetition.

Second. As to the tenure by which the judges are to hold their places: this chiefly concerns their duration in office, the provisions for their support, the precautions for their responsibility.

According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices *during good behavior*; which is conformable to the most approved of the State constitutions, and among the rest, to that of this State. Its propriety having been drawn into question by the adversaries of that plan is no light symptom of the rage for objection which disorders their imaginations and judgments. The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. 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.

This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power;¹ that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the Judiciary remains truly distinct from both the legislature and the executive. For I agree that "there is no liberty if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from

¹ The celebrated Montesquieu, speaking of them, says: "Of the three powers above mentioned, the JUDICIARY is next to nothing." -*Spirit of Laws*, Vol. I, page 186.

any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.

This exercise of judicial discretion in determining between two contradictory laws is exemplified in a familiar instance. It not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable that between the interfering acts of an *equal* authority that which was the last indication of its will should have the preference.

But in regard to the interfering acts of a superior and subordinate authority of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory Statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything, would prove that there ought to be no judges distinct from that body.

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies² in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence and to introduce in its stead universal distrust and distress.

² *Vide Protest of the Minority of the Convention of Pennsylvania, Martin's speech, etc.*

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.

There is yet a further and a weighty reason for the permanency of the judicial offices which is deducible from the nature of the qualifications they require. It has been frequently remarked with great propriety that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind that the records of those precedents must unavoidably swell to a very considerable bulk and must demand long and laborious study to acquire a competent knowledge of them. Hence it is that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us that the government can have no great option between fit characters; and that a temporary duration in office which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench would have a tendency to throw the administration of justice into hands less able and less well qualified to conduct it with utility and dignity. In the present circumstances of this country and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established *good behavior* as the tenure of their judicial offices, in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably defective if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

PUBLIUS

Federalist #81

Alexander Hamilton

The wisdom of establishing one supreme court and the relations of that court to subordinate courts are presented.

LET us now return to the partition of the judiciary authority between different courts and their relations to each other.

"The judicial power of the United States is" (by the plan of the convention) "to be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish."³

That there ought to be one court of supreme and final jurisdiction is a proposition which has not been, and is not likely to be contested. The reasons for it have been assigned in another place and are too obvious to need repetition. The only question that seems to have been raised concerning it is whether it ought to be a distinct body or a branch of the legislature. The same contradiction is observable in regard to this matter which has been remarked in several other cases. The very men who object to the Senate as a court of impeachments, on the ground of an improper intermixture of powers, advocate, by implication at least, the propriety of vesting the ultimate decision of all causes in the whole or in a part of the legislative body.

The arguments or rather suggestions, upon which this charge is founded are to this effect: "The authority Of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the *spirit* of the Constitution will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain the judicial power, in the last resort, resides in the House of Lords, which is a branch of the legislature; and this part of the British government has been imitated in the State constitutions in general. The Parliament of Great Britain, and the legislatures of the several States, can at any time rectify, by law, the exceptionable decisions of their respective courts. But the errors and usurpations of the Supreme Court of the United States will be uncontrollable and remediless." This, upon examination, will be found to be made up altogether of false reasoning upon misconceived fact.

In the first place, there is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State. I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution. But this doctrine is not deducible from any circumstance. peculiar to the plan of convention, but from the general theory of a limited Constitution; and as far as it is true is equally applicable to most if not to all the State governments. There can be no objection, therefore, on this account to the federal judicature which will not lie against the local judicatures

in general, and which will not serve to condemn every constitution that attempts to set bounds to the legislative discretion.

But perhaps the force of the objection may be thought to consist in the particular organization of the proposed Supreme Court; in its being composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great Britain and in that of this State. To insist upon this point, the authors of the objection must renounce the meaning they have labored to annex to the celebrated maxim requiring a separation of the departments of power. It shall, nevertheless, be conceded to them, agreeably to the interpretation given to that maxim in the course of these papers, that it is not violated by vesting the ultimate power of judging in a *part* of the legislative body. But though this be not an absolute violation of that excellent rule, yet it verges so nearly upon it as on this account alone to be less eligible than the mode preferred by the convention. From a body which had had even a partial agency in passing bad laws we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them would be too apt to operate in interpreting them; still less could it be expected that men who had infringed the Constitution in the character of legislators would be disposed to repair the breach in the character of judges. Nor is this all. Every reason which recommends the tenure of good behavior for judicial offices militates against placing the judiciary power, in the last resort, in a body composed of men chosen for a limited period. There is an absurdity in referring the determination of causes, in the first instance, to judges of permanent standing; and in the last, to those of a temporary and mutable constitution. And there is a still greater absurdity in subjecting the decisions of men, selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge. The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information, so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshaled on opposite sides will be too apt to stifle the voice both of law and of equity.

These considerations teach us to applaud the wisdom of those States who have committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and of men. Contrary to the supposition of those who have represented the plan of the convention, in this respect, as novel and unprecedented, it is but a copy of the constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia; and the preference which has been given to these models is highly to be commended.

It is not true, in the second place, that the parliament of Great Britain, or the legislatures of the particular States, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory, neither of the British, nor the State constitutions, authorizes the reversal of a judicial sentence by a legislative act. Nor is there anything in the proposed Constitution, more than in either of them, by which it is forbidden. In the former, as well as in the latter, the impropriety of the thing, on the general principles of law and reason, is the sole obstacle. A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases. This is the principle and it applies in all its consequences, exactly in

the same manner and extent, to the State governments, as to the national government now under consideration. Not the least difference can be pointed out in any view of the subject.

It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority which has been upon many occasions reiterated is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations. While this ought to remove all apprehensions on the subject it affords, at the same time, a cogent argument for constituting the Senate a court for the trial of impeachments.

Having now examined, and, I trust, removed the objections to the distinct and independent organization of the Supreme Court, I proceed to consider the propriety of the power of constituting inferior courts,⁴ and the relations which will subsist between these and the former.

The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance. It is intended to enable the national government to institute or *authorize*, in each State or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits.

But why, it is asked, might not the same purpose have been accomplished by the instrumentality of the State courts? This admits of different answers. Though the fitness and competency of those courts should be allowed in the utmost latitude, yet the substance of the power in question may still be regarded as a necessary part of the plan, if it were only to empower the national legislature to commit to them the cognizance of causes arising out of the national Constitution. To confer the power of determining such causes upon the existing courts of the several States would perhaps be as much "to constitute tribunals," as to create new courts with the like power. But ought not a more direct and explicit provision to have been made in favor of the State courts? There are, in my opinion, substantial reasons against such a provision: the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst

⁴ This power has been absurdly represented as intended to abolish all the county courts in the several States which are commonly called inferior courts. But the expressions of the Constitution are to constitute "tribunals INFERIOR TO THE SUPREME COURT"; and the evident design of the provision is to enable the institution of local courts, subordinate to the Supreme, either in States or larger districts. It is ridiculous to imagine that county courts were in contemplation.

every man may discover that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws. And if there was a necessity for confiding the original cognizance of causes arising under those laws to them, there would be a correspondent necessity for leaving the door of appeal as wide as possible. In proportion to the grounds of confidence in or distrust of the subordinate tribunals ought to be the facility or difficulty of appeals. And well satisfied as I am of the propriety of the appellate jurisdiction in the several classes of causes to which it is extended, by the plan of the convention I should consider everything calculated to give, in practice, and *unrestrained course* to appeals, as a source of public and private inconvenience.

I am not sure but that it will be found highly expedient and useful to divide the United States into four or five or half a dozen districts, and to institute a federal court in each district in lieu of one in every State. The judges of these courts, with the aid of the State judges, may hold circuits for the trial of causes in the several parts of the respective districts. Justice through them may be administered with ease and dispatch and appeals may be safely circumscribed within a narrow compass. This plan appears to me at present the most eligible of any that could be adopted; and in order to it, it is necessary that the power of constituting inferior courts should exist in the full extent in which it is to be found in the proposed Constitution.

These reasons seem sufficient to satisfy a candid mind, that the want of such a power would have been a great defect in the plan. Let us now examine in what manner the judicial authority is to be distributed between the supreme and the inferior courts of the Union.

The Supreme Court is to be invested with original jurisdiction only "in cases affecting ambassadors, other public ministers, and consuls, and those in which A STATE shall be a party." Public ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation. Though consuls have not in strictness a diplomatic character, yet, as they are the public agents of the nations to which they belong, the same observation is in a great measure applicable to them. In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal.

Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering

the article of taxation and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a preexisting right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

Let us resume the train of our observations. We have seen that the original jurisdiction of the Supreme Court would be confined to two classes of cases, and those of a nature rarely to occur. In all other cases of federal cognizance the original jurisdiction would appertain to the inferior tribunals; and the Supreme Court would have nothing more than an appellate jurisdiction "with such *exceptions* and under such *regulations* as the Congress shall make."

The propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact. Some well-intentioned men in this State, deriving their notions from the language and forms which obtain in our courts, have been induced to consider it as an implied supersedure of the trial by jury, in favor of the civil-law mode of trial, which prevails in our courts of admiralty, probate, and chancery. A technical sense has been affixed to the term "appellate" which, in our law parlance, is commonly used in reference to appeals in the course of the civil law. But if I am not misinformed, the same meaning would not be given to it in any part of New England. There, an appeal from one jury to another is familiar both in language and practice, and is even a matter of course until there have been two verdicts on one side. The word "appellate" therefore will not be understood in the same sense in New England as in New York, which shows the impropriety of a technical, interpretation derived from the jurisprudence of any particular State. The expression, taken in the abstract, denotes nothing more than the power of one tribunal to review the proceedings of another, either as to the law or fact, or both. The mode of doing it may depend on ancient custom or legislative provision (in a new government it must depend on the latter), and may be with or without the aid of a jury, as may be judged advisable. If, therefore, the re-examination of a fact once determined by a jury should in any case be admitted under the proposed Constitution, it may be so regulated as to be done by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court.

But it does not follow that the re-examination of a fact once ascertained by a jury will be permitted in the Supreme Court. Why may not it be said, with the strictest propriety, when a writ of error is brought from an inferior to a superior court of law in this State, that the latter has jurisdiction of the fact as well as the law? It is true it cannot institute a new inquiry concerning the fact but it takes cognizance of it as it appears upon the record and pronounces the law arising upon it.⁵ This is jurisdiction of both fact and law; nor is it even possible to separate them. Though the common-law courts of this State ascertain disputed facts by a jury, yet they

⁵ This word is composed of JUS and DICTO, *juris, dictio*, or a speaking or pronouncing of the law.

unquestionably have jurisdiction of both fact and law; and accordingly when the former is agreed in the pleadings they have no recourse to a jury but proceed at once to judgment. I contend therefore, on this ground, that the expressions, "appellate jurisdiction, both as to law and fact," do not necessarily imply a re-examination in the Supreme Court of facts decided by juries in the inferior courts.

The following train of ideas may well be imagined to have influenced the convention in relation to this particular provision. The appellate jurisdiction of the Supreme Court (it may have been argued) will extend to causes determinable in different modes, some in the course of COMMON LAW, others in the course of the CIVIL LAW. In the former, the revision of the law only will be, generally speaking, the proper province of the Supreme, Court; in the latter, the re-examination of the fact is agreeable to usage, and in some cases, of which prize causes are an example, might be essential to the preservation of the public peace. It is therefore necessary that the appellate jurisdiction should, in certain cases, extend in the broadest sense to matters of fact. It will not answer to make an express exception of cases which shall have been originally tried by a jury because in the courts of some of the States *all causes* are tried in this mode;⁶ and such an exception would preclude the revision of matters of fact, as well where it might be proper as where it might be improper. To avoid all inconveniences, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction both as to law and fact, and that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

This view of the matter, at any rate, puts it out of all doubt that the supposed *abolition* of the trial by jury, by the operation of this provision, is fallacious and untrue. The legislature of the United States would certainly have full power to provide that in appeals to the Supreme Court there should be no re-examination of facts where they had been tried in the original causes by juries. This would certainly be an authorized exception; but if, for the reason already intimated, it should be thought too extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial.

The amount of the observations hitherto made on the authority of the judicial department is this: that it has been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature; that in the partition of this authority a very small portion of original jurisdiction has been reserved to the Supreme Court and the rest consigned to the subordinate tribunals; that the Supreme Court will possess an appellate jurisdiction, both as to law and fact, in all the cases referred to them, but subject to any *exceptions* and *regulations* which may be thought advisable; that this appellate jurisdiction does, in no case, *abolish* the trial by jury; and that an ordinary degree of prudence and integrity in the national councils will insure us solid advantages from the establishment of the proposed judiciary without exposing us to any of the inconveniences which have been predicted from that source.

PUBLIUS

⁶ I hold that the States will have concurrent jurisdiction with the subordinate federal judicatories in many cases of federal cognizance as will be explained in my next paper.

Federalist #84

Alexander Hamilton

Publius defends the absence of a bill of rights in the Constitution, noting that since the new government was not delegated powers to infringe rights, these rights did not need protection.

IN THE course of the foregoing review of the Constitution, I have taken notice of, and endeavored to answer most of the objections which have appeared against it. There however remain a few which either did not fall naturally under any particular head or were forgotten in their proper places. These shall now be discussed; but as the subject has been drawn into great length, I shall so far consult brevity as to comprise all my observations on these miscellaneous points in a single paper.

The most considerable of these remaining objections is that the plan of the convention contains no bill of rights. Among other answers given to this, it has been upon different occasions remarked that the constitutions of several of the States are in a similar predicament. I add that New York is of this number. And yet the opposers of the new system, in this State, who profess an unlimited admiration for its constitution, are among the most intemperate partisans of a bill of rights. To justify their zeal in this matter they allege two things: one is that, though the constitution of New York has no bill of rights prefixed to it, yet it contains, in the body of it, various provisions in favor of particular privileges and rights which, in substance, amount to the same thing; the other is that the Constitution adopts, in their full extent, the common and statute law of Great Britain, by which many other rights not expressed in it are equally secured.

To the first I answer that the Constitution proposed by the convention contains, as well as the constitution of this State, a number of such provision.

Independent of those which relate to the structure of the government, we find the following: Article 1, section 3, clause 7-“Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to the law.” Section 9, of the same article, clause 2-“The privilege of writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” Clause 3-“No bill of attainder or *ex post facto* law shall be passed.” Clause 7-“No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.” Article 3, section 2, clause 3-“The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.” Section 3, of the same article-“Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.” And clause 3, of the same section-“The Congress shall have power to declare the punishment of treason; but not attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.”

It may well be a question whether these are not, upon the whole, of equal importance with any which are to be found in the constitution of this State. The establishment of the writ of *habeas corpus*, the prohibition of *ex post facto* laws, and of TITLES OF NOBILITY, *to which we have no corresponding provision in our Constitution*, are perhaps greater securities to liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone,⁷ in reference to the later, are well worthy of recital: “To bereave a man of life [says he] or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nations; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.” And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls “the BULWARK of the British Constitution.”⁸

Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the cornerstone of republican government; for so long as they are excluded there can never be serious danger that the government will be any other than that of the people.

To the second, that is, to the pretended establishment of the common and statute law by the Constitution, I answer that they are expressly made subject “to such alterations and provisions as the legislature shall from time to time make concerning the same.” They are therefore at any moment liable to repeal by the ordinary legislative power, and of course have no constitutional sanction. The only use of the declaration was to recognize the ancient law and to remove doubts which might have been occasioned by the Revolution. This consequently can be considered as no part of a declaration of rights, which under our constitutions must be intended as limitations of the power of the government itself.

It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was MAGNA CHARTA, obtained by the barons, sword in hand, from King Johns. Such were the subsequent confirmations of that charter by subsequent princes. Such was the *Petition of Right* assented to by Charles the First in the beginning of his reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of Parliament called the Bill of rights. It is evident, therefore, that, according to their primitive signification, they 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, “WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this constitution for the United States of

⁷ Vide Blackstone’s *Commentaries*, Vol. 1, Page 136.

⁸ *Idem*, Vol. 4, Page 438.

America.” Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our States bills of rights and which would sound much better in a treatise of ethics than in a constitution of government.

But a minute detail of particular rights is certainly for less applicable to a constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns. If, therefore, the loud clamors against the plan of the convention, on this score, are well founded, no epithets of reprobation will be too strong for the constitution of this State. But the truth is that both of them contain all which, in relation to their objects, is reasonably to be desired.

I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, 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. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.

On the subject of the liberty of the press, as much as has been said, I cannot forbear adding a remark or two; in the first place, I observe, that there is not a syllable concerning it in the constitution of this State; in the next, I contend that whatever has been said about it in that of any other state amounts to nothing. What signifies a declaration that “the liberty of the press shall be inviolably preserved”? What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.⁹ And here, after all, as is intimated upon another occasion, must we seek for the only solid basis of all our rights.

⁹ To show that there is a power in the Constitution by which the liberty of the press may be affected, recourse has been had to the power of taxation. It is said that duties may be laid upon the publications so high as to amount to a prohibition. I know not by what logic it could be maintained that the declarations in the State constitutions, in favor of the freedom of the press, would be a constitutional impediment to the imposition of duties upon publications by the State legislatures. It cannot certainly be pretended that any degree of duties, however low, would be an abridgment of the liberty of the press. We know that newspapers are taxed in Great Britain, and yet it is notorious that the press nowhere enjoys greater liberty than in that country. And if duties of any kind may be laid without a violation of that liberty, it is evident that the extent must depend on legislative discretion, regulated by public opinion; so that, after all, general

There remains but one other view of this matter to conclude the point. The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS. The several bills of rights in Great Britain form its Constitution, and conversely the constitution of each State is its bill of rights. And the proposed Constitution, if adopted, will be the bill of rights of the Union. Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the plan of the convention; comprehending various precautions for the public security which are not to be found in any of the State constitutions. Is another object of a bill of rights to define certain immunities and modes of proceeding, which are relative to personal and private concerns? This we have seen has also been attended to in a variety of cases in the same plan. Adverting therefore to the substantial meaning of a bill of rights, it is absurd to allege that it is not to be found in the work of the convention. It may be said that it does not go far enough though it will not be easy to make this appear; but it can with no propriety be contended that there is no such thing. It certainly must be immaterial what mode is observed as to the order of declaring the rights of the citizens if they are to be found in any part of the instrument which establishes the government. And hence it must be apparent that much of what has been said on this subject rests merely on verbal and nominal distinctions, entirely foreign from the substance of the thing.

Another objection which has been made, and which, from the frequency of its repetition, it is to be presumed is relied on, is of this nature: "It is improper [say the objectors] to confer such large powers as are proposed upon the national government, because the seat of that government must of necessity be too remote from many of the States to admit of a proper knowledge on the part of the constituent of the conduct of the representative body." This argument, if it proves anything, proves that there ought to be no general government whatever. For the powers which, it seems to be agreed on all hands, ought to be vested in the Union, cannot be safely interested to a body which is not under every requisite control. But there are satisfactory reasons to show that the objection is in reality not well founded. There is in most of the arguments which relate to distance a palpable illusion of the imagination. What are the sources of information by which the people in Montgomery County must regulate their judgment of the conduct of their representatives in the State legislature? Of personal observation they can have no benefit. This is confined to the citizens on the spot. They must therefore depend on the information of intelligent men, in whom they confide; and how must these men obtain their information? Evidently from the complexion of public measures, from the public prints, from correspondences with their representatives, and with other persons who reside at the place of their deliberations. This does not apply to Montgomery County only, but to all the counties at any considerable distance from the seat of government.

declarations respecting the liberty than in that country. And if duties of any kind may be laid without a violation of that liberty, it is evident that the extent must depend on legislative discretion, regulated by public opinion; so that, after all, general declarations respecting the liberty of the press will give it no greater security than it will have without them. The same invasions of it may be effected under the State constitutions which contain those declarations through the means of taxation, as under the proposed Constitution, which has nothing of the kind. It would be quite as significant to declare that government ought to be free, that taxes ought not to be excessive, etc., as that the liberty of the press ought not to be restrained.

It is equally evident that the same sources of information would be open to the people in relation to the conduct of their representatives in the general government, and the impediments to a prompt communication which distance may be supposed to create will be overbalanced by the effects of the vigilance of the State governments. The executive and legislative bodies of each State will be so many sentinels over the persons employed in every department of the national administration; and as it will be in their power to adopt and pursue a regular and effectual system of intelligence, they can never be at a loss to know the behavior of those who represent their constituents in the national councils, and can readily communicate the same knowledge to the people. Their disposition to apprise the community of whatever may prejudice its interest from another quarter may be relied upon, if it were only from the rivalry of power. And we may conclude with the fullest assurance that the people, through that channel, will be better informed of the conduct of their national representatives than they can be by any means they now possess, of that of their State representatives.

It ought also to be remembered that the citizens who inhabit the country at and near the seat of government will, in all questions that affect the general liberty and prosperity, have the same interest with those who are at a distance, and that they will stand ready to sound the alarm when necessary, and to point out the actors in any pernicious project. The public papers will be expeditious messengers of intelligence to the most remote inhabitants of the Union.

Among the many extraordinary objections which have appeared against the proposed constitution, the most extraordinary and the least colorable one is derived from the want of some provision respecting the debts due *to* the United States. This has been represented as a tacit relinquishment of those debts, and as wicked contrivance to screen public defaulters. The newspapers have teemed with the most inflammatory railings on this head; and yet there is nothing clearer than that the suggestion is entirely void of foundation, and is the offspring of extreme ignorance or extreme dishonesty. In addition to the remarks I have made upon the subject in another place, I shall only observe that as it is a plain dictate of common sense, so it is also an established doctrine of political law, that "*States neither lose any of their rights, nor are discharged from any of the obligations, by a change in the form of their civil government.*"¹⁰

The last objection of any consequence, which I at present recollect, turns upon the article of expense. If it were even true that the adoption of the proposed government would occasion a considerable increase of expense, it would be an objection that ought to have no weight against the plan.

The great bulk of the citizens of America are with reason convinced that Union is the basis of their political happiness. Men of sense of all parties now with few exceptions agree that it cannot be preserved under the present system, nor without radical alterations; that new and extensive powers ought to be granted to the national head, and that these require a different organization of the federal government—a single body being an unsafe depository of such ample authorities. In conceding all this, the question of expense must be given up; for it is impossible, with any degree of safety, to narrow the foundation upon which the system is to stand. The two branches of the legislature are, in the first instance, to consist of only sixty-five persons, which is the same number of which Congress, under the existing Confederation, may be composed. It is

¹⁰ *Vide* Rutherford's Institutes, Vol. 2, Book II, Chapter X, Sections XIV and XV. *Vide* also Grotius, Book II, Chapter IX, Sections VII and IX.

true that this number is intended to be increased; but this is to keep pace with the increase of the population and resources of the country. It is evident that a less number would, even in the first instance, have been unsafe, and that a continuance of the present number would, in a more advanced stage of population, be a very inadequate representation of the people.

Whence is the dreaded augmentation of expense to spring? One source pointed out is the multiplication of offices under the new government. Let us examine this a little.

It is evident that the principal departments of the administration under the present government are the same which will be required under the new. There are now a Secretary at War, a Secretary for foreign Affairs, a Secretary for Domestic Affairs, a Board of treasury, consisting of three persons, a treasurer, assistants, clerks, etc. These offices are indispensable under any system and will suffice under the new as well as under the old. As to ambassadors and other ministers and agents in foreign countries, the proposed Constitution can make no other difference than to render their characters, where they reside, more respectable, and their services more useful. As to persons to be employed in the collection of the revenues, it is unquestionably true that these will form a very considerable addition to the number of federal officers; but it will not follow that this will occasion an increase of public expense. It will be in most cases nothing more than an exchange of State offices for national officers. In the collection of all duties, for instance, the persons employed will be wholly of the latter description. The States individually will stand in no need of any for this purpose. What difference can it make in point of expense to pay officers of the customs appointed by the State or those appointed by the United States? There is no good reason to suppose that either the number or the salaries of the latter will be greater than those of the former.

Where then are we to seek for those additional articles of expense which are to swell the account to the enormous size that has been represented to us? The chief item which occurs to me respects the support of the judges of the United States. I do not add the president, because there is now a president of Congress, whose expenses may not be far, if anything, short of those which will be incurred on account of the President of the United States. The support of the judges will clearly be an extra expense, but to what extent will depend on the particular plan which may be adopted in practice in regard to this matter. But it can upon no reasonable plan amount to a sum which will be an object of material consequence.

Let us now see what there is to counterbalance any extra expense that may attend the establishment of the proposed government. The first thing that presents itself is that a great part of the business which now keeps congress sitting through the year will be transacted by the President. Even the management of foreign negotiations will naturally devolve upon him, according to general principles concerted with the Senate, and subject to their final concurrence. Hence it is evident that a portion of the year will suffice for the session of both the Senate and the House of Representatives; we may suppose about a fourth for the latter and a third, or perhaps a half, for the former. The extra business of treaties and appointments may give this extra occupation to the Senate. From this circumstance we may infer that, until the House of Representatives shall be increased greatly beyond its present number, there will be a considerable saving of expense from the difference between the constant session of the present and the temporary session of the future Congress.

But there is another circumstance of great importance in the view of economy. The business of the United States has hitherto occupied the State legislatures, as well as Congress. The latter

has made requisitions which the former have had to provide for. Hence it has happened that the sessions of the State legislatures have been protracted greatly beyond what was necessary for the execution of the mere local business of the States. More than half their time has been frequently employed in matters which related to the United States. Now the members who composed the legislatures of the several States amount to two thousand and upwards, which number has hitherto performed what under the new system will be done in the first instance by sixty-five persons, and probably at no future period by above a fourth or a fifth of that number. The Congress under the proposed government will do all the business of the United States themselves, without the intervention of the State legislatures, who thenceforth will have only to attend to the affairs of their particular States, and will not have to sit in any proportion as long as they have heretofore done. This difference in the time of the sessions of the State legislatures will be all clear gain, and will alone form an article of saving, which may be regarded as an equivalent for any additional objects of expense that may be occasioned by the adoption of the new system.

The result from these observations is that the sources of additional expense from the establishment of the proposed Constitution are much fewer than may have been imagined; that they are counterbalanced by considerable objects of saving; and that while it is questionable on which side the scale will preponderate, it is certain that a government less expensive would be incompetent to the purposes of the Union.

PUBLIUS

Federalist #85

Alexander Hamilton

Publius concludes with an appeal that the reader carefully consider why the new Constitution will further liberty. "A nation without a national government is ... an awful spectacle."

ACCORDING to the formal division of the subject of these papers announced in my first number, there would appear still to remain for discussion two points: "the analogy of the proposed government to your own State constitution," and "the additional security which its adoption will afford to republican government, to liberty, and to property." But these heads have been so fully anticipated and exhausted in the progress of the work that it would now scarcely be possible to do anything more than repeat, in a more dilated form, what has been heretofore said, which the advanced stage of the question and the time already spent upon it conspire to forbid.

It is remarkable that the resemblance of the plan of the convention to the act which organizes the government of this State holds, not less with regard to many of the supposed defects than to the real excellences of the former. Among the pretended defects are the re-eligibility of the executive, the want of a council, the omission of a formal bill of rights, the omission of a provision respecting the liberty of the press. These and several others which have been noted in the course of our inquiries are as much chargeable on the existing constitution of this State as on the one proposed for the Union; and a man must have slender pretensions to consistency who can rail at the latter for imperfections which he finds no difficulty in excusing in the former. Nor indeed can there be a better proof of the insincerity and affectation of some of the zealous adversaries of the plan of the convention among us who profess to be the devoted admirers of the government under which they live than the fury with which they have attacked that plan, for matters in regard to which our own constitution is equally or perhaps more vulnerable.

The additional securities to republican government, to liberty, and to property, to be derived from the adoption of the plan under consideration, consist chiefly in the restraints which the preservation of the Union will impose on local factions and insurrections, and on the ambition of powerful individuals in single States who might acquire credit and influence enough from leaders and favorites to become the despots of the people; in the diminution of the opportunities to foreign intrigue, which the dissolution of the Confederacy would invite and facilitate; in the prevention of extensive military establishments, which could not fail to grow out of wars between the States in a disunited situation; in the express guaranty of a republican form of government to each; in the absolute and universal exclusion of titles of nobility; and in the precautions against the repetition of those practices on the part of the State governments which have undermined the foundations, of property and credit, have planted mutual distrust in the breasts of all classes of citizens, and have occasioned an almost universal prostration of morals.

Thus have I, fellow-citizens, executed the task I had assigned to myself; with what success your conduct must determine. I trust at least you will admit that I have not failed in the assurance I gave you respecting the spirit with which my endeavors should be conducted. I have addressed myself purely to your judgments, and have studiously avoided those asperities which are too apt to disgrace political disputants of all parties and which have been not a little provoked by the language and conduct of the opponents of the Constitution. The charge of a conspiracy against the liberties of the people which has been indiscriminately brought against the advocates of the plan has something in it too wanton and too malignant not to excite the indignation of every man who feels in his own bosom a refutation of the calumny. The perpetual changes which have been

rung upon the wealthy, the well-born, and the great have been such as to inspire the disgust of all sensible men. And the unwarrantable concealments and misrepresentations which have been in various ways practiced to keep the truth from the public eye have been of a nature to demand the reprobation of all honest men. It is not impossible that these circumstances may have occasionally betrayed me into intemperances of expression which I did not intend; it is certain that I have frequently felt a struggle between sensibility and moderation; and if the former has in some instances prevailed, it must be my excuse that it has been neither often nor much.

Let us now pause and ask ourselves whether, in the course of these papers, the proposed Constitution has not been satisfactorily vindicated from the aspersions thrown upon it; and whether it has not been shown to be worthy of the public approbation and necessary to the public safety and prosperity. Every man is bound to answer these questions to himself, according to the best of his conscience and understanding, and to act agreeably to the genuine and sober dictates of his judgment. This is a duty from which nothing can give him a dispensation. 'Tis one that he is called upon, nay, constrained by all the obligations that form the bands of society, to discharge sincerely and honestly. No partial motive, no particular interest, no pride of opinion, no temporary passion or prejudice, will justify to himself, to his country, or to his posterity, an improper election of the part he is to act. Let him beware of an obstinate adherence to party; let him reflect that the object upon which he is to decide is not a particular interest of the community, but the very existence of the nation; and let him remember that a majority of America has already given its sanction to the plan which he is to approve or reject.

I shall not dissemble that I feel an entire confidence in the arguments which recommend the proposed system to your adoption, and that I am unable to discern any real force in those by which it has been opposed. I am persuaded that it is the best which our political situation, habits, and opinions will admit, and superior to any the revolution has produced.

Concessions on the part of the friends of the plan that it has not a claim to absolute perfection have afforded matter of no small triumph to its enemies. "Why," say they, "should we adopt an imperfect thing? Why not amend it and make it perfect before it is irrevocably established?" This may be plausible enough, but it is only plausible. In the first place I remark that the extent of these concessions, has been greatly exaggerated. They have been stated as amounting to an admission that the plan is radically defective and that without material alterations the rights and the interests of the community cannot be safely confided to it. This, as far as I have understood the meaning of those who make the concessions, is an entire perversion of their sense. No advocate of the measure can be found who will not declare as his sentiment that the system, though it may not be perfect in every part, is, upon the whole, a good one; is the best that the present views and circumstances of the country will permit; and is such a one as promises every species of security which a reasonable people can desire.

I answer in the next place that I should esteem it the extreme of imprudence to prolong the precarious state of our national affairs and to expose the Union to the jeopardy of successive experiments in the chimerical pursuit of a perfect plan. I never expect to see a perfect work from imperfect man. The result of the deliberations of all collective bodies must necessarily be a compound, as well of the errors and prejudices as of the good sense and wisdom of the individuals of whom they are composed. The compacts which are to embrace thirteen distinct States in a common bond of amity and union must as necessarily be a compromise of as many dissimilar interests and inclinations. How can perfection spring from such materials?

The reasons assigned in an excellent little pamphlet lately published in this city¹¹ are unanswerable to show the utter improbability of assembling a new convention under circumstances in any degree so favorable to a happy issue as those in which the late convention met, deliberated, and concluded. I will not repeat the arguments there used, as I presume the production itself has had an extensive circulation. It is certainly well worth the perusal of every friend to his country. There is, however, one point of light in which the subject of amendments still remains to be considered, and in which it has not yet been exhibited to public view. I cannot resolve to conclude without first taking a survey of it in this aspect.

It appears to me susceptible of absolute demonstration that it will be far more easy to obtain subsequent than previous amendments to the Constitution. The moment an alteration is made in the present plan it becomes, to the purpose of adoption, a new one, and must undergo a new decision of each State. To its complete establishment throughout the Union it will therefore require the concurrence of thirteen States. If, on the contrary, the Constitution proposed should once be ratified by all the States as it stands, alterations in it may at any time be effected by nine States. Here, then, the chances are as thirteen to nine¹² in favor of subsequent amendment, rather than of the original adoption of an entire system.

This is not all. Every Constitution for the United States must inevitably consist of a great variety of particulars in which thirteen independent States are to be accommodated in their interests or opinions of interest. We may of course expect to see, in any body of men charged with its original formation, very different combinations of the parts upon different points. Many of those who form a majority on one question may become the minority on a second, and an association dissimilar to either may constitute the majority on a third. Hence the necessity of moulding and arranging all the particulars which are to compose the whole in such a manner as to satisfy all the parties to the compact; and hence, also, an immense multiplication of difficulties and casualties in obtaining the collective assent to a final act. The degree of that multiplication must evidently be in a ratio to the number of particulars and the number of parties.

But every amendment to the Constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise in relation to any other point-no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently, whenever nine, or rather ten States, were united in the desire of a particular amendment, that amendment must infallibly take place. There can, therefore, be no comparison between the facility of affecting an amendment and that of establishing, in the first instance, a complete Constitution.

In opposition to the probability of subsequent amendments, it has been urged that the persons delegated to the administration of the national government will always be disinclined to yield up any portion of the authority of which they were once possessed. For my own part, I acknowledge a thorough conviction that any amendments which may, upon mature consideration, be thought useful, will be applicable to the organization of the government, not to the mass of its powers; and on this account alone I think there is no weight in the observation just stated. I also think there is little weight in it on another account. The intrinsic difficulty of governing THIRTEEN

11 Entitled "An Address to the People of the State of New York."

12 It may rather be said TEN, for though two thirds may set on foot the measure, three fourths must ratify

STATES at any rate, independent of calculations upon an ordinary degree of public spirit and integrity will, in my opinion, constantly impose on the national rulers the *necessity* of a spirit of accommodation to the reasonable expectations of their constituents. But there is yet a further consideration, which proves beyond the possibility doubt that the observation is futile. It is this: that the national rulers, whenever nine States concur, will have no option upon the subject. By the fifth article of the plan, the Congress will be *obliged* "on the application of the legislatures of two thirds of the States [which at present amount to nine], to call a convention for proposing amendments which *shall be valid*, to all intents ~and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the states, or by conventions in three fourths thereof." The words of this article are peremptory. The Congress "*shall* call a convention." Nothing in this particular is left to the discretion of that body. And of consequence all the declamation about the disinclination to a change vanishes in air. Nor however difficult it may be supposed to unite two thirds or three fourths of the State legislatures in amendments which may affect local interests can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority.

If the foregoing argument is a fallacy, certain it is that I am myself deceived by it for it is, in my conception, one of those rare instances in which a political truth can be brought to the test of mathematical demonstration. Those who see the matter in the same light with me, however zealous they may be for amendments, must agree in the propriety of a previous adoption as the most direct road to their own object.

The zeal for attempts to amend, prior to the establishment of the Constitution, must abate in every man who is ready to accede to the truth of the following observations of a writer equally solid and ingenious: "To balance a large state or society [says he], whether monarchical or republican, on general laws, is a work of so great difficulty that no human genius, however comprehensive, is able, by the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work; EXPERIENCE must guide their labor; TIME must bring it to perfection, and the FEELING of inconveniences must correct the mistakes which they *inevitably* fall into in their first trials and experiments."¹³ These judicious reflections contain a lesson of moderation to all the sincere lovers of the Union, and ought to put them upon their guard against hazarding anarchy, civil war, a perpetual alienation of the States from each other, and perhaps the military despotism of a victorious demagogue, in the pursuit of what they are not likely to obtain, but from TIME and EXPERIENCE. It may be in me a defect of political fortitude but I acknowledge that I cannot entertain an equal tranquillity with those who affect to treat the dangers of a longer continuance in our present situation as imaginary. A NATION, without a NATIONAL GOVERNMENT, is, in my view, an awful spectacle. The establishment of a Constitution, in time of profound peace, by the voluntary consent of a whole people, is a PRODIGY, to the completion of which I look forward with trembling anxiety. I can reconcile it to no rules of prudence to let go the hold we now have, in so arduous an enterprise, upon seven out of the thirteen States, and after having passed over so considerable a part of the ground, to recommence the course. I dread the more the consequences of new attempts because I KNOW that POWERFUL INDIVIDUALS, in this and in other States, are enemies to a general national government in every possible shape.

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13 Hume's Essays, Vol. 1, Page 128: "'The Rise of Arts and Sciences.'"

III. The Federalist Papers, The Constitution, and Separation of Powers

The Federalist Papers, the Constitution, and Separation of Powers

R. Bruce Carroll

The design of the American Constitution directly reflects the framers' decision that power should not be permitted to be centralized. After their colonial experiences under the rule of George III, the framers well understood the necessity of designing a governmental scheme that would so fragment power as to make it difficult for one person or group to rule. Their definition of tyranny was the holding of all governmental power in one set of hands and they were determined to structure their new government in ways that would make it difficult, but not impossible, for a tyranny to arise.

For the framers, democracy implied majority rule, but they were as worried about a tyranny of a majority and its potential abuse of minority rights as they were of creating a system of government that would itself promote liberties. They were firmly convinced that “vigor of government is essential to the security of liberty,”¹⁴ so their task was to create a government with power adequately limited in ways that would minimize (but not prevent) the likelihood of a tyranny.

Their solution can only be termed ingenious. The framers created a system that did promote liberty while restraining governmental power and one that has endured in spite of enormous domestic and international strains. It is a system which has been widely admired and copied. Its fundamental characteristic is its separation of power among the branches of the government and between the levels of government. This separation of powers with its checks and balances and division of powers between the national and state governments – federalism – constitute the unique American contributions to political thought and practice.

The Theory of the Constitution

¹⁴ Hamilton, Madison, and Jay, The Federalist (New York: The Modern Library Edition, n.d.) #1, p.5.

The call to convention in 1787 was issued in order to amend the Articles of Confederation. It was clear to most that the Confederation had not worked and the convention was intended to remedy its defects; however, at the outset virtually all delegates agreed that a new start was in order and that the Articles should be scrapped. With that agreement the framers started the task of creating and establishing a new system of government that would meet the needs of the people and the nation.

The primary task confronting the framers was to develop a new government to which citizens could adhere in faith and unity while knowing their best interests would continually be protected. The task was to create a system which would provide stability and harmony among the governed and between the people and their government. The government has to be one that would be enduring and recognized as legitimate.

One possibility which was immediately dismissed from consideration was a despotic or one ruler form of government. The Revolution had not been fought to rid Americans of the hardships under the colonial rule of George III only to consider a similar system in the birth of their nation. As a result, debate centered on the merits of (pure) democratic and (representative) republican rule.

The framers necessarily focused their inquiry and reasoning upon their view of the purposes of government. At least for some, this in turn led to analysis of the nature of man and how the government might best serve and protect the individual. Only if man were understood did they feel that the sort of government appropriate for him could be devised. Thus, a description of the basis of the system of governance necessarily starts with the theoretical foundations on which it is premised – the governed, or man.

The single best source for that analysis is The Federalist by Hamilton, Madison and Jay. Leaders at the Convention, they subsequently published 85 newspaper articles in defense of the new Constitution. The articles were intended to convince the voters of the state of New York to ratify the Constitution and certainly they informed their readers in ways that contributed to that ratification. Today they remain the best explanation of the reasons for the design of the Constitution.

The framers started from the premise that man is by nature frequently a power-seeking, nasty fellow. They believed that one could “not always [be] sure that those who advocate the truth are influenced by purer principles than their antagonists. Ambition, avarice, personal animosity, party opposition, and many other motives not more laudable than these, are apt to operate as well upon those who support as those who oppose the right side of a question.”¹⁵

Man does have reason, but “the reason of man, like man himself, is timid and cautious when left alone, and acquires firmness and confidence in proportion to the number with which it

15 Ibid., #1, pp. 4-5.

is associated.”¹⁶ Thus, men could form a government, a process requiring “firmness and confidence,” through reason, but reason conditioned by the group to which they belonged.

The problem would be to restrain the irrational and maximize the rational in the face of man’s drive to join others of like interest in order to further personal gain. Placing enormous faith on man who, though selfish, could create a government which would guarantee life, liberty, and property, the framers concluded that a system of governance could be created to meet the society’s needs. To do this at least some men would have to place the interest of the country above that of self and use their reason to further the interest of all.

They believed that the basic problem centered in the fact that factions existed. A faction is

a majority or minority of the whole who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interest of the community. ¹⁷

Man, timid and alone, in order to further himself joins factions whose interests by definition are contrary to the public interest. This creates a serious problem of governance, for in a democracy a faction might easily become a majority and deprive the minority of its freedoms. Factions are natural and inevitable and if allowed to flourish in a free society would ultimately destroy the very freedom which allowed them to arise.

Factions could be obliterated by eliminating the freedom which generated them; this, however, would be counterproductive. As Madison noted, “liberty is to faction what air is to fire, ...but it could not be less folly to abolish liberty...because it nourished faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.”¹⁸ Alternatively, a society could so control public opinion as to insure that all had the same opinions, thus eliminating diversity and factions. The problem here was that “the protection of [man’s] faculties is the first object of government.”¹⁹ It would defeat the very purpose of government if it sought to overcome the propensity to faction by defaulting on its basic obligation to protect the diversity of faculties among its citizens. Thus, the framers confronted the reality that factions would always be present in a free society, that they could not be controlled without removing the very liberty the society was seeking to further.

The problem seemed insuperable. The differing faculties of man result in mutual animosities that inevitably result in conflicts. Indeed, these differing faculties only lead to severe class conflict, for some would always gain economic advantages over others by using their

16 Ibid., #49, p. 329.

17 Ibid., #10, p. 54.

18 Ibid., p. 55.

19 Ibid., p. 54

greater capacities. Conflicts would arise among those who had property and those who did not, and among those with differing sorts of property, so that “the regulation of these various and interfering interests forms the principal task of modern legislation.”²⁰

The solution lay in controlling the effects of factions. In other words, in order to protect the freedom deemed fundamental to life, liberty, and happiness, the framers concluded that factions must be allowed to exist and flourish, but their effects must be controlled.

The framers recognized that in a democracy if a faction were a minority it would not be able to exert its will upon the majority. It might make things difficult, but not be able to execute its insidious goals. What, though, if it were a majority? “[M]easures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.”²¹ That could mean a tyranny by the majority which would be just as dangerous and distasteful as that experienced under indiscriminate rule of one man. Thus, reliance upon the majority principle would not be suitable, suggesting that a pure democracy could readily result in majority tyranny.

Instead of a pure democracy, “a society consisting of a small number of citizens, who assemble and administer the government in person,”²² the framers proposed a republic. Such a form of government, involving representatives selected by the body politic, would remedy the difficulties encountered by the pure democratic form. Representatives would present the views of their constituents in refined ways, having filtered the good and the bad. Their wisdom would enable them to “discern the true interest of their country and [their]... patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”²³ While sounding good, this remedy simply did not square with the premise of man’s nasty nature. The fact of the matter is that “enlightened statesmen will not always be at the helm.”²⁴ “Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people.”²⁵ The new nation must take measures to insure that its aims would be met no matter who was in office.

One protection would emerge from the large size and concomitant large population of the country. The framers assumed that the proportion of citizens who would be qualified for office would be the same in a large and a small population. In the United States the fact of a large population worked to the advantage of the republican principle, for the people would in absolute terms have a larger number of qualified office seekers from among whom to choose. Further,

20 Ibid., p. 56.

21 Ibid., p. 54.

22 Ibid., p. 58.

23 Ibid., p. 59.

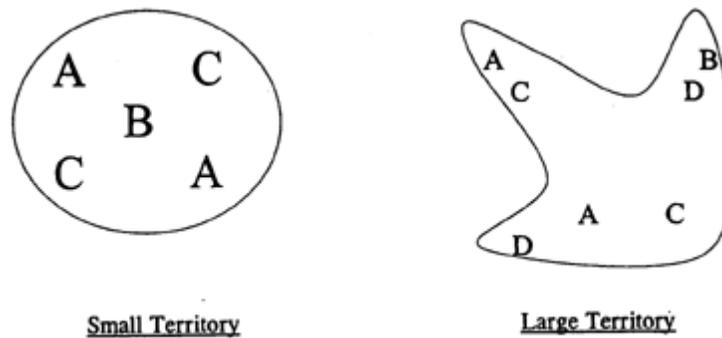
24 Ibid., p. 57.

25 Ibid., p. 59.

in the large territory a representative would have great difficulty in rigging the election process, so the people would be more free to elect their representatives on merit.

Perhaps the strongest argument in favor of a republic was premised on the existence of factions. The framers understood that a pure democracy would plainly be impractical in the large territory with the large population; historically, however, a large territory had implied tyrannical rule as in the Roman Empire. Contrary to historical precedent, they concluded a republic would preserve the democratic character they sought without tyrannical rule. The large territory would work to promote the democratic republic, for the reality was the larger the area the greater the difficulty of like factions uniting. Whereas in a small territory, with, say, four significant factions, it would be easy to overcome geographic distance among those of like interest and unite to become a majority: in a large area it would be significantly more difficult. As Figure 1 suggests, in the small area members of faction A could be much more easily joined with one another than in the large area. Though there may be more members of a given faction in the larger territory with a larger population, they nevertheless would have a more difficult time in identifying their shared interests and joining to fulfill them. “The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States.”²⁶

Figure 1: Factions in a Small and a Large Territory

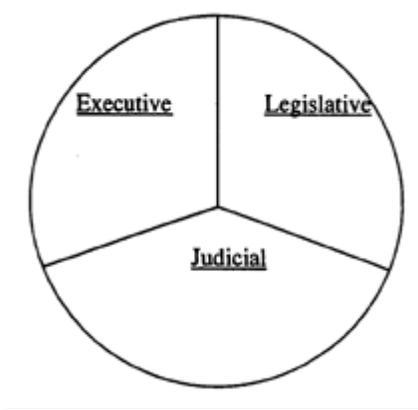


Thus, the first significant decision was made – the new government would be a republic, with some ruling for and on behalf of the others. It would be a government to which powers would be delegated to a small number of citizens. In turn that small number would be constituted of good men (which assumed the election of the good even by the bad). The large union, with its large, heterogeneous population, combined with the republican principle would be

able to absorb and take into account the propensity of man to factions. They would render “factious combinations less to be dreaded”²⁷

With that decision, the problem then confronting the framers was how to guarantee the freedom the system was designed to promote. First, the new government would be limited to the powers that were delegated to it. More, the new government itself would be structured in ways that would make it difficult for a faction to obtain tyrannical power. Statesmen, however good, possessed the same human frailties as all others and even without attempting it could work to the disadvantage of the body politic. The framers therefore concluded that they should so divide power as to make its accumulation in one set of hands an arduous task that could only be achieved over a long period of time. It should be emphasized that, in the interest of freedom and liberty, restrictions upon the possibility of gaining tyrannical control over the government were not imposed; rather, that possibility was made very remote by the very structure of the government. The concept of a separation of powers, of three co-equal branches of government providing checks and balances on the powers and defined interests of each other, and of federalism, the federal and state governments’ working within their defined spheres (“the powers proposed to be lodged in the federal government are...little formidable to those reserved to the individual States”²⁸), were consequently woven into the Constitution. Power would be divided into its executive, legislative, and judicial parts.

Figure2: Power Separated
All Government Power



Relying heavily upon Montesquieu, Madison assumed the distinction among legislative, executive, and judicial powers, and assigned to each the powers necessary for co-equality. Power was separated according to kinds, but essential to understanding the American system of government is the realization that the separation of each branch from the others was intentionally incomplete. The power of each was deliberately blended with the others in order to preserve the power of each. This curious design was premised on the judgment that power is of an

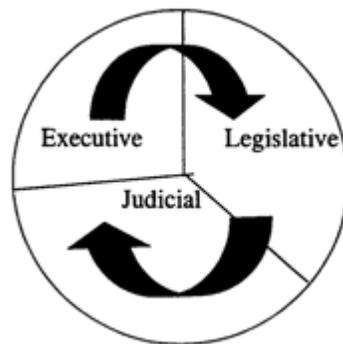
27 Ibid., p. 60.

28 Ibid., #46, p. 312.

encroaching nature and that the best way to protect the power of one branch is to introduce another into its sphere. That deliberate threat of encroachment would induce resistance, a check and balance. Thus, the separation was blurred and in practice the boundaries would always be changing. Powers perhaps best assigned to one branch were intentionally assigned to another. A creative tension was structured into the system.

The creative tension was premised on man's nature and truly represents and characterizes the brilliance of the creation. The government was designed to control the effects of factions which would arise naturally because of man's nature. By definition men and factions would seek to promote their self-interest to the detriment of the public interest, yet considerations of freedom and the purpose of government mandated that no restrictions be placed that would prevent their evil and selfish ends' being pursued. To protect freedom, therefore, the framers sought to use man's propensity to power to guard the assignments of power to each of the three branches and to the federal and state governments. They did this by assigning to each sphere some of the power of the others. That in turn would lead to strong efforts to resist the encroachments and to encroach, thus in the push and shove protecting the integrity of each.

Figure 3: Power Separated and Shared:
The Overlapping nature of the Separation



-
1. Some Judicial Functions of the Executive
 - Nomination of candidates
 - Enforcement of decisions
 - Litigation (Justice Dept.)
 2. Administration of legislation
 1. Some Legislative Functions of the Executive
 - Proposes legislation/budget
 - State of the Union
 - Veto

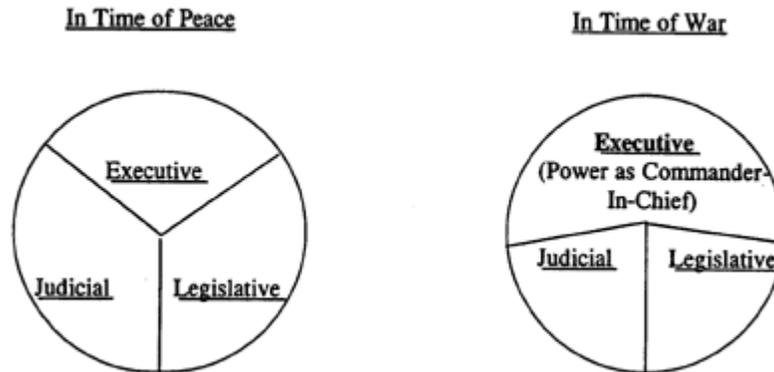
3. Some Judicial Functions of the Legislature
 - Creation of lower courts
 - Approval of nominations
 - Control of appellate jurisdiction
 - Impeachment of judges
 4. Some Executive Functions of
 - Impeachment of President
 - Appropriations
 - Legislation/budget
 - Treaty review
 5. Some Executive Functions of the Judiciary
 - Judicial review of alleged *ultra vires* and/or unconstitutional action
 6. Some Legislative Functions of the Judiciary
 - Judicial review of alleged unconstitutional action
-

The power of each department would be reduced and diminished by the incursions of the others at any given moment. Subsequently, though, over time it would be expanded at the expense of the others by the fact of its own incursions into the power of the others. “Ambition must be made to counter ambition,” so the framers structured their system to take advantage of the nature they feared. Their goal was “to divide and arrange the several offices in such a manner as that each may be a check on the other – that the private interest of every individual may be a sentinel over the public rights.” They well understood that “if men were angels, no government would be necessary.”²⁹ But men are not angels, and the effects of their free actions must be controlled.

The flexible nature of the separation meant that the tri-partite division might have little symmetry at any given time. It might assume awkward configurations under the stresses of the conflicts among the branches that were structured into their separateness. The implicit assumption was that in times of peace and tranquility the tensions would not be severe and attempts at encroachment would continue in ways that would redress any serious imbalances that might have occurred. Thus, from a relatively even distribution at any given moment a thoroughly uneven distribution might eventuate, as for example during war when the President with his power as commander-in-chief might become pre-eminent. Figure 4 suggests how the balance might shift.

Figure 4: Separation of Power

²⁹ Ibid., #51, p. 337.



The recent increase of presidential power has been achieved while the nation has been experiencing exceptional domestic and international stress. Under the pressures of the Depression, three wars, and the Cold War, the executive was not only permitted, but also encouraged, to enlarge its scope. Nearly all viewed that expansion as essential to the national interest, for only the executive had the necessary unity to achieve desired goals with speed.

The trend came to an end with the tranquility of the 1970's and the exposure of the Johnson-Nixon presidential excesses. The legislature reasserted itself on the grounds that the public interest demanded it, that the executive (albeit with legislative support!) had so distorted the system of separation of powers as to endanger it. Redress was in order. Thus we saw Congress seeking data the executive deemed solely its and the judiciary siding with the legislature (e.g. U.S. v. Nixon, 418 U.S. 683 (1974)). Congress sought intelligence data as against a Presidential claim that the distribution, classification, and control over such data were executive determinations. All was done within the very context the framers intended and created.

It appears anomalous today to note that the framers believed that the legislatures would necessarily be the strongest of the three branches of government. Though the Revolution had been against a monarch, George III, leading many to conclude that the real danger to freedom would arise from the executive branch, the reality was that the nature of the republic suggested that the legislature would be the strongest. It would present the greatest dangers to the freedoms all were striving to implement and institutionalize. The reasons were clear:

...in a representative republic, where the executive...is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribed; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.³⁰

30 Ibid., #48, pp. 322-23.

The legislature, whose powers included the power of the purse, was the least constrained of the three branches. Its powers were broad and undefined as compared with the others. It could most easily overextend its bounds.

Precautions had to be taken. “The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will permit.”³¹ As with any concentration of power, the solution to potential abuse lay in dividing the power. And as the broad, diffuse powers of the legislature required that its power be divided, so the nature of the executive grant, with its narrow and precise limits, required that it remain unified. The judiciary, having only the power of judgment and dependent upon the executive for enforcement of its decisions and the legislature for its appellate jurisdiction, was not deemed dangerous to the other two. Indeed,

...the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. 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 judgment.³²

The executive and the judiciary, then, were not the chief threats to freedom or undue encroachment. It was the legislative assumption of power that had to be guarded, and bicameralism was the answer.

In case that these divisions might prove inadequate, federalism would further diffuse power. The fact of two separate levels of government, each with its own separation of powers and checks and balances, should achieve the desired check upon abuses of power, for:

The powers delegated...to the federal government are few and defined. Those which are to remain in the State government are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which

31 Ibid., #51, p. 338.

32 Ibid., #78, p. 504.

last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and properties of the people, and the internal order, improvements, and prosperity of the State.³³

The State governments, closest to the people and therefore most under their scrutiny, would regulate that which was most likely to intrude upon freedom, the internal affairs of the nation. The federal government would provide for the common defense and commercial regulation. Yet while the state governments were excluded from external regulations, the federal government was not proscribed from much internal activity. As with the separation of the branches, this division of power between the federal and state governments intentionally provided an overlap of power or an invitation to encroachment. While the state governments were viewed as having the principal domestic role, the framers understood that events could change and with that necessarily the role and power of the states.

If...the people should in future (sic.) become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due.³⁴

As with the creative tension within the national government that would mean shifting powers among the three branches, so the federal system would have its creative tension with correlative shifts in power. It was a system that was intended to grow with the times and adapt itself to the circumstances of human affairs.

The unique virtue of the system was that it was structured on totally realistic terms. The architects were experienced in governance and created a government that directly took into account those experiences. They believed they understood man and what motivated him and created a government that would both further his goals and protect his freedom to achieve them. For that, the government would have to have power, but not too much lest the ambition of office-holders overcome the boundaries that were established. Over time a determined faction could gain control over the government. It could elect a President and a majority of the lower house in one election; with a second election, holding the strength already gained, it could gain control over the second house. And with that strength, if held, over time it could gain a majority of the appointments to the judiciary. The likelihood of achieving all of that, however, was and is extraordinarily remote. The framers did their work well. They took a realistic look at power and dealt accordingly with it. They shrewdly conceived a system that would make achieving tyrannical rule difficult, while preserving the fundamental characteristics of a democracy. They sought above all to protect minority rights and for that used the natural resources of the nation – its large, heterogeneous population and large territory. Equally, with sober insight and courage they so splintered power as to make its assimilation in one set of hands, whether of one, few, or

33 Ibid., #45, p. 303.

34 Ibid., #46, p. 306.

the many, difficult. With that splintering they well understood that efficiency would inevitably be diminished, but viewed that loss insignificant in comparison to the gain, protected liberty. That gain would be furthered only by insuring that any changes would come but slowly; it would not be furthered if it were potentially susceptible to the action of passionate, transient majorities who by definition would only be interested in their own selfish ends. And slow, deliberate change would itself come by the fact of having separated power into three decision-making organs of government. All three would ultimately have to agree on the proposed change, virtually a guarantee that proposals would have to be in the interests of all.

The Constitution

The Constitution embodies the aims of its drafters. It was created in four months in 1787 in Philadelphia by the fifty-five delegates who represented twelve of the thirteen colonies (Rhode Island declined to send a representative). In accord with the constitutional prescription of Article VII, it was ratified by the necessary nine states on June 21, 1788. It directly reflects the assumption that democracy will follow a government with sufficient power and vigor to meet its obligations and responsibilities while itself limited in ways that make governmental usurpation of liberty difficult.

Articles I, II, and III deal respectively with the legislative, executive, and judicial branches of the federal government. Each Article assigns and limits power in varying degrees of specificity. Understanding the system of separation of powers necessarily includes understanding of their formal expression in these Articles.

While they do fix responsibilities and limits, at the same time each Article also poses nearly as many ambiguities as it resolves. It is within the context of those ambiguities that the Constitution has grown and adapted to the times, for differing interpretations of what the meaning of each provision of each Article actually is have kept the Constitution abreast of felt needs. For example, Article I, Section 8 assigns Congress the power of regulating commerce among the states. By 1942, that power was interpreted by the Court to include regulation of agricultural goods that were grown solely for home consumption on the ground that local consumption had an effect on interstate commerce.³⁵ Indeed, by 1964, it was used as the constitutional basis among other things to regulate the integration of places of public accommodation.³⁶ The framers doubtless never conceived such congressional power within the meaning of the clause, but the larger point is that they probably did conceive that the Constitution would need to be adapted to the times. It is in fact by changing and expanding interpretations that a document written in very different times and circumstances has been maintained in the spirit the framers sought. It is a living Constitution, one intended to endure for the ages. In the course of its being adapted to the times each branch of government has

³⁵ Wickard v. Filburn, 317 U.S. 111 (1942)

³⁶ Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964)

expanded its powers and in turn had those powers contracted in the push and shove of separation of powers. The system works remarkably in tune with the intent of its creators.

Article I: The Congress

All legislative powers of the United States government are vested in the Congress of the United States in Article I, Section I of the Constitution. In addition to the legislative powers, which are subsequently defined in the Article, Section 2 gives Congress a judicial function by assigning the House of Representatives the sole power of impeachment and (in Section 3) giving the Senate the authority to try impeachments. Section 4 provides that the state legislatures shall regulate the election of members of Congress (altered by Amendment XVII which provides for direct election of Senators) and provides that Congress may by law change these regulations. Section 5 deals with the actual operation of each house while Section 6 fixes salaries and establishes the free speech rights of members of Congress (“for any speech...they shall not be questioned in any other place.”)

Section 7 prescribes that revenue bills shall originate in the House and delineates the processes by which law must be made. This delineation characterizes the entire system of separation of powers, for each house is constitutionally obliged to concur in a proposal and the President must sign it before it may become law. In addition this Section provides that a President may decline to sign a bill. This is called a veto, or the return of the unsigned measure to the house of Congress where it originated with a statement of objections. Alternatively, the President may allow a bill to become law without his signature by doing nothing with it for ten days at the end of which it automatically becomes a law. If Congress were to adjourn before the end of such a ten day period, it would prevent the President from being able to return it and that would effectively kill the measure. This procedure – holding an enactment for something less than ten days in the face of a prospective adjournment – is called a pocket veto. In any case the House and the Senate may override a Presidential veto by a two-thirds vote.

It is in Section 8 of Article I that the principal powers of the legislative branch are established. Those powers may be divided into three general categories: (1) authority over money and matters of finance; (2) provision for the general security of the United States; and (3) general regulations.

Under the first category Congress is assigned power to lay and collect taxes, pay debts of and borrow money for the United States, regulate commerce among the states and with other nations and the Indian tribes, establish rules of bankruptcy, coin and regulate money, and provide punishments for counterfeiting. In the second, national security category Congress is charged with defining and punishing piracies, felonies committed on the high seas, and offenses against international law. In addition, it is given power to declare war and regulate the disposition of captures on water and land, to raise and support an army and a navy, to make rules for the government of the armed forces, to provide for the calling forth of the militia, and to organize, arm, and discipline the militia.

The third, general set of powers ranges widely. Congress is given power to establish rules for naturalization, to fix standards of weights and measures, to establish post offices and roads, to provide for patents, and to create inferior (to the Supreme Court) federal courts. Finally,

it is authorized to make “all laws which shall be necessary and proper for carrying into execution” its powers. This necessary and proper clause represents the broadest possible grant and has repeatedly been used by the Congress and the Court to justify legislation.

Article I, Section 8 contains 18 clauses, the first seventeen of which are specific, the last the necessary and proper clause. That clause was designed to insure that Congress had appropriate authority to implement the specific grants, but was immediately interpreted as meaning that Congress had implied powers beyond those specifically granted. For example, although Congress was given no authorization in the Constitution to create a bank, under the power given it by the necessary and proper clause in 1816 it incorporated the Bank of the United States. In one of its most famous cases the Supreme Court applied the definitive interpretation of the clause:

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are Constitutional.³⁷

Holding that the Congress had the power to incorporate the bank, the Court ruled that Congress was not restricted to exercising only those powers specifically assigned it, that it had inherent and implied powers extending beyond the specific grants. Congress has fully agreed! With all of the ambition appropriate to countering that of the other branches, it has eagerly sought to expand its powers, and more specifically those of the federal government vis a vis the states.

Two examples illustrate how Congressional power has extended beyond enumerated grants in the Constitution. One concerns a specific allocation of power, that of regulating commerce. The other is not specified in the Constitution and is an implied power, that of conducting investigations. Each has grown over time to dimensions probably never envisioned by the framers.

Article I, Section 8, clause 3 specifies that Congress may “regulate Commerce with foreign nations, and among the several States, and with the Indian tribes.” The absence of such authority to regulate commerce represented one of the conspicuous failures of government under the Articles of Confederation. The new Constitution was intended among other things to remedy this. It assigned Congress a power that it has used to the utmost. Especially with reference to regulation of commerce among the states, Congress has generated prolific amounts of legislation.

³⁷ McCulloch v. Maryland, 4 Wheat 316, 421 (1819).

The central question concerning this power is what constitutes commerce. “The determinative test of the exercise of power by the Congress under the Commerce Clause is

tes than one' and has a real and substantial relation to the national interest."³⁸ Thus, any activity or policy conducted by any person or group which can be viewed as influencing commerce between the states can come under the scrutiny and regulation of Commerce. The scope of this power has been used to control the growth and sale of crops,³⁹ to assert navigation rights,⁴⁰ to inhibit the spread of gambling through the sale of lottery tickets,⁴¹ and to insure equitable railroad fare rates.⁴²

At the same time the clause has been extended far beyond mere commercial regulation. For example, it has been used to support various enactments which appear primarily to be concerned with the protection of rights of individuals rather than regulation of interstate commerce. The fact, however, "that Congress was legislating against moral wrongs in many of these areas [has] rendered its enactments no less valid."⁴³ Thus, under this authority Congress enacted the Civil Rights Act of 1964 which in part sought to protect blacks from discrimination by motels⁴⁴ and restaurants.⁴⁵ Similarly, a legislative act designed to protect children from harmful labor prohibited the transportation in interstate commerce of products manufactured by child labor.⁴⁶ Reasonable wage and hour standards for workers⁴⁷ and prohibitions against discrimination by employers in their hiring and retaining members of labor unions have been held to fall within the scope of the commerce power.

Perhaps the most litigated clause of the Constitution because of the all - pervasive use to which Congress has put it, the commerce power has grown steadily throughout the history of the nation. With Court approval that Congress has implied powers beyond those specifically granted it, it was not a far step to conclude that those implied powers would only be defined and ascertained on a case by case basis over time. By that rationale the powers of Congress (and the federal government) have been extended to virtually every facet of life.⁴⁸ The scope or extent of the power has never been defined with specificity, one consequence of which will be continuing

38 Heart of Atlanta Motel v. United States, 379 U.S. 241, 255 (1964).

39 Wickard v. Filburn, 317 U.S. 111 (1942).

40 Gibbons v. Ogden, 9 Wheat. 1 (1824).

41 Champion v. Ames, 188 U.S. 321 (1903).

42 Shreveport Rate Case, 234 U.S. 342 (1914).

43 Heart of Atlanta Motel v. United States, 379 U.S. at 257 (1964).

44 Ibid.

45 Katzenbach v. McClung, 379 U.S. 294 (1964).

46 United States v. Darby, 312 U.S. 100 (1941).

47 NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937).

48 Since the New Deal, the growth of Federal power under the Commerce Clause has accelerated. The Supreme Court has consistently upheld the expansion with the exception of the imposition of the federal minimum wage on state employees, later over-ruled, the federal prohibition against carrying a handgun with a 100 feet of a schoolyard, and the Federal requirement under the Brady Bill that local law enforcement conduct background investigations of applicants for a Federal firearm permit. U.S. v. Lopez, 514 U.S. 549 (1995) shows the deep division on the Court regarding the reach of the Commerce Clause.

use of it to justify regulation hitherto deemed private and/or subject only to state control. It is certain to be the subject and object of continuing controversy.

As the commerce power illustrates how Congress has used a specific grant to justify many of its actions, so the power of investigation illustrates how it has developed an implied power. Nowhere in the Constitution is the power of investigation mentioned, yet Congress exercises it virtually every day. It emanates from the Congressional charge as the nation's law-maker and rests on the assumption that as making law is the most significant power of the federal government it may only be exercised responsibly with proper means for acquiring information. Those means may extend to review of existing legislation to ascertain its adequacy and usefulness as well as its actual implementation and administration, and to inquiry of future needs. The power is as broad as the congressional power of legislation. It is "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."⁴⁹ It is "an essential and appropriate auxiliary to the legislative function."⁵⁰

The power is primarily exercised through committees of each house of Congress. Necessarily, because of the magnitude of the workload, each house has divided its responsibilities among its committees which are essentially given total autonomy for their assigned areas. In turn, each committee has delegated its responsibilities to sub-committees of which there are now hundreds. Most are absolutely responsible. Some are not. All possess so much autonomy that they are almost totally free to do anything or nothing. For example, in the early and mid-1950's Senator Joseph McCarthy, as ranking Republican on the Senate permanent investigations subcommittee, with impunity undertook a demagogic crusade against alleged Communists in government. Though ultimately censored by his colleagues, for years he was able to extend far beyond the boundaries of decency and propriety because of the customs of the Senate as respects its committees and subcommittees.

49 Barenblatt v. United States, 360 U.S. 109, 111 (1959)

50 McGrain v. Daugherty, 273 U.S. 135, 174 (1927).

Just as the excesses of subcommittees go unregulated, so does inactivity of a subcommittee. The Senate subcommittee on Immigration and Naturalization failed to meet from

period. The chairman of the subcommittee, also the chairman of the parent Committee of the Judiciary, had a long record of opposition to change in the nation's immigration laws. Indeed, it appeared that the chairman had been so opposed to enforcement of existing laws as to intervene to prevent border patrol agents from identifying and removing from the nation illegal aliens. Before that intervention, however, seventeen Mexicans who were illegally employed at a cotton gin were arrested. The arrests were made at the place of employment, fifty miles from the chairman's home.⁵¹ More recently, the Chairman of the Senate Foreign Affairs Committee simply refused, in his opposition to the appointment of William Weld to be the Ambassador to Mexico, to hold a confirmation hearing. That refusal, after a very rancorous, public debate, finally obliged Mr. Weld to withdraw his name from consideration.

Each house has its own committee system and shares the conclusion that the business of legislating is so broad that decentralization and delegation to its committees is essential. The committees gather information through staff research and holding hearings that will aid each house in its deliberations and law-making.

As the power to legislate is admittedly and necessarily broad, so is the power of investigation. At the same time the power is not unlimited. The system of separation of powers does not intend that any governmental authority be totally without bounds. Thus, though the power of congressional inquiry be extensive, it operates within the context of the system of separation of powers.

There is no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress.... Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.⁵²

While broad, any doctrine of implied power cannot justify intrusion into the direct sphere of power of another branch of government. Equally, the fact of specific grants of power such as the regulation of commerce does not carry with it implicit power to intrude upon the jurisdiction of another branch, but does include all necessary and proper power to implement the grant.

⁵¹ New York Times, September 29, 1975, p. 1. The counterpart House subcommittee met an average of 25 times a year throughout the decade.

⁵² Watkins v. United States, 354 U.S., 178, 187 (1957).

Article II: The Executive

Article II, though primarily an expression of the authority of the executive branch of the federal government, contains provisions concerning the legislature. It stipulates that the Senate is to advise and consent on all treaties made and that a two-thirds vote of concurrence of all senators present is necessary for a treaty to be valid. The Senate is also mandated to provide advice and consent on the appointment of ambassadors, public ministers and counsels, Supreme Court justices, and all other officers of the United States whose manner of appointment is not otherwise prescribed in the Constitution. Congress is additionally given the responsibility of formulating laws regarding the procedure of appointment of those other officers.

The thrust of Article II, however, concerns the executive. Section 1 assigns the nation's executive power to the President and fixes his term at four years. It creates the office of Vice President and provides the means for electing the President and Vice President.⁵³ It creates the Electoral College⁵⁴ and establishes the qualifications for the office. Finally, it establishes the mode of presidential succession and compensation and prescribes his oath of office.

No provision of the Constitution had historically proved to be so inadequate to its tasks as Article II, Section 1. It repeatedly has been formally amended, with Amendments XII, XX, XXII, and XXV all directed at improving the original. Providing for the country's only nationally elected leaders, the President and Vice President, has proved to be particularly troublesome.

Section 2 enumerates the substantive powers of the President. In it the President is designated as the Commander-in-Chief of the army and navy and of the state militias when they are in the service of the United States. The President is given power to grant pardons and

⁵³ Amendment XXII limits a President to two, four-year terms and limits one who succeeds to the presidency for more than two years to one term. By its terms, Lyndon B. Johnson, who served less than two years of John F. Kennedy's presidency and who ran and was elected in his own right in 1964, could have again run in 1968. Gerald R. Ford, however, who assumed office for more than two years of the period for which Richard M. Nixon had been elected, could only run in his own right in 1976.

⁵⁴ In 1800, Jefferson and Burr each had the same number of electoral votes because Article II did not provide for separate balloting for President and Vice President. Congress quickly proposed Amendment XII which provides for separate means of electing the two. It was adopted in 1804.

reprieves for federal crimes⁵⁵ except in the case of impeachment. He is assigned the primary treaty-making authority and the responsibility for appointing ambassadors, other public ministers and counsels, judges of the Supreme Court and other officers of the United States. If a vacancy occurs in a post during a Senate recess, the President may grant a new commission which is to expire at the end of the next session of the Senate.⁵⁶

Under Section 3 the President is mandated periodically to give to Congress information of the State of the Union and to propose legislation. He may convene both or either house of Congress in special circumstances and may provide for their adjournment if both houses cannot agree on a time. The President is charged with receiving ambassadors and other public ministers and with commissioning all officers of the United States. Finally, beyond the specific grants, and paralleling the Article I format for Congress, the President is assigned broad authority to meet his executive obligations by the provision that he shall “take care that the laws be faithfully executed.”

Section 4 is the final portion of Article II. It specifies the grounds for removing executive and civil officers of the United States. They “shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”⁵⁷

The actual exercise of Presidential power under Article II has rarely been restricted by the other two branches. Particularly since the 1930's under the rationale that the nation needed unified and efficient leadership that the Congress could not provide, the executive has accumulated more and more power. Yet much of that accumulation has not come at the expense of the other two branches. In the face of broadening governmental powers generally, it is the executive that has been given the major tasks of their administration. Under their Constitutional authority faithfully to execute the laws, the Presidents of the twentieth century have expanded the office far beyond the dreams of the framers, yet within the boundaries that they established among the branches. When the boundaries were threatened or breached, the other branches responded.

Two examples illustrate how perceived presidential encroachments have been resisted, one concerning his power of removal of executive appointments and the second concerning his

⁵⁵ It was under the authority of this provision that President Ford pardoned ex-President Nixon for all crimes he may have committed while in office. Similarly, President Bush pardoned several Iran-Contra affair officials, to include Oliver North and Secretary of Defense Casper Weinberger.

⁵⁶ Using only recess appointments, it would theoretically be possible for a President to appoint many officials without Senate approval. He could make an appointment while the Senate was not in session which would expire at the end of the next Senate session, and at that time again make an appointment.

⁵⁷ The 1974 and 1995 impeachment proceedings against Richard M. Nixon and William J. Clinton generated considerable interest in this provision. Two thoughtful, and somewhat differing, opinions on its meaning are presented in Berger, Raoul, Impeachment: The Constitutional Problems (Cambridge: Harvard University Press, 1973) and Black, Charles L. Jr., Impeachment: A Handbook (New Haven: Yale University Press, 1974).

power as Commander-in-Chief. With reference to removals, the executive has asserted that the power is fundamentally an executive prerogative, though appointments constitutionally necessitate Senate consent, removals do not. In Myers v. United States⁵⁸ the Supreme Court held that a legislative provision asserting that certain postmasters could not be removed by the President alone without consent of the Senate was an unconstitutional restriction on the Executive's control over public officials within his own branch.

As the character and size of the executive branch expanded, the importance of the appointment and removal power of executive subordinates became more apparent. Presidents asserted that they may responsibly perform their duties only with loyal employees who are in agreement with presidential goals. The Court has tended to agree that proper functioning of the executive branch implies control over staff. At the same time the Court has recognized a legislative role in matters involving personnel not directly under executive supervision. Thus, in Humphrey's Executor v. United States,⁵⁹ involving the removal of a Federal Trade Commissioner by the President for reasons other than those stipulated in the Federal Trade Commission Act, the Court held that due to the quasi-legislative, quasi-judicial character of the Commission the Congress could limit the President's power of removal.

The Myers and Humphrey cases leave a significant gray area of doubt of the extent of the Presidential removal power. Myers held that the President could essentially remove those whom he appointed. Humphrey affirmed that holding, but noted that among those whom he appointed were quasi-legislative and quasi-judicial officials whom he could not remove except for cause. The Court was not able to clarify its position:

To the extent that, between the decisions in the Myers case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt. We leave such cases as may fall within it for future consideration and determination as they may arise.⁶⁰

The larger point is that as against an executive assertion of an unrestricted right of removal as a concomitant of the appointment power, the Congress and the Court have resisted. The extent of power will only be determined on a case by case basis.

Similarly, the authority requisite to conducting foreign affairs rests primarily in the executive branch. "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak and listen as a representative of the nation. The President is the sole organ of the nation in its external relations and its sole representative with foreign nations."⁶¹ And the President's designation as Commander-in-Chief provides the principal, albeit last, means for implementing the nation's foreign affairs.

58 72 U.S. 52 (1926).

59 295 U.S. 602 (1935).

60 Id., at 632.

61 United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 319 (1936).

However, the war-making and the war-waging powers are definitely shared between the President and the Congress.

The powers of the military in the theater of war are clearly under the control of the Executive. Policy matters with regard to war, however, are the responsibility of both branches. Congress is charged by the Constitution with the power to declare war. It is also obliged to finance and regulate the armed forces. The Constitution intends that both branches have a part in the implementation of war.

The determination of which branch is responsible for what is virtually in direct proportion to the perceived imminence of the danger to the United States and the type of procedure needed to avoid the threat. Legislative deliberations are slow compared to the speed with which an executive order can be implemented, yet there are times when those deliberations are far more preferable, and constitutional, than executive assertions of power.

Thus, the government's seizure of steel mills threatened by a strike and whose production of war materials was deemed necessary to national defense during the Korean War was deemed unconstitutional by the Supreme Court. A majority of the Court concluded that the President had exceeded his constitutional power as Commander-in-Chief. Essentially the Court held that if seizures were to occur under existing circumstances Congress was the appropriate branch.⁶² Yet if the threat to the nation had been more immediate, few doubt that the Court would uphold presidential seizures. It is a matter of time and circumstance.

With an imminent threat to the security of the nation, the Court will grant the President virtually unrestrained authority. Indeed, if the Court does actually object to Presidential action, it will express itself when the threat has been removed;⁶³ the greater likelihood is that it will not object. For example, the forced removal from their homes and subsequent military encampment of Japanese Americans residing on the West Coast during the early stages of World War II was held a proper exercise of the President's war power. The Court concluded that the President was justified in taking this extraordinary action because he may have concluded that the threat of invasion was imminent and that some of the Japanese Americans may have been disloyal.⁶⁴ Such a decision in highest probability would be patently unconstitutional in time of peace.

The era of the most unpopular war in the history of the nation, the Vietnam War, produced the strongest efforts by the other branches to limit what they perceived to be Presidential excesses. Ultimately at issue was the power of Congress to involve itself in the war (under its power to declare war and appropriate funds necessary for implementing military activity) and the President's assertion that as Commander-in-Chief he had final authority. As Congress never did declare war, many argued that the President had no constitutional authority

⁶² Youngstown Sheet and Tube Company v. Sawyer, 343 U.S. 579 (1952).

⁶³ Ex parte Milligan, 4 Wall. 2 (1866) and Duncan v. Kahanamoku, 327 U.S. 304 (1946) both limited the power of the President to have civilians tried in military courts during war time, after the war was done.

⁶⁴ Korematsu v. United States, 323 U.S. 214 (1944).

to wage war. (A similar argument was made regarding wars in Korea, Panama, Granada, and Iraq.)

Congress did, however, appear to support the President by passing the so-called Gulf of Tonkin Resolution. After North Vietnamese gun boats had attacked American naval vessels in the Gulf of Tonkin, it was:

Resolved by the Senate and House of Representatives of the United States in Congress assembled, That the Congress approves and supports the determination of the President, as Commander-in-Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. ...[T]he United States is...prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

Sec. 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United States or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.⁶⁵

This August 10, 1964, resolution did not constitute a declaration of war, but on its face gave congressional approval to presidentially ordered military activity.

With seeming unity between the political branches, opponents turned to the courts. Their attempts to test the constitutionality of the war were, however, unsuccessful,⁶⁶ so they turned to the political process. Public pressures and dissatisfactions were focused on the Vietnam War and were clearly prime considerations in President Johnson's decision not to seek another term in office in 1968. It cannot have been pleasant for him to have to seek the shelter of safe refuges such as army bases in order to make public speeches, but in the face of public vituperation he concluded he had no choice but to do so.

⁶⁵ Southeast Asia (Tonkin Bay) Resolution, H.J. Res. 1145, 73 Stat. 384 (1964).

⁶⁶ See, for example, Mora v. McNamara, 389 U.S. 934 (1967), McArthur v. Clifford, 393 U.S. 1102 (1968), Hart v. United States, 391 U.S. 956 (1968), Holmes v. United States, 391 U.S. 936 (1968) and Symposium, "Legality of United States Participation in the Vietnam Conflict," 75 Yale L.J. 1084 (1966).

President Nixon assumed office and continued the policies of his predecessors to the growing disenchantment of the American public. The Congressional response was slow in coming, but in January 1971, as an amendment to the Foreign Military Sales Act, Congress repealed the Gulf of Tonkin Resolution. The President now had no formal congressional support for his action, yet continued to order a war fought. He was relying solely on his power as Commander-in-Chief. Congress, under its authority to declare war and make the appropriations necessary to fight one, increasingly was moving in opposition to the President. The blending of the war power between the two branches was creating the check and balance the framers intended. Ambition, if not good sense and right reason, was countering ambition.

In 1973, both houses formally disapproved of the President's decision to bomb in Cambodia and in June 1973, agreed that no appropriations might be spend to support combat activity in Laos and Cambodia. The President vetoed the measure, but acquiesced immediately to a more moderate position. He soon signed into law a measure which fixed August 15 as the appropriations cut-off which obliged the President to seek prior legislative approval for any subsequent military activity in Indochina.

Controlling appropriations and requiring advance approval of action in Indochina constituted one significant Congressional check on the President beyond the virtually constant criticisms of his policies that were ringing on Capitol Hill. Congress, however, was determined to move further. On November 7, 1973, over the veto of the President who argued that the action unconstitutionally took from his office powers granted in the Commander-in-Chief clause, the Congress passed the War Powers Act (PL 93-148). It stipulated that:

The constitutional powers of the President as Commander-in-Chief to introduce United States armed forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by an attack upon the United States, its territories, or possessions, or its armed forces.

It urged that consultation occur between the President and the Congress before American forces were introduced "into hostilities," but should that not be possible the President

shall submit within 48 hours a report, in writing, [to Congress] setting forth (a) the circumstances necessitating the introduction of United States armed forces; (b) the constitutional and legislative authority under which such introduction took place; and (c) the estimated scope and duration of the hostilities or involvement.

By those terms the Act significantly limited the President in ways that hitherto had never been done. It also raised profound constitutional questions, precisely in line with what the framers intended. In the final analysis the courts will have to resolve the boundaries of the extent of the war powers of each branch. When they do, all three branches of the federal government

will have been involved in the push and shove that remains at the heart of the system of separation of powers.

These two examples of the exercise of presidential power suggest how fluid the boundary delineations among the branches are. At the same time, they show that though the presidential powers of removal and war are great, they are in fact subject to the restrictions of the separation of powers. The control over executive personnel and the conduct of war in most systems of government would appear to be exclusively within the province of the executive. That they are not in the United States is solely attributable to the framers' determination to make ambition counter ambition.

Article III: The Judiciary

The judicial power of the United States is vested in the Supreme Court and such other inferior courts as Congress may establish. That power is extended to cases and controversies arising under the Constitution, laws and treaties of the United States and is divided into those cases which the Court may hear in its original and appellate jurisdiction. Original jurisdiction may be exercised over cases concerning Ambassadors, other public ministers and counsuls, and those in which a state is a party. Thus, if a suit were brought by one state against a second, the case could be heard by the Supreme Court. In all other cases over which the Court has jurisdiction, which Article III defines precisely, the Court has appellate jurisdiction. Such cases will have first been heard by a lower court and a decision reached. Then, if the Court chooses to accept it, appeal may be taken to it for a review of the lower court decision.

A final grant of authority to the Supreme Court is contained in Article I, Section 3. By its terms the Chief Justice shall preside over the Senate trial, following the impeachment by the House, of a President of the United States.

No broad summary grant of power is given to the Courts as it is to the Congress and the President. That, however, has not in the least inhibited the Court from assuming that it had implied powers in the same way that the other two branches have. The central power which it has assumed is that of judicial review of the actions of the other branches of the government and of the states. Judicial review consists of the power to declare unconstitutional certain actions and represents the final step in the law making process. If the Court were to find legislation unconstitutional, it would mean that it was null and void, as though it had never existed. In spite of the fact that the representatives of the people in both houses of Congress and in the presidency had agreed of the wisdom and/or need of the legislation, the Court's determination would be final. Some argue that this is the most undemocratic feature of the American system of government.

Though not explicit in the Constitution, the power of judicial review, if not its scope, was understood by the framers. Hamilton made the case in Federalist Paper #78 when he asserted it was the duty of the courts "to declare all acts contrary to the manifest tenor of the Constitution

void.” Indeed, “No legislative act...contrary to the Constitution can be valid,” and “the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.” He concluded:

A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.⁶⁷

As the Constitution, laws, and treaties of the United States are made the supreme law of the land by Article VI and as the courts are charged with the fundamental responsibility of holding invalid any law contrary to the Constitution, it follows that the judiciary is the ultimate interpreter both of law and of the Constitution.

It was Chief Justice John Marshall who gave formal expression to Hamilton’s position on the role of the judiciary. In the famous case of Marbury v. Madison, Marshall declared:

if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.⁶⁸

Thus, Marshall declared that the judiciary’s primary role was to judge the constitutionality of governmental action. It had the final authority of judgment of the activities of the other two branches.

Clearly this is a broad power which the Court claimed for itself. Applied to its broadest extent, it allows the judiciary the power of final decision-making on every challenged activity of government that falls within the jurisdictional and case requirements of Article III. Some would argue that this power makes the judiciary not the co-equal branch of government, but the senior, superior partner.

⁶⁷ Hamilton, Madison, and Jay, op. cit., #78, pp. 505-06.

⁶⁸ Marbury v. Madison, 1 Cranch 137, 177-78 (1803).

The Court, however, has not chosen to develop its powers in ways that could be deemed dominating of the other branches. Judicial review has not become a vehicle that has been used to overstep the authority of the other two branches; rather, it has been used to maintain the viability of the system of separation of powers and of federalism. The Court has become the umpire of boundary disputes among parts of the entire governmental system, and it has done so by imposing self-limitations upon the broad grant of authority it assigned itself.

The Court has developed a set of rules by which it decides whether to pass on a question. First, it looks to Article III to ascertain that it actually has jurisdiction over the matter. Section 2 specifies eleven sorts of cases over which the Court may exercise jurisdiction and any issue that arises which does not fall within those eleven categories is not within the jurisdiction of the Court. Second, that must actually be a case. It must be a real, not a hypothetical, adversary proceeding capable of final judicial determination.⁶⁹ In addition a case must be justiciable. “Justiciability is...not a legal concept with a fixed content or susceptible of scientific verification.”⁷⁰ Rather, it is a process by which courts decide whether a case meets its standards for decision.

Embodied in the words “cases” and “controversies” are two complementary but somewhat different limitations upon the power of judicial review. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression of this dual limitation placed upon federal courts by the case-and-controversy doctrine.⁷¹

Justiciability is a procedural technique created by the courts to limit themselves to issues they are capable of resolving. Judicial doctrines such as standing, ripeness, and mootness are expressions of this concern with the justiciability of an issue. They have been developed to insure that “federal judicial power is exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action,”⁷² and to insure that the issue is one appropriately decided by the court. In this light, for example, the Court will not decide a question that is presented in a friendly, non-adversary proceeding in which there is no immediate harm to a party to the dispute. Equally, it will decline to render an advisory opinion as there would not be adversaries (to argue both sides of the issue and thus present relevant information for decision) or actual harm. Issues raised in either manner would be judged nonjusticiable.

69 Nashville, C. and St. L. Ry v. Wallace.

70 Poe v. Ullman, 367 U.S. 497, 508 (1961).

71 Flast v. Cohen, 392 U.S. 83, 95 (1968).

72 Poe v. Ullman, 367 U.S. 497, 504 (1961).

The Court also limits its willingness to examine constitutional questions, for “it is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.”⁷³ The Court presumes the constitutionality of legislation or executive action and only reluctantly examines it. When the validity of a statute is called into question, the Court will presume its constitutionality and uphold it if at all possible. And if the question must be addressed, the Court will decide it on the narrowest possible grounds. By this doctrine of avoiding constitutional questions if at all possible, the Court diminishes conflict with the other branches. It also residually obtains credibility in those instances when it concludes it must conflict with them.

A final self-containment of judicial authority is embodied in the Court’s doctrine of political questions. “[I]t is the relationship between the judiciary and the coordinate branches of Federal Government, and not the federal judiciary’s relationship to the States, which gives rise to the ‘political question.’” “The nonjusticiability of a political question is primarily a function of the separation of powers.”⁷⁴ When the Court concludes that an issue could more properly be handled by one of the other branches, it will decline to enter the political thicket. “The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action.” It “...has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, in the people in exercising their political rights.”⁷⁵ This reasoning was used by the Court in dismissing a complaint alleging that state law apportioning congressional districts was unconstitutional because some districts were substantially larger than others, thus diluting the vote in the more populous ones. The Court appeared to believe that as it was congressional districts that were involved, the issue was better suited for decision by the political branches.⁷⁶ Sixteen years later, however, in a very similar case the Court changed its mind. Here, a state apportionment statute concerning state legislative districts was challenged on the same grounds, and the Court decided that federal courts could hear the case. There was no political question, for neither of the other two branches of government was involved.⁷⁷

An example of how the doctrine of political questions may or may not be used occurred in 1969. The Court was asked to set aside a judgment of the House of Representatives that Adam Clayton Powell, the duly elected representative of New York’s 23rd District, was not qualified to sit. Article I, Section 5 of the Constitution provides that the House shall be the judge of the qualifications of its own members and that by a two-thirds vote it may expel any member deemed unqualified. Had this in fact occurred, the Court explained, it would have viewed the case as presenting a political issue; however, in point of fact this is not what happened. Rather, the House refused to allow the Congressman to take his seat. The Court concluded that the

73 Burton v. United States, 196 U.S. 283, 295 (1904).

74 Baker v. Carr, 369 U.S. 186, 210 (1962).

75 Colegrove v. Green, 328 U.S. 549, 556 (1946).

76 Ibid.

77 Baker v. Carr, op. cit.

House had excluded Mr. Powell rather than expelled him. It therefore had violated the Constitution.⁷⁸ By that reasoning the issue was not a political question and was justiciable. The Court intervened into the sphere of another branch of government by finding a delicate difference between its doctrine of political questions and what had been done to the Congressman. In considerable degree the case suggested that when the Court wanted to deal with an issue it would find the appropriate rationale; when it did not, it could invoke its doctrine of self-limitation.

The larger point is that the Court does limit itself. In the face of having asserted that it was the final arbiter of the Constitution, and recognizing that in spite of that claim it was particularly vulnerable to assertions of power of the other two branches, the Court has proceeded with a sensitivity appropriate to its weak position. In effect, to survive in the face of the power of the other two branches, the judiciary has understood that it must maintain the integrity of the very system that could so easily displace it. Its ambition is curtailed by the fact of the dominating power of the other branches, the legislature with its power to regulate the appellate jurisdiction of the Court and the executive with its power to enforce, or not to enforce, its decisions. The Court's self-limitations are uniquely illustrative of ambition's countering ambition, for they demonstrate judicial awareness that if too much power were attempted, the response could be fatal to the very system the judiciary umpires. Sensitive to the delicate balance it must observe and enforce among the three units of government, the judiciary operates precisely within the constitutional constraints that are imposed in Article III.

The Vertical Separation of Powers: Federalism

The theory of separation of powers is not confined to dividing only federal authority. In addition, the framers distinguished federal from state power and sought to unify the several states under a governmental structure that would be separate from them. The framers well understood that much centralization of power was needed to meet the problems of the nation, but also realized that the states would never relinquish all of their power to a national government. The framers were in effect confronted with the monumental task of carving areas of national authority from the hitherto essentially autonomous state governments. Their job was not so much one of protecting the sovereignties of the states from being overwhelmed by the new national government as it was with establishing a truly viable national government that would meet the needs of the nation. In particular, those needs centered on national defense, external relations, and commercial regulation.

The solution was the creation of "federalism," the division of power between two relatively autonomous jurisdictions. As with the separation among the branches, this separation is blurred. Power is overlapping and shared, though some activities are exclusively the province

⁷⁸ Powell v. McCormack, 395 U.S. 486 (1969).

of one jurisdiction (as the power to make war or treaties is specifically assigned to the national government). In matters of formal conflict, the federal level would be supreme.

Federalism, as opposed to the unitary system of Great Britain, implies the existence of separate systems of governance. In the United States these separate systems are comprised of one national government and fifty relatively autonomous states. Though that is the basic division, state power is fragmented and decentralized among thousands of sub-systems, ranging from school districts to county governments, from special districts for specific governance tasks to city or town governments.

Federalism, then, is “a joining of partially or wholly separate political units with one another by a compact under which each preserves its corporate personality with certain duties and powers while becoming a part of a comprehensive new political system to which duties and powers...[are] also allocated.”⁷⁹ Each of the levels of government is relatively autonomous within its sphere and is constrained in that sphere by the existence of the other operating within its area of influence. Each level has its own system of governance and citizens who simultaneously have citizenship in the other.⁸⁰

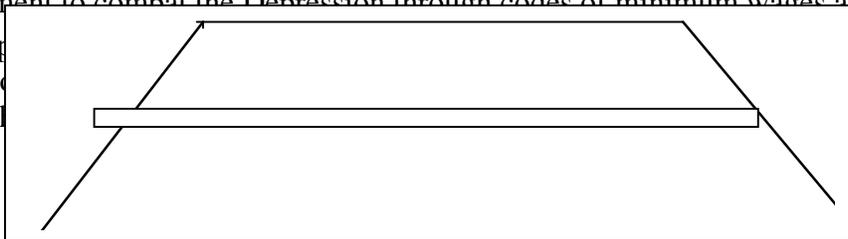
For years it was common to view the American system as one in which the national and state governments were totally distinct entities, each with separate power of a sort that often brought jurisdictional disputes. Though supreme within its sphere in cases of conflict with the states, the Federal government was to be restricted to the exercise of those powers delegated to it in the Constitution. All other powers were reserved to the states. This division of power is expressed in Amendment Ten of the Constitution which stipulates that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Under the Articles of Confederation the word “expressly” had been used to qualify the delegation to the central government (“The powers not expressly delegated”). In the Tenth Amendment, though, it was deliberately dropped and that omission became the central consideration on which the Supreme Court’s great interpretation of the Amendment turned. In McCulloch v. Maryland Chief Justice Marshall seized the omission and concluded that the federal government was not restricted to the specific delegation, that it had implied and inherent powers. On the basis of the Court’s blessings in McCulloch, the federal government has used its implied powers in varying degrees throughout history.

⁷⁹ John M. Gaus, “Agriculture Policy and Administration in the American Federal System,” in Arthur W. MacMahon (ed.), Federalism, Mature and Emergent (Garden City, NY: Doubleday & Co., Inc., 1955), p. 281.

⁸⁰ Edward S. Corwin (ed.), The Constitution of the United States of America: Analysis and Interpretation (Washington, DC: United States Government Printing Office, 1953), p. xi.

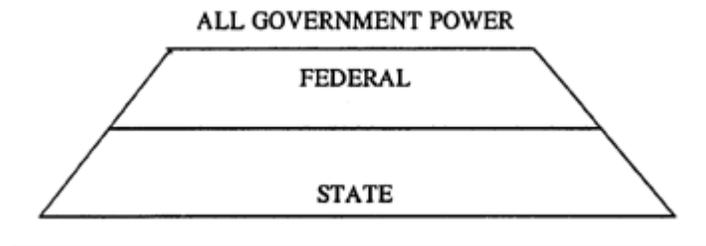
As the federal and state governments enlarged their scopes with the growth of the nation, the American system became characterized as one of dual federalism. The national and state governments were seen as distinct entities, each with separate powers of a sort that often brought jurisdictional disputes that the Court had to resolve. The Tenth Amendment was the Constitutional focus and was interpreted by the Court to resolve disputes, whether concerning taxation of state government officials' salaries by the federal government⁸¹ or an attempt by the federal government to combat the Depression through codes of minimum wages and regulation of unfair labor practices⁸² and other decisions the Court made. The Court's decisions of power, that the federal government had reserved to the states.



The Civil War stands as a prime example of dual federalism in action. It was precipitated by one level of government on the ground that the other was usurping power unconstitutionally. The southern states were perceived by the northern states and the national government as violating the Constitution by asserting they had the right to leave the union. Over a half million people died in that war to establish in practice what the Constitution directed in Article VI, that in conflict between the two jurisdictions, it is the national that is supreme.

Figure 5 depicts this view of federalism. It illustrates “the union of ...autonomous political entities...for common purposes.”⁸³ The two levels are distinct, with each responsible for its separate concerns.

Figure 5: The Vertical Separation



In this way the federal system may best be viewed as a layer cake with two separable layers that have been placed on top of one another.⁸⁴ All of the other sub-divisions of the states

⁸¹ Collector v. Day, 11 Wallace 113 (1871), overruled by Graves v. O’Keefe, 306 U.S. 466 (1939).

⁸² Schechter Poultry Corporation v. United States, 295 U.S. 495 (1935).

⁸³ Ibid.

are totally subject to state requirements and are not created by the national constitution. Though today absolutely integral to federalism as it operates, strictly speaking they are creatures of the states and not of the national government or constitution.

The layer cake view of federalism implied considerable tension between the two levels of government. Rather than cooperating to achieve common goals, the federal and state governments were perceived in conflict with one another. Two separate governments, with separate goals, were the hallmark of this view.

The difficulty of that analysis was that it rested on the assumption that the creative tension of federalism would only mean conflict. It assumed jealous guarding of power and prerogative. It did not perceive federalism as constituting one system of government with sometimes cooperating and sometimes conflicting systems all of which were striving for common governance.

The reality is that as the separation of power among the branches resulted in considerable degrees of cooperation (and conflict) to overcome the built-in obstacles to efficiency, so the nature of the federal system has resulted in similar outcomes. Much cooperation, and conflict, exists between the levels. No matter what the activity, the evidence suggests that each level of government is actively involved in the affairs of the other and no governmental agency is immune to the influence exercised by the other level. That influence ranges from fiscal participation to lobbying on behalf of a desired goal. It may, for example, involve the entire governmental apparatus of the state and city of New York seeking federal assistance to prevent bankruptcy of the City by actively influencing the federal bureaucracy or it may involve federal use of funds to influence school integration.

Close examination and empirical evidence suggests that:

In fact, the American system of government as it operates is not a layer cake at all. It is not three layers of government...Operationally, it is a marble cake, or what the British call a rainbow cake. No important activity of government...is the exclusive province of one of the levels⁸⁵

No matter what the activity each level of government is actively involved. Instead of the *de jure* separate levels, the *de facto* reality is that an extraordinary amount of interaction exists between the levels, making any attempt at depicting real separation impossible.

⁸⁴ The analogy is Morton Grodzins', who led the contemporary resurgence of interest in federalism. Under Grodzins, the bakery became the indispensable tool for understanding federalism.

⁸⁵ Morton Grodzins, The American System: A New View of Government in the United States Daniel J. Elazar, (ed.) (Chicago: Rand McNally & Co., 1966), p. 8.

federalism and the involvement of each level in the affairs of the others. It is in line with the basic tenets of federalism.

Today, nearly all governmental activities are shared by all levels. The role of each level is broader and more extensive than the framers could have predicted. It is agreed by most that the complexities of life in contemporary America require input and administration from many centers. The result is a federal system that developed from a basic premise that much governmental authority should be retained by the states, through an emerging awareness and acceptance of the leadership in many domestic affairs by the national government, to recognition of the intermingling of all levels of government in programs and activities which touch and shape the lives of every American.

Both the vertical and horizontal schemes of separation of power incorporated in the American form of republicanism express unique concepts of governance. They are intended to protect the individual and his liberty. They take into account the dangers of unchecked power, of majority tyranny. They reflect a belief in partnerships among those whose power was splintered and in man's ability to govern himself. It is a design that has endured and adapted through two centuries and now confronts the reality of continued adaptation to meet the exigencies of the future.

IV. The Anti-Federalist : Still With Us Today

The Anti-Federalists: Still With Us Today

Robert Maranto

The political life of the community continues to be a dialogue, in which the Anti-Federalist concerns and principles still play an important part. The Anti-Federalists are entitled, then, to be counted among the Founding Fathers...and to share in the honor and the study devoted to the founding.

Herbert J. Storing⁸⁶

I thought about it, and I realized that if I took a strong public position asserting opposition to the proposed factory, it would become a local v. federal issue. You aren't likely to win in a situation like that.

A modern Federal manager

The tensions between states rights and Federal powers reflect the original battles between the Federalists and the Anti-Federalists. These conflicts are not tangential to but rather are at the heart of public administration under our Constitution. In the original Constitution, each of seven articles and 16 of 24 sections dealt explicitly with the rights and obligations of the states. Twenty-one of 27 amendments mention or primarily address the states. Even today, effective Federal executives must work with state and local officials and interests in ways foreign to most other public sector administrators around the globe. These concerns are not abstract. They are central to the work you do. Arguably, for most policies and through most of our history the system has done a good job fragmenting political power and keeping it close to the people. This brief paper will outline the arguments of the Federalists and Anti-Federalists and follow with modern examples of state v. Federal controversies from education and environmental policy.

The Early Arguments: Federalists v. Anti-Federalists in Philadelphia and After

⁸⁶ Storing, Herbert, J., What the Anti-Federalists Were For, University of Chicago Press, 1981, p. 3.

Fundamentally, the Anti-Federalists and Federalists disagreed about whether freedom is best safeguarded in a small polity such as a county or state, or in a larger nation. Second, they disagreed over whether freedom could be best safeguarded through the best possible structure of government to regulate conduct, or through the cultivation of a virtuous and active public.

In Federalist Paper #10, James Madison argued that in any free political system, factions would form which would seek to dominate others.

The latent causes of faction are ...sown in the nature of man.

* * *

A zeal for different opinions concerning religion, concerning government and many other points ... an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have in turn divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to cooperate for the common good.⁸⁷

Sounds familiar! Accordingly, Madison designed a structure of government in which ambition would be made to counteract ambition. In part this would work through the separation of powers. Since none of the three branches of the Federal government could dominate, none could impose a dictatorship. Secondly, tyranny would be avoided because America would be a large, or "extended" republic. In a large nation, the variety of factions would be so diverse that none could come to dominate.

Not all Federalist arguments were so pessimistic. For example, some argued that a large nation would have a greater pool of talent from which to draw in choosing leaders. With more and better leaders, there would be less corruption (in part since there would be too many officeholders to bribe) and government would be more effective. An effective government would protect the nation from foreign invasion, deliver the mail, administer justice, issue a stable currency to facilitate commerce, and build roads, canals, and other internal improvements. As Hamilton argued before the New York constitutional convention, "The confidence of the people will be easily gained by good administration. That is the true touchstone."⁸⁸ The security and

⁸⁷ Hamilton, Madison, and Jay, The Federalist, #10, NY: The Modern Library, p. 55.

⁸⁸ Quoted in Storing, p. 42. See also p. 44. Storing presents a good summary of the Federalist arguments on pp. 38-47. See also David F. Epstein, The Political Theory of the Federalist, Chicago:

infrastructure provided by such a government would assure America's place as a global trading nation, and would assure that Americans would be relatively cosmopolitan in outlook.⁸⁹

The Anti-Federalists disagreed. Regarding the separation of powers, Patrick Henry warned that the proposed government would be too complex for citizens to understand:

A constitution ought to be like a beacon, held up to the public eye, so as to be understood by every man. This government is of such an intricate and complicated nature that no man on this earth can know its real operation.⁹⁰

(What he think about the tax code or campaign finance laws?) Similarly, other Anti-Federalists derided the proposed Constitution as a "spurious brat," "this bantling," "this 13 homed monster," and "this heterogeneous phantom." Anti-Federalists felt that only a simple government was conducive to freedom. A complicated government might be used against the public interest.⁹¹ The American government may be the most complex in the world, and two hundred years later our people still have trouble understanding it.⁹² Further, the Anti-Federalists doubted that a separation of powers could be stable. Some Anti-Federalists feared that the presidency would be too weak to counter Congress. More typically, however, they feared that the president would be a "foetus of monarchy," as Edmund Randolph put it at the Constitutional Convention.

With a powerful presidency and great size, the Federal government could become so strong as to threaten the states and the people. As James Monroe warned in a suppressed pamphlet, the powers of the Federal government could easily grow to usurp the states. For example, a Federal government able to tax the citizens directly would weaken the ability of the states to tax. Replying to those who saw the power to tax as the soul of a new American national government, Patrick Henry boldly replied that "they shall not have the soul of Virginia."⁹³ In

University of Chicago Press; 1984; Forrest McDonald, Novus Ordo, Seclorum: the Intellectual Origins of the Constitution, Lawrence: University Press of Kansas, 1985.

⁸⁹ Forrest McDonald, E Pluribus Unum: The Formation of the American Republic, 1776-1790, 1965, Boston: Houghton Mifflin.

⁹⁰ Quoted in Storing, p. 54. Luckily, Patrick Henry refused to attend the Constitutional Convention even though he was chosen to, saying that he "smelled a rat in Philadelphia, tending toward monarchy."

⁹¹ Storing, pp. 54, 58. See also Forrest McDonald, Novus Ordo Seclorum: the Intellectual Origins of the Constitution, Lawrence: University Press of Kansas, 1985.

⁹² Modern political scientists find that Americans love the Constitution and understand that the Constitution divides power to prevent tyranny. At the same time, the public does not like the molasses pace and frequent conflict inherent to our constitutional system. See Hibbing, John R. and Elizabeth Theiss-Morse, Congress as Public Enemy: Public Attitudes Toward American Political Institution. New York: Cambridge University Press, 1995. Hibbing and Theiss-Morse argue that we need to do a better job informing the public that the separation of powers was not designed for efficiency and seems to work quite well *in the long run*.

⁹³ Storing, pp. 34-35.

general, the Anti-Federalists favored weak governments with low taxes. They felt that American government must not be well supported, lest it come to *rule over* rather than *be ruled by* the people. As one wrote, "the poverty of publick bodies, whether sole or aggregate, prevents tyranny." The Anti-Federalists feared that Federalists wanted American "to be like other

nations," whose governments had stately palaces and large, expensive standing armies waging bloody wars to satisfy the glory of monarchs and generals.⁹⁴

Most importantly, the Anti-Federalists felt that freedom and virtue were best cultivated in small, homogeneous polities where the leaders and led knew each other and had a common culture and common beliefs; thus the states should have far more power than the national government. As "Brutus" (many writers used such pen names) writes:

In a Republic, the manners, sentiments, and interests of the people should be similar. If this be not the case, there will be a constant clashing of opinions; and the representatives of one part will be continually striving against those of the other. This will retard the operations of government, and will prevent such conclusions as will promote the public good.⁹⁵

Anti-Federalists noted that Pennsylvania grew rapidly through open immigration. This made the state large and powerful, but also led to bitter divisions between the English and German communities. In the view of "Agrippa," diverse Pennsylvania and New York were not well governed, while the New England states "have, by keeping separate from the foreign mixtures, acquired their present greatness in the course of a century and a half, and have preserved their religion and morales."⁹⁶ Americans still argue about the tradeoffs between diversity and commonality. Thus, what Madison regarded as positive, a diversity that could retard tyranny, the Anti-Federalists saw as a fatal flaw. Indeed, they feared that only a large standing army could keep a large, diverse nation together, since people's natural sentiments for each other could not suffice. Those watching politics in the former Yugoslavia and the former Soviet Union might find reasons to agree with the Anti-Federalists.

⁹⁴ Storing, pp. 30-31. Hamilton and other Federalists thought it vital to have an army and navy to defend against European incursions. Anti-Federalists did not think these threats likely. They feared that building an army would cause war rather than deter it, and eschewed the expense of a large military (pp. 27, 31). Of course, these same arguments still take place.

⁹⁵ Storing, Herbet, J., What the Anti-Federalists Were For, University of Chicago Press, 1981, p. 31.

⁹⁶ Each quoted in Storing, pp. 19-20. Elazar finds that politics in the New England and Midwestern states have traditionally been dominated by moral concerns about what constitutes the good society. In contrast, in the more diverse middle Atlantic states, from the Founding politics has been based on materialist struggles between competing individuals and communities. See Elazar, Daniel J. 1972. Federalism: A View From the States, 2nd ed. New York: Harper & Row, pp. 90-104.

Concordant with their support for community, the Anti-Federalists wanted state governments to be much more powerful than the national government. Since the capital of a large nation would be far distant from, and share little with, those in local communities, the national government could not represent the people. Those in government would look to their own interests first, and only then to those of the people. In turn, the people could not be expected to give the government their support.⁹⁷ In contrast, citizens would probably have more in common with their state and local governments, and could participate directly in them. Anti-Federalists believed that such participation could build civic virtue, a view also held by many modern political scientists.⁹⁸ Finally, the Anti-Federalists pointed out that there was little evidence that citizens wanted so strong a Federal government as provided by the Constitution. Indeed, in some states the ratification of the Constitution was met with riots.⁹⁹

In short, the Anti-Federalists made immense contributions to American government. Their arguments helped assure that states and localities would play a large, and in many policy areas, preeminent, role in policy-making. Anti-Federalist warnings that the federal government might become too powerful led to the passage of the Bill of Rights, the first ten amendments to the Constitution designed to protect the liberties of individuals. Notably, the 10th amendment reserves those powers not specified as belonging to the national government to the states or to the people. (It was often quoted by Senator Bob Dole in 1996 while he was seeking the presidency.) In short, the arguments of Anti-Federalists helped assure that America would have limited government.¹⁰⁰ Further, in some respects the Anti-Federalists have proven prophetic. As James Q. Wilson writes:

[The Anti-Federalists] argued that a strong national government would be distant from the people, and would use its powers to annihilate or absorb the functions that properly belong to the states. Congress would tax heavily, the Supreme Court would overrule state courts, and the president would come to head a large standing army. Since all these things have occurred, we cannot dismiss the Anti-Federalists as cranky obstructionists who opposed without justification the plans of the framers.¹⁰¹

The Changing Tensions Between State and Nation.

⁹⁷ Storing, pp. 15-23.

⁹⁸ See, for example, Robert L. Bish and Vincent Ostrom. 1979 Understanding Urban Government. Washington: American Enterprise Institute; Amy Gutmann. 1987. Democratic Education. Princeton University Press.

⁹⁹ Storing, pp. 7-14; see also Forrest McDonald. 1994. The Presidency: An Intellectual History. Lawrence: University Press of Kansas, pp. 186-87.

¹⁰⁰ Though the Anti-Federalists opposed a strong national government, predictably, once Anti-Federalist Thomas Jefferson was elected president, he used his power even more aggressively than his Federalist predecessors. See James Sterling Young (1966). The Washington Community. New York: Columbia University Press.

¹⁰¹ Wilson, James Q. 1992. American Government: Institutions and Policies, fifth edition. Lexington, MA: D.C. Heath and Company, pp. 30-31.

Through the 1800s, the most important cleavages in American politics were geographic. In appointments to federal positions, presidents were careful to enforce geographic quotas to hold their party and nation together. (Lincoln was a notable exception. For understandable reasons he purged southerners from the civil service.)¹⁰² Many Americans were more loyal to their states than to the nation. As Shelby Foote points out, before the Civil War Americans would say "the United States are" rather than "the United States is" as we do today.¹⁰³ The nation was thought of as a federation of states rather than a single nation, particularly in the South and West. Just as southern and western Republicans today argue for more state and local power and reduced Federal power, through the 19th and early 20th centuries southern and western Democrats argued that states should be preeminent. In some sense, each descended from Anti-Federalists.

The Civil War settled the matter of Federal preeminence, not through argument but by force of arms. From 1865 to the 1950s, states would not seriously claim the ability to "nullify" Federal laws they disagreed with. To free the slaves and assure African-Americans the basic rights of citizenship, even in the South, the 14th and 15th amendments were passed and the Federal government for the first time became involved in state and local elections. Federal involvement ended after the disputed 1876 presidential election. The election was probably won by Democrat Samuel J. Tilden, but Republican Benjamin Harrison won enough southern electoral votes to take office after agreeing to remove troops from the South. Without Federal "interference," from the 1870s to the 1960s, southern whites used such means as the poll tax and "literacy tests" (often in foreign languages) to keep African-Americans from exercising their rights to vote and hold office. (The requirements were waived for whites.) African Americans who attempted to exercise the basic rights of citizenship often lost their jobs and occasionally their lives. State and local governments often refused business permits to African Americans. From Reconstruction until the Great Depression, few thought that the Federal government could intervene. In the Progressive Era and to a much greater degree during the New Deal, however, the inability of state and local governments to cope with economic calamity led to unprecedented Federal involvement, which provided job and entitlement programs and assured the rights of workers to join unions. When the Federal government began to intervene to assure the basic rights of citizenship for all Americans in the 1950s and 1960s, some sought to resurrect the old nullification doctrine. Eventually, through Federal court decisions, but even more through changes in public opinion and the passage of the 1964 and 1965 Civil Rights Acts, voting rights and integration came to the South.¹⁰⁴

¹⁰² See Maranto, Robert and Schultz, David (1991). A Short History of the U.S. Civil Service. Lanham: University Press of America. In the Civil War, many who supported the union nonetheless fought for the Confederacy out of loyalty to their states and communities. Those who did not fight risked ostracism.

¹⁰³ Bums, Ken, "The Civil War" , NY: Public Broadcasting Service, 1991.

¹⁰⁴ For examples of techniques used to disenfranchise black voters, see Jack Bass's Unlikely Heroes (New York: Simon and Schuster, 1981). For a detailed discussion of how integration resulted from changes in public opinion and Federal laws (rather than court cases, which had little impact), see Gerald Rosenberg's The Hollow Hope (University of Chicago Press, 1991). For examples of how state and local

For some, the long history of racial segregation and oppression by state governments delegitimized federalism. As political scientist William H. Riker wrote, "the main effect of federalism since the Civil War has been to perpetuate racism."¹⁰⁵ Those who support a more unitary government, with more Federal government involvement in state and local affairs, argue that state and local governments lack the resources and technical capacity to solve problems, that those governments are often insensitive to the rights of those of low income and minorities, that it is unfair for low income states and localities to provide inferior services to their citizens, that problems such as pollution cross state boundaries and thus must be controlled by the national government, and that in a global economy, the Federal government must assure common standards in education, health care, and worker protection. Finally, as Federalist #10 suggests, in a small community it may be possible for a single faction to dominate politics, to the detriment of others. For example, in some counties a single mining or timber company owns most of the land.

On the other hand, former Brookings Institution scholar and OMB Director Alice Rivlin points out that today's state governments are much less biased and also have far more capacity than in the past, in part due to Federal grants and mandates which forced the states to modernize. Others supporting strong states and localities argue that competition between states is healthy, that the Federal government lacks the capacity to manage all domestic programs, that the existence of state and local governments gives citizens more control over policy implementation, and that not allowing local variations in public policy would increase political conflict to unacceptable levels. For example, should San Francisco and Birmingham be forced to have exactly the same policies regarding abortion or gay marriage?¹⁰⁶

Contemporary Examples.

Though the Federal government has far more power today than through most of our history, the battles between the Federalists and Anti-Federalists are still with us. On most issues, we call Federalists Democrats and Anti-Federalists Republicans. While the tensions between modern Federalists and Anti-Federalists complicate the roles of American public managers, the long term impacts may be healthy. Innovative Federal leaders can often work in ways which

governments kept African Americans from opening businesses, see Walter E. Williams [The State Against Blacks](#). (New York: McGrawHill, 1982).

¹⁰⁵ "Federalism," in Fred I. Greenstein and Nelson W. Polsby ed. [Handbook of Political Science](#) (Reading, Mass.: Addison-Wesley, 1975), vol. 5, 101. Notably, until the 1960s the Federal government often acted to restrict the rights of African Americans, and many state governments actually had a better record. See Desmond King's [Separate and Unequal: Black Americans and the US Federal Government](#). (New York: Oxford University Press, 1995).

¹⁰⁶ For summaries of arguments in favor of and opposed to federalism, see Wilson [op.cit.](#) P. 51; Dye and Zeigler, [op.cit.](#), pp. 366-72. On the history of federalism and how the states have recently improved, see Alice M. Rivlin, [Reviving the American Dream](#), Washington: Brookings Institution, 1992, particularly pp. 102-08. Also see David Osborne, [Laboratories of Democracies: A New Breed of Governor Creates Models for National Growth](#), Boston: Harvard Business School Press, 1988.

make use of our divided powers, in part by recognizing the legitimate roles of state and local governments, and of the citizens.¹⁰⁷

For example, regarding the Federal role in education, traditionally a state and local concern, modern Democrats point out that:

... if the United States has fifty different systems, teachers will never be sure what newcomers in the class have studied, so they will do exactly what they do now--which is to spend about 30 percent of the class time reviewing the materials from the previous year before moving ahead with the current year's work ... I strongly support the Goals 2000 legislation because it gets people talking about and debating [national] standards and assessments.¹⁰⁸

The Federalists would probably agree. On the other hand, Republicans take an Anti-Federalist view, fearing that Federal standards will take power away from states and localities:

New national tests could lead to a national curriculum. In developing new assessments the tendency is to create a new curriculum to match those assessments. But like new national tests, a national curriculum is something Americans don't want and don't need. Local control is a hallmark of American education.

Representative Bill Goodling, Chair of the House Committee on Education and the Workforce.¹⁰⁹

Notably, the Federal government has had enormous impacts on state and local provision of education even without national standards as such. The Nation At Risk Report issued by the U.S. Department of Education in 1983 (and with annual supplements since), reported student achievement levels on standardized tests by state. As Secretary of Education Terrel Bell recalled:

[Governors] said they had no information that told them where their states stood educationally in comparison to others. Lacking this, they were defenseless when their state superintendents and commissioners of education insisted that students in *their* state were above the national average in academic achievement. If you believed these top-level state school officers, just about every state in the country was above the national average! Though many of the seriously

¹⁰⁷ Robert Reich, Mark Moore, and others have developed this theme. The most succinct explanation of it is developed by Marc K. Landy, Marc J. Roberts, and Stephen R. Thomas in The Environmental Protection Agency: Asking the Wrong Questions (New York: Oxford University Press, 1994), pp. 6-9.

¹⁰⁸ Shanker, Albert, "The Case For High Stakes and Real Consequences," pp. 145-53 In Diane Ravitch ed. Debating the Future of American Education. Brookings Institution: Washington, 1995, p. 149.

¹⁰⁹ "More Testing Is No Solution," Washington Post, August 13, 1997, A21.

concerned governors knew this was far from true, there was little they could do without data to support their efforts for change.¹¹⁰

The Nation At Risk Report gave governors *and voters* the ability to check up on their state level student achievement compared to that in other states and over time. This empowered governors vis a vis state school bureaucracies, led state level education bureaucracies to emphasize and to some degree standardize output measures, and led to fifteen years of near constant education reform.¹¹¹

Thus the Federal government influences state level policies not merely by issuing grants and mandates, but also by providing information which state governments and their citizens can act on. To the degree the public is better informed of the choices facing government, public opinion will be more reasoned and perhaps more supportive of policy decisions. In this way the Federal government increases its capacity and strengthens civic education.

This is hardly the only example of such impacts. For example, in 1983 EPA Administrator William Ruckelshaus led a series of public meetings in Tacoma to discuss his options regarding the implementation of new clean air standards. If interpreted strictly, the standards could save as many as 18 Tacoma cancer cases a year-by closing a plant which provided 500 high paying jobs. Ruckelshaus wanted to inform the public of the value conflict and hear public feedback. (The plant closed for unrelated reasons before the proposed new standards could take effect.)¹¹²

Such controversies do not only face high level political appointees. As Superintendent of Shenandoah National Park, career executive Doug Morris faced an important political decision in his first weeks on the job. The Cardinal Glass company proposed to open a plant in Front Royal, only a few miles outside Park boundaries. The company was reputable, and would provide the community with 300 high-wage jobs. On the other hand, air pollution from the plant could harm visibility on Skyline Drive, Virginia's ninth leading tourist attraction with 1.9 million visitors annually. On his third day on the job, a local environmental group demanded that Superintendent Morris join their effort to stop the plant.

Complicating Morris' dilemma was the difficult history of Shenandoah National Park. In response to national calls for the establishment of a national park in the eastern U.S., in the 1920s Virginia used eminent domain to take the land of hundreds of farmers living in the mountains, often without adequate compensation. While Virginia took their land, residents saw the Federal government as the ultimate cause of their distress. Their descendants formed Children of Shenandoah, a group which opposed extensions of the National Park and complained that Park

110 The Thirteenth Man: A Reagan Cabinet Memoir.(1988). New York: Free Press, p. 136.

111 Bell, opcit., pp. 139-40; phone interview with former Education Department official, November 23, 1998; "CSSO Center on Assessment and Evaluation," Council of Chief State School Officers, October 17, 1985.

112 Landy et at, opcit. 252-54.

displays and the introductory film in the visitors center made only short, condescending references to the area's previous inhabitants.¹¹³ Morris recalls:

I thought about that, and I realized that if I took a strong public position asserting opposition to the proposed factory, it would become a local v. federal issue. You aren't likely to win in a situation like that. It would have diverted attention from considering local quality of life issues, which seemed the most promising forum to protect both local and Park values. So, I remained off the public stage, but did assert our obligation to provide scientific information regarding potential impact of the proposed factory on Park resources, and maintained private communication with all parties.¹¹⁴

Perhaps since the local economy was healthy and because the controversy remained local rather than one involving Washington, large numbers of area residents themselves organized to oppose the plant. In the face of widespread opposition at public hearings, county supervisors postponed their decision and Cardinal Glass eventually decided to locate elsewhere.

In short, as many Federal executives know, 200 years after the original debates between the Federalists and Anti-Federalists, we still live under an ever evolving power sharing arrangement that tests the patience and creativity of American public leaders. Yet with the notable exception of racial discrimination, one can argue that the system has served well in supplying a strong but limited national government, while still allowing communities to thrive by allowing significant local power over affairs.

113 When Morris became the first Shenandoah Superintendent to meet with Children of Shenandoah, a local paper compared the meeting to the Pope's visit to Communist Cuba! Daily Progress (Charlottesville), February 8, 1998, B 1.

114 Personal communication, October 13, 1998.

V. The American Constitution: Rights and Freedoms of Individuals

The American Constitution: Rights and Freedoms of Individuals

R. Bruce Carroll

Among the most significant American contributions to political thought is the written constitution. The purpose of a written constitution is formally to define and limit the powers of government. With that in mind, while creating the new government, the framers made a curious and significant omission to the Constitution: they excluded from its terms most protections of individual rights. While Congress, for example, was explicitly granted certain powers in Article I, section 8, and explicitly denied others in Article I, section 9, little mention, either as a grant or a denial of power, was made in the original Constitution on the matter of protection of individual rights.

It is true that certain protections against federal encroachment were specified in the Constitution. The prohibitions against bills of attainder, ex post facto laws, the suspension of habeas corpus except in extraordinary circumstances, and the guarantees of the right to trial by jury and to all the privileges and immunities of citizenship are suggestive of the framers concern about protecting individual rights.¹¹⁵ As respects most liberties, though, the Constitution is silent. There are several reasons for this.

¹¹⁵ Of contemporary interest was the extensive discussion by the framers of impeachments and its subsequent specification in the Constitution. Intended as “the haviest peice of artillery in the congressional arsenal” [Lord Bryce, 1 American Commonwealth (rev. Ed., New York: MacMillan & Co., 1914), p. 212], it represents the greatest check against arbitrary government. The Congress, as representative of the people, could by the impeachment provision remove members of the executive and the judicial branches; neither of those branches, however, alone or in concert, could remove a member of Congress. Bryce continues by noting that “because it is so heavy it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at.” Id. Recent experience only corroborates his judgment.

Above all, the framers assumed that the newly created federal government would not have the power to regulate or diminish individual rights. They concluded that as the federal government was one of delegated powers, and as no authority to intrude upon the rights of individuals had been delegated to it in the Constitution, no constitutional protection of individual rights was necessary. As Hamilton stated, “why declare [in the Constitution] that things shall not be done which there is no power to do?”¹¹⁶ Further, if varying constitutional protections were specified, such as liberty of the press, then the government might pass regulations to enforce those protections. Those regulations themselves would represent restrictions upon an otherwise unfettered right to publish.¹¹⁷ Thus, the framers concluded that since the new government did not have the power to act to restrict liberties, it should not. But what if it did?

Historically, a large territory had implied the existence of a tyranny to govern it. Only through unified rule had diverse peoples and territories been capable of being united. Confronted with the large expanse of America, the framers turned the lessons of history to their advantage. Instead of the large territory’s providing a rationale for tyranny, it would provide a natural protection against tyranny. The protection would emanate from the fact that the large territory would militate against groups’ being able to join together to diminish the rights of others. The simple fact of largeness would make it difficult for persons of like interests to communicate and act in concert in ways that would have the effect of depriving others of freedoms.

A concomitant of the large territory would be a large population. The framers believed that the larger the population, the greater the likelihood that good men could be selected to govern. They chose to create a republic (a representative system), not a democracy (direct participation in government), in order to allow the best to govern. If the proportion of good men to the remainder be equal in a small and in a large population, then the larger the population the greater the number of good men from whom the people might select their leadership. Those leaders would not be inclined to the pursuit of private interests at the expense of others; rather, they would govern in the interests of all. Thus, the large territory and the large population would work hand in hand as natural forces to protect freedoms of all.¹¹⁸

Finally, on the assumption that the absence of Constitutional authorization and the existence of natural restraints might not prove to be adequate, artificial constraints were conceived. While man in isolation may be timid, by nature he tends to join others of like interest. His reason “acquires firmness and confidence in proportion to the number with [whom he] ... is associated.”¹¹⁹ It is in groups that his true nature emerges, characterized by “ambition, avarice, personal animosity, party opposition, and many other motives not more laudable”¹²⁰ and he is naturally inclined to joining others in pursuit of his aims. Since the natural checks of large territory and population might not be enough to check man’s natural impulse, artificial

116 Hamilton, Madison and Jay, The Federalist, #84 (New York: The Modern Library, n.d.), p. 559.

117 Id.

118 Id., #10, pp. 59-61.

119 Id., #49, p. 329.

120 Id., #1, p. 4.

restraints had to be established. They centered in the system of separation of powers, checks and balances, federalism, and republicanism.¹²¹ Instead of assuming the people would in fact act in their own best interests, the framers assumed that they would not. They assumed that institutional restraints, including the representative principle which tied directly into the assumption of a large population and a large number of potential leaders, were additionally necessary and appropriate to protect individual rights.

The existence of natural and artificial checks upon man's nature would only work if the government were actively seeking to protect freedoms. The framers believed the "vigor of government is essential to the security of liberty..."¹²² The paradox was that while fearful of the tendency of government to deprive the citizenry of liberty, the framers nevertheless viewed vigorous governmental activity as essential to the preservation and protection of civil rights. The resolution of the apparent anomaly was left to subsequent generations, a resolution which first assumed the form of constitutional amendment and second actual practice under those amendments. The result is a system of government which prohibits intrusions on specified rights (civil liberties) and simultaneously one which by action protects others rights (civil rights).

The Constitutional Amendments

Hamilton had argued the dangers of attempting to include a listing in the Constitution of the various protections citizens should have.

Bills of rights...are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.¹²³

In spite of the logic of his position, several of the framers sought to have a bill of rights included in the original Constitution. They were not persuasive. After three months of work on the new Constitution the framers left Philadelphia in September, 1787. They had created "a large, powerful republic with a competent national government regulated under a wise Constitution,"¹²⁴ one which, nevertheless, significant numbers of people believed fatally defective in its failure adequately to protect individual rights. At least in New York, Massachusetts, and Virginia the price of ratification was agreement that a Bill of Rights would be proposed immediately upon the creation of the new government.

Madison soon introduced twelve amendments to the first Congress. Two did not receive adequate support for ratification, but the others were quickly adopted and appended to the original Constitution. Though not viewed as a Bill of Rights, and scoffed by some as being

121 See Tab III for an extended discussion of the form and structure of the governmental system.

122 Hamilton, Madison and Jay, *op. cit.*, #1, p. 5.

123 *Id.*, #84, p. 559.

124 Diamond, Martin, "What the Framers Meant by Federalism," in Robert A. Goldwin (ed.), *A Nation of States* (Chicago: Rand McNally & Company, 1963), p. 37.

unnecessary, over time the ten amendments came to be recognized as the hallmarks of American liberty, and the basis of much of the freedom in America.

The First Amendment is the best known with its basic command that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Some, to include the late Justice Black, a great civil libertarian, have argued that the language of the Amendment means precisely what it says, that "Congress shall make no law" in the constitutionally protected areas of religion, speech, press, and assembly.¹²⁵ This absolutist position has never been accepted by a majority of the Supreme Court. Rather, practice suggests that Congress may pass certain laws concerning speech, press, assembly and religion that the Court majority will deem constitutional; however, that majority's opinion may change according to time, circumstance, and its own composition.¹²⁶

The Second and Third Amendments of the Constitution concern the right of the people to bear arms ("a well regulated Militia, being necessary to the security of a free State") and not to have soldiers quartered in their homes. The third is of little contemporary significance, though some today argue that the Second's right to bear arms means that the government may not regulate hand guns and other firearms.

Amendments Four through Eight deal with rights of citizens involved in the criminal process. Protecting against unreasonable searches and seizures, self-incrimination, double jeopardy, and cruel and unusual punishments, and guaranteeing the right to a speedy, public, and fair trial with assistance of counsel, these rights are central to civil liberty. Justice Frankfurter has noted that "the history of American freedom is, in no small measure, the history of procedure,"¹²⁷ and Justice Douglas has asserted that "it is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."¹²⁸

Under the Constitution the states have primary responsibility for the administration of criminal justice. While the Fourth through Eighth Amendments were held only to restrict the federal government and not to apply to the states by an early Court,¹²⁹ practice has overcome

¹²⁵ See, for example, Meiklejohn, Alexander, "The First Amendment Is an Absolute," in Phillip B. Kurland (ed.), The Supreme Court Review: 1961 (Chicago: The University of Chicago Press, 1961).

¹²⁶ Cf. The flag salute cases, Mintersville School District v. Gobitis, 310 U.S. 586 (1940) and West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), in which the Court overruled itself within a three year period, principally through the efforts of Justices Black and Douglas who stated in the latter case "reasons for ...[their] change of view" since Gobitis.

¹²⁷ Malinski v. New York, 324 U.S. 401, 414 (1945).

¹²⁸ Concurring, Join Anti Fascist Refugee Committee v. McGrath, 341 U.S. 123, 149 (1951).

¹²⁹ Barron v. Baltimore, 7 Peters 243 (1833)

that decision. By a process of selective incorporation within the meaning of the due process clause of the Fourteenth Amendment more recent Courts have concluded that state action is essentially limited by those amendments. The history of which of the protections in the Bill of Rights restricts only the federal government and which in addition restrict the states has centered on judicial determinations of which rights are in fact “implicit in the concept of ordered liberty.”¹³⁰ Those that are, determined on a case-by-case basis, have been found applicable to, and restrictive of, state action.

The Ninth and Tenth Amendments contribute little to protection of rights. Each was essentially an expression of the status quo, and established little that was not publicly understood at the time of their adoption. They neither delegate nor restrict powers which the people or the states might reasonably be thought to possess. The Ninth meets Hamilton's fear that an enumeration of rights would imply that rights not specified were foresaken by the people. It states that "the enumeration ... of certain rights shall not be construed to deny or disparage others retained by the people." The Tenth applies similar reasoning to the fact of federalism, stating that those "powers not delegated to the United States... nor prohibited...to the States, are reserved to the States respectively, or to the people." It is from the Tenth Amendment that so-called "states rights" have emanated.¹³¹

One further Amendment is central to understanding civil rights in the United States. In the aftermath of the Dred Scott decision,¹³² which perhaps as much as anything precipitated the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments were adopted. Their collective purpose was to protect the newly freed Negro, giving him citizenship, non-discriminatory treatment, and the right to vote,¹³³ but the Fourteenth Amendment assumes center stage in any

¹³⁰ Palko v. Connecticut, 302 U.S. 319, 325 (1937).

¹³¹ It has been alleged by some, including former Governor George Wallace of Alabama, that at some point in the drafting of the Amendment the words “...reserved exclusively to the States” were used, and that “exclusively” was inadvertently omitted in the final draft. While such an allegation would lend support to a theory of strong if not dominant states rights, there appears to be little evidence corroborating it.

¹³² Dred Scott v. Sanford, 19 How. 393 (1857).

¹³³ In the Slaughter-House Cases, 16 Wall. 36 (1873), when the Supreme Court first considered these amendments, it stated (at pp. 71-72):

...on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and protection of the newly made free men and citizen from the oppressions of those who had formerly exercised dominion over him. It is true that only the 15th Amendment, in terms, mentions the negro (sic) by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

discussion of civil rights. It contains three significant protections of rights in its privileges and immunities, due process, and equal protection clauses.

While an unfriendly Court gutted the privileges and immunities clause of substantive meaning in the Slaughter-House Cases, the due process and equal protection clauses have, by judicial interpretation, been the central focus and force for protection of rights. The equal protection clause has been used to prevent discrimination especially on grounds of race and through the due process clause the Court has prohibited, for the most part, state action against individuals by stipulating that the First and Fourth through Eighth Amendments limit the federal government. Although "the notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by [the] ... Court again and again after impressive consideration"¹³⁴ by a "gradual and empiric process and 'inclusion and exclusion,'"¹³⁵ which may be defined as what the majority of the Court believes, "is all that is 'implicit in the concept of ordered liberty,'"¹³⁶ the Fourteenth Amendment's due process clause to all intents and purposes has come today to mean that which the federal government may or may not do, the states may or may not do.

Finally, a group of amendments at the core of discussion of civil liberties, but usually ignored, concerns the franchise. In any nation truly free, an uninhibited, untrammled right to vote is central to checking governmental abuse of power. It is no accident that the largest number of constitutional amendments deal with voting than with any other subject. The Fifteenth, Seventeenth, Nineteenth, Twenty-Third, Twenty-Fourth and Twenty-Sixth Amendments all concern and enlarge the right to vote. Whether for the newly-freed slaves or popular election of Senators, women's suffrage, or that of the residents of the District of Columbia, prohibiting intrusions upon the right to vote for failure to pay taxes or granting eighteen year olds the franchise, the various amendments attempt to broaden public participation in the electoral process. In all probability the next franchise amendment will seek to abolish the electoral college and institute direct popular elections of presidents.¹³⁷

Constitutional Practice

Formal constitutional amendment is the first method by which civil liberties and rights have been protected in the United States. As with much of the original constitution, however, the language of the amendments is ambiguous. Just what constitutes constitutionally protected

Unused since 1873, the privileges and immunities clause had a resurrection in a California welfare case, Sanchez v. Roe, in May, 1999. Its future is unclear.

¹³⁴ Justice Frankfurter for the Court in Wolf v. Colorado, 338 U.S. 25, 26 (1949). See too Frankfurter concurring in Malinksi V. New York, 324 U.S. 401, 414 (1945) where the same point in nearly the same words is made.

¹³⁵ Id., at 27.

¹³⁶ Id., quoting 302 U.S. at 325.

¹³⁷ U.S. Senate, Committee on the Judiciary. Report (To Accompany Senate Joint Resolution 1), Direct Popular Election of the President. Report No. 93. 93d Cong., 2d Sess., 1974.

free speech, or the right to counsel, or an unreasonable search and seizure has required a significant amount of interpretation, especially by the courts. Consider, for example, the following two situations involving allegations of deprivations of the protections against self-incrimination and unreasonable searches and seizures.

In the first, the police had information that a person possessed and was selling drugs. They went to his home and entered illegally. They found him sitting on his bed and asked him what two capsules lying on his night stand were. He immediately reached for them, placed them in his mouth and swallowed them. The police responded by attempting to make him regurgitate and when that failed took him to a hospital where over his objection they had his stomach pumped and retrieved the capsules. They were subsequently identified as morphine and were used as evidence to obtain a conviction.¹³⁸ Did what occurred constitute a violation of the defendant's rights not to incriminate himself? What of his protection against unreasonable searches and seizures?

Compare this to a similar set of circumstances. Here, a man was apparently the driver of an automobile involved in an accident. He was taken to a hospital for treatment of injuries received in the accident. While there, a police officer directed a physician to take a blood sample over the objection of the patient. The subsequent analysis indicated that he was intoxicated and was later used in court to obtain a conviction. He protested on the grounds that the taking of the blood against his wishes constituted both an unreasonable search and seizure and a violation of his right not to incriminate himself.¹³⁹

The Supreme Court heard both of these cases. On the face of things they appeared to present the same issues. Interpreting the same constitutional provisions in each case the Court concluded that in the first instance there were constitutional violations and in the other there were not. This is how constitutional law is made, on a case-by-case basis. The results, interpreting and reinterpreting the constitutional language, represent the best insight into what constitute civil liberties and rights in America.

First Amendment Freedoms

The fundamental and central role of First Amendment freedoms in the democratic process has always been recognized in light of the fact that individual freedom and national security interests may conflict, that as both are essential to the community, neither is absolute. Each imposes constitutional restraints upon the other. The purpose of individual rights is to promote the welfare of the community, and that of the community is to promote individual rights. They are interlocking and interdependent, yet at the same time frequently in conflict with one another.

It is primarily the ambiguity of constitutional language and seeming conflict among its provisions which has generated these conflicts. When the community moves in one direction

¹³⁸ Rochin v. California, 342 U.S. 165 (1952)

¹³⁹ Schmerber v. California, 384 U.S. 757 (1966). See, too, Breithaupt v. Abram, 352 U.S. 432 (1957).

under its Tenth Amendment police power, it may well collide directly with a citizen's rights under the First Amendment. For example, the Court has long been clear that obscenity is not protected by the First Amendment, that a community may prohibit its distribution, say, to minors. But the First Amendment guarantees a free press and does not make age distinctions as to whom it protects. Minors, as well as adults have constitutional rights.

To compound the difficulty, just what obscenity is varies from individual to individual, from judge to justice. Justice Stewart in a 1964 case commented that he could not define obscenity, but knew it when he saw it; such insight does not provide much of a standard as to what is constitutionally permissible. This sets the stage for litigation about what the community may do to control obscenity in what it believes to be the public interest, and determination of the extent to which attempts at regulation intrude upon protected rights.

Countless other examples exist, generated by the friction between community needs and individual rights and compounded by the ambiguity of constitutional phraseology. May New Hampshire legislate voluntary recitation of prayers in the public schools or does that violate the First Amendment's ban on establishment of religion? May a city prohibit any performance of Hair in its public auditorium on the ground that it is obscene or would that constitute prior restraint or censorship in violation of the First Amendment? May the Washington Post publish classified material under the First Amendment's freedom of the press, or may the government on grounds of national security obtain a court order to enjoin the publication? Is a city obliged to protect the speech rights of one speaking in a private forum, but whose presence as a known racist and fascist is causing mob disturbances outside the forum? Does free speech extend to using a loud speaker to broadcast the message or does that use intrude upon any right of the community to peace and quiet?

To compound the problems, may private, as opposed to public, persons violate constitutional rights? Does society have an obligation to protect liberties against encroachment by private parties? What if, for example, a state university were to dismiss a professor because of alleged criticisms of the administration of the university? Would that violate the professor's First Amendment rights? As a public institution, what public responsibilities does a university have? But what if it were a private college? Suppose the professor in his effort to make his institution better had established outside his office a bulletin board on which daily he placed varying criticism of college practices. Soon that bulletin board became the center of student and faculty attention and the subject of much conversation critical of the college. Could an officer of the college indicate to the professor that he would be dismissed for his criticisms in spite of the First Amendment's freedom of the press (and the college's expressed support of academic freedom)? Even if he were not dismissed, could the officer so "chill" the professor's disposition to criticism as to violate his right to expression? This push and pull is at the heart of discussion of rights and of constitutionalism. Through the resolution the meaning of constitutional language becomes clearer, if not actually clear.

The First Amendment freedoms of speech, religion, press, and assembly have never been interpreted by a majority of the Supreme Court as absolute.¹⁴⁰ Since some regulation of these

¹⁴⁰ The Court's position on the extent of these freedoms may be seen for religion in Cantwell v. Connecticut, 310 U.S. 296 at 303-304 (1940); for press in Near v. Minnesota, 283 U.S. 697 at 716

rights is constitutional, the Court has constantly been confronted with the task of deciding just how much. In the process it has had to attempt to balance individual liberties against the rights and needs of society to regulate and protect those liberties. It is clear, for example, that freedom of speech would extend to shouting "Fire!" in a vacant meadow: it is also clear that it would not extend to a person's shouting "Fire!" in a crowded theater when there was no fire and when the result could be a stampede for the exits that endangered all. The question becomes one of time, place, and circumstance for determination of the extent to which one may exercise First Amendment freedoms.

The greater the importance of safeguarding the security of the community...the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.¹⁴¹

With agreement that First Amendment freedoms are not absolute, the Court has attempted to determine what are "reasonable" limitations on their exercise. To inject fairness and stability into its opinions, members of the Court have formulated "rules" or "tests" by which the "reasonableness" of a statutory restriction may be judged. Critical analysis of these tests provides insight into what the Court has done. It reveals that there has never been agreement as to the appropriateness of a given test and that the multiple tests that have been created suggest only that each is a creation of its author to justify a desired result. Effectively the tests are devices to support a fundamental posture of judicial activism (tending to restrict or strike down legislative or executive action) or of judicial restraint (tending to support the executive and/or the legislature). Above all, whether a given Court majority and the individual justices who constitute it will intervene depends upon the issue. On an issue of free speech a given justice may be viewed as a judicial activist; on an issue concerning privacy that same justice may be judged a staunch reactionary, refusing to recognize that such a right exists on the ground that no where is it mentioned in the Constitution. To justify his position that justice invokes an absolutist interpretation of the entire Constitution, yet in his consistency is found on both sides of the activist/restraint spectrum.

In spite of their intrinsic ambiguity, which may or may not compound the very imprecision of the Constitution that they are designed to clarify, sensitivity to the varying judicial tests provides understanding of the way the Court confronts trying issues. The fertile minds of the justices have generated many tests, some in direct conflict with others, yet each

(1931) and Ginzburg v. U.S., 383 U.S. 463 at 475-76 (1966); for speech, Chaplinsky v. New Hampshire, 315 U.S. 568 at 571-72 (1942); and for assembly, Communist Party of America v. Subversive Activities Control Board, 367 U.S. 1 at 94-103 (1961). "...[A] state, in the exercise of its police power, may punish those who abuse...freedom by [expression]...inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace..." Gitlow v. New York, 268 U.S. at 667 (1920). See too, Toledo Newspaper Co. v. United States, 247 U.S. 402, 419, where the Court stated: "The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions."

¹⁴¹ DeJonge v. Oregon, 299 U.S. 353, 365 (1937).

providing insight into constitutional interpretation. Surveying each would involve significantly more than is appropriate here, but reviewing how the Court has used one concerning free speech, the clear and present danger test, and a second concerning expression, the Roth test, is illustrative.

The Clear and Present Danger Test

Perhaps the most famous test to determine impermissible speech that the Court has used is the "clear and present danger" test. This test says that when men use speech in such a way as to create an immediate danger that substantive evils will follow, against which society has a right to protect itself through legislation, then the words themselves may be declared unlawful and those who utter them punished. Substantive evils are those inimical to the security and welfare of society which the legislature specifies as crimes.

This test originated in 1919, when Justice Holmes for a unanimous court in the case of Schenck v. U.S. used the words "clear and present danger" to justify legislation which patently suppressed speech. This case arose during World War I, an era of "Red Scares," bombings, and allegedly Communist-inspired labor strikes, and a time when great fear of a socio-economic revolution gripped the American public.

Schenck had transmitted a circular through the mails which urged those eligible for the draft to oppose it. The circular labelled the draft despotism in its worst form and advocated insubordination upon entrance into the armed forces. He was indicted for violating the Espionage Act of 1917, which penalized actions and speech designed to "interfere with the prosecution of the war." Justice Holmes did not question whether the provisions of the Espionage Act were "reasonable" limitations upon the right of free speech; rather, he sought to determine the proximity and degree of Schenck's actions and words to those made unlawful by the act.

The question in every case is whether the words used are used in such circumstance and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.¹⁴²

Holmes continued by noting that the "character of every act depends upon the circumstances in which it is done." Here, "when a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." It is speech that may be prevented, not just action, for "if the act, its tendency and the intent with which it is done are the same, there is ... no ground for saying that success alone warrants making the act a crime."¹⁴³ Holmes assumed that the intent of the document was obstruction within the meaning of the Act.

Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon

142 249 U.S. 47, 52 (1919)

143 Id.

persons subject to the draft except to influence them to obstruct the carrying of it out.¹⁴⁴

Thus, it seems that while formulating what was to become the standard for cases of this kind, Holmes was actually deciding the case on grounds of intent rather than the existence or absence of a "clear and present danger."

The effect of Schenk was to give judicial blessing to legislative attempts to restrict speech in the name of national security. It created a general rule for determining when speech may be restricted -- when words are in such proximity to illegal acts and of such a degree as to urge or incite such illegal acts so as to constitute a clear and present danger to the state. It clearly established that the First Amendment freedoms are not absolute; they may be restricted in special circumstances. Above all, it set a standard subject to the vagaries of the Court because of the number of central questions it left to subsequent determination and discretion. What is a clear and present danger? How proximate must the words be to the illegal act? To what degree must the words urge the prohibited act? What is the character of the words in relation to the circumstances in which they were uttered that is proscribed? What constitute a threat to national security? These and other questions placed the Court in the position of having to interpret the constitutionality of law relative to the facts and circumstances of each case. In that effort the Court could apply the test not only to restrict speech, but also to protect it.

That Holmes viewed his opinion as creating a new judicial standard is not apparent. One week after the Schenk case, Holmes again wrote for a unanimous Court in Frowerck v. U.S. and Debs v. U.S. upholding convictions again under the Espionage Act, the Court cited Schenk as analogous, but did not refer explicitly to the clear and present danger test.¹⁴⁵ The cases set the stage for the next Espionage Act conviction which came to the Court in Abrams V. U.S.¹⁴⁶

The Espionage Act had been amended in 1918 to include within its proscriptions advocating reduction of production of war materials with the intent of hindering the prosecution of the war. This addition constituted a direct regulation of speech as speech, not just speech as it related to conduct, and only intent needed to be proved to violate it. While the nation was involved in World War I, the defendants were convicted under the act of unlawfully writing and publishing language "intended to incite, provoke and encourage resistance to /and criticism of/ the United States" and conspiring "to urge, incite and advocate curtailment of production of .ordinance and ammunition necessary and essential to the prosecution of war."¹⁴⁷

¹⁴⁴ Id., at 51 (emphasis added).

¹⁴⁵ Frowerck v. U.S., 249 U.S. 204 (1919), was decided on the basis of intent, the Court's holding that "a conspiracy is criminal even without the means with which to carry out the intent." Debs v. U.S., 249 U.S. 211 (1919), was similarly decided on the basis of intent and effect. "One purpose of the Speech, whether incidental or not does not matter, was to oppose not only war in general but this war. ***The opposition was so expressed that its natural and intended effect would be to obstruct recruiting."

¹⁴⁶ U.S. 616 (1919).

¹⁴⁷ Id., at 617.

Their conviction was upheld by the Supreme Court. Justice Clarke wrote for the majority that although appellants were interested primarily in aiding the Russian Revolution, they “must be held to have intended, and to be accountable for, the effects which their acts were likely to produce.”¹⁴⁸ These effects included hindering the war effort; therefore, the majority held them within the reach of the statute. Although relying upon the Schenck case as precedent, the Court did not mention the clear and present danger test.

The conviction generated one of the most famous Holmes dissents in which Justice Brandeis concurred. “Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, ‘Congress shall make no law abridging freedom of speech.’”¹⁴⁹ While “we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country,”¹⁵⁰ surely that is not the case here. Since Abrams’ intent was not to obstruct war production in order to hinder the war, he could not have created a clear and present danger. No such danger could be created by “the surreptitious publishing of a silly leaflet by an unknown man”¹⁵¹

...when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free-trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market...¹⁵²

Thus, for Holmes, speech could be restricted, but only when "lawful and pressing" purposes of the law are so "imminently" threatened as to imperil the safety of the nation. The clear and present danger test could be used only on very narrow grounds as a justification for limiting the right to free speech.

In Schaefer v. U.S., 251 U.S. 466 (1919), an Espionage Act case involving statements published in two newspapers concerning the war, Brandeis with Holmes dissented. After quoting the Schenck clear and present danger formulation, they stated the test “is a rule of reason. Correctly applied it will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities and from abuse by irresponsible, fanatical minorities.”¹⁵³ And in Pierce v. U.S.,¹⁵⁴ again Holmes quoted his Schenck formula and argued that its requirements had not been met, although the majority as in Schaefer relied upon it to uphold

148 Id., at 621.

149 Id., at 630-31.

150 Id., at 630.

151 Id. at 628.

152 Id., at 630.

153 251 U.S. at 482.

154 252 U.S. 339 (1920).

convictions. While the majority of the Court was using the new formula for restricting speech, its creator was dissenting on the ground that the majority was improperly applying it.

In Gitlow v. N.Y., 268 U.S. 652 (1925), the appellant was a publisher convicted under a New York criminal anarchy statute which made it unlawful to advocate, advise, or teach the overthrow of the government by force or violence or to publish anything which so advocated, advised, or taught. The majority rejected use of the clear and present danger test on the ground that the legislature had already determined that the danger of such speech was sufficient to merit suppression. Whether the specific utterance was within the prohibited class was not subject to review, for “the state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration.” The State “cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger to its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency.”¹⁵⁵

Holmes and Brandeis dissented, holding that the Schenck standard should be applied. “It is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who share the defendant's views. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”¹⁵⁶

Finally, in Whitney v. California, 274 U.S. 357 (1927), the test received its most definitive statement, although the case was decided on other grounds. Here, the defendant was convicted under a California statute which made it unlawful to teach or advocate crime, sabotage, or violence as a means of affecting political or industrial change. Miss Whitney violated the California Syndicalism Act of 1919 by assisting in organizing the California Communist Party and by joining and attending meetings of that party. As in Gitlow, Justice Sanford delivered the opinion of the Court, and reaffirmed that the right of free speech was not unlimited. He concluded:

The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. *** That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals, is clear. We cannot hold that, as here applied, the act is an unreasonable or arbitrary exercise of the police power of the state, unwarrantably infringing any rights of free speech, assembly or association, or that those persons are protected from punishment by the due process

155 268 U.S. at 669.

156 Id., at 673.

clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State.¹⁵⁷

The Court found that the Act did not violate free speech guarantees. It did not determine whether Miss Whitney's actions were of such a character and use as to come within the prohibitive provisions of the statute, nor was it asked to do so.

Justice Brandeis, joined by Justice Holmes, concurred. He asserted that the states may restrict speech when it “would produce, or is intended to produce, clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent.” Speech and assembly rights may be curtailed “if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral.”¹⁵⁸ For there to be a clear and present danger that would justify restrictions.

...there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.¹⁵⁹

If these criteria do not exist, the corollary is that speech must be unfettered. Free speech is a fundamental principle of American government, for

To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.¹⁶⁰

Withal, Brandeis supported upholding the conviction because the defendant had failed to challenge the statute on the ground that there was no clear and present danger. She had not asked the trial court to ascertain the existence of the necessary circumstances for conviction. Lacking such evidence in the record, Brandeis felt compelled to join the majority, though not without qualification.

Whitney v. California was the last case in which the originators of the clear and present danger test wrote opinions explaining its meaning. When used by the majority of the Court, it became the basis for convictions restricting speech and the occasion for further definition by Holmes and/or Brandeis. In spite of their efforts, no general agreement emerged about the meaning of the test, or, indeed, when and if it should even be applied.

157 Id., at 371-72.

158 Id., at 372.

159 Id., at 376.

160 Id., at 376.

By 1927, the virtues of the test were unclear, its future definition and application left to the judgment if not the whim of any majority of the Court. As a judicial test on the basis of

which free speech rights might be ascertained, it only served notice that the government might use it to justify suppression of expression. By appearing to be a “test,” it may well have generated more mischief than guidance because of the uncertainty and ambiguity it compounded.

More than a substantive test, it actually appeared to be a device to justify the opinion in a given case. If a majority found it suitable for supporting its posture, it invoked the standard; if it did not, it found another suitable for achieving the desired result. Clearly, the extensive litigation surrounding constitutional rights and involving an extraordinary array of issues, necessarily required the Court to deliberate matters that could not be accommodated by a single test or approach. Such a doctrinaire approach to the Constitution would have stifled the very feasibility that is among its major virtues. In the process, multiple tests have emerged.

Each formulation of an encompassing judicial principle with which to address the constitutionality of regulations involving speech and press has given way through the decisional process to new approaches. The Court has been sensitive to the fact that primary involvement in regulating activity belongs to the legislature which has deliberated the clash of interests in creating laws and presumptively weighed the significance for society of its actions. It is for the judiciary to decide not the wisdom of the legislation, but its constitutional permissibility, a process that has involved case-by-case deliberation that has allowed the Constitution to grow with the times. The struggle to ascertain how obscenity may be constitutionally regulated indicates that the Court's search for appropriate tests continues.

Freedom of Expression - The Roth Test

The First Amendment grant of freedom of speech and press provides for liberties that are especially precious to a free society. These freedoms denote more than an individual's right to utter or to print words. The First Amendment has been construed, particularly since the pervasive appearance of films, television, and radio, to protect expression, the communicating of information or opinion. Indeed, one of the major questions the Court has had to decide has centered on just what is expression, for it is clear that

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.¹⁶¹

161 Cohen v. California, 403 U.S. 15, 20 (1971).

Especially in the area of expression the Court has developed tests to determine the constitutionality of restrictions that various governmental agencies have imposed. Attempting as much as possible to further the right, the Court has nevertheless confronted the reality that in an orderly society free rein to expression would be imprudent. The varying tests have been applied when the Court has confronted allegations of prior restraint upon expression -- the previous censorship of unexpressed ideas -- and subsequent punishment -- the penalizing of expression already made. Generally, prior restraint has been found to be unconstitutional; subsequent punishment, dependent upon time, place, and circumstance, may be upheld.

The Court has concluded that there is speech which is not expression under the First Amendment and therefore not under its regulatory ban.

It is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problems. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.¹⁶²

Thus, there are types of speech which have no redeeming social value and which are detrimental to society and individuals. Two cases presenting similar facts, but receiving contrary constitutional protection, provide examples of protected and unprotected speech.

Father Terminiello, well-known for his anti-Semitism and racist views, was arrested and convicted for a breach of the peace which occurred when demonstrators, gathered outside the hired hall in which Terminiello was speaking to an audience, attempted to disrupt the assembly. The Court reversed his conviction, albeit on a technicality.¹⁶³

In a parallel case, Feiner delivered a speech through a loud speaker on a street corner. His speech contained derogatory remarks about the city's mayor and the American Legion and urged blacks to fight for their rights. He attracted a crowd which blocked the sidewalk for pedestrian traffic. Some listeners protested to the police in attendance and indicated that if the police did not act to remove Feiner they would. When Feiner refused to stop speaking, he was arrested and later convicted for disorderly conduct. The Court upheld this decision, seemingly in contradiction to the Terminiello case.¹⁶⁴

In the first case the Court reversed on the ground that the trial judge provided a definition of illegitimate speech in his charge to the jury that had changed the issue from one of an application of a breach of the peace statute to a too broad and sweeping limitation of speech. In the second case no such unconstitutional charge interfered with the properly applied disorderly conduct statute. Still, the Court's difficulty in interpreting First Amendment free speech protections is apparent in a comparison of these decisions.

162 Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

163 Terminiello v. Chicago, 337 U.S. 1 (1949).

164 Feiner v. New York, 340 U.S. 315 (1951).

Terminiello had hired a hall and was addressing his remarks primarily to an audience that clearly desired to hear them. The outside demonstrators chose to be affected by the insulting speech. Feiner, on the other hand, was speaking in a public place, using a device which accosted the ears of all nearby though they were not necessarily in the vicinity with the intent of listening to the speaker. Thus, Feiner's speech provided a direct, unavoidable confrontation with the public that led to a disruption. The disturbance surrounding Terminiello's speech, on the contrary, could be deemed to be manufactured; the circumstances of the speech did not necessitate a direct confrontation with public order, safety, and tranquility.

The distinction between protected and unprotected speech involved in cases where the public order or serenity is impaired is clearly a necessary, but difficult, one to make. The problem typifies the confrontation between the state's responsibility to the individual speaker as well as to the public in providing protection. Where is the line between the responsibility of the community to secure a platform for speech, however controversial, and its responsibility to protect the public peace?

The Court has been sensitive to the fact that primary involvement in regulating activity belongs to the representative body which has deliberated the clash of interests in creating legislation and presumptively weighed the significance for society of its actions. It is for the judiciary to decide not the wisdom of the legislation, but its constitutional permissibility, a process that has involved case-by-case deliberation, that has allowed the Constitution to grow with the times.

This process is exemplified by the Court's efforts to cope with the constitutional problems presented by obscenity. The Court has been clear in every case in which it has addressed the question that obscenity is within the regulatory power of the Congress and the States, that it is not protected by the First Amendment. In its first great censorship case, Near v. Minnesota, the Court emphasized that "the primary requirements of decency may be enforced against obscene publications."¹⁶⁵

The Court's first substantive review of the control of the distribution of obscene materials produced the "Roth test," a functional principle named for the case in which it originated.¹⁶⁶ After reasserting that some classes of speech could not receive First Amendment protection and stating that obscenity fell into this realm as being "utterly without redeeming social importance," the Court set forth the standard by which allegedly obscene material was to be judged: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."¹⁶⁷ As with other tests, this one has caused the Court almost as much difficulty as relief and guidance.

Applying it, the judiciary has supported several regulations intended to protect society from the evils of pornography. Decisions have sustained the constitutionality of a board's

¹⁶⁵ 283 U.S. 687, 716 (1931).

¹⁶⁶ Roth v. United States, 354 U.S. 476 (1957).

¹⁶⁷ Id., at 489.

reviewing and censoring alleged obscene films before a public showing¹⁶⁸ and affirming restraints placed upon the use of the mails for disbursement or selling of obscene literature.¹⁶⁹ In each instance, the Roth test was reviewed, redirected, refined, and reapplied, but without consistency or certainty. On a case-by-case basis, the Court proceeded to judge whether each film or book appealed to prurient interest and had no redeeming social value. Necessarily, this resulted in divided decisions, casting uncertainty upon just what the Court's posture was in this area.¹⁷⁰

It seemed that the Court was reassessing its original stance of placing obscenity outside constitutional bounds when in Stanley v. Georgia¹⁷¹ it reversed a conviction for possession of obscene materials. The films were discovered in a search by police of the defendant's home for items related to another matter of criminal concern. The specific language of the Stanley decision indicated that on privacy grounds one might possess things that would otherwise be viewed beyond the bounds of constitutional protection. In permitting the private possession of things judged obscene, the Court appeared to be affording constitutional protection to obscenity, a novel application for the Court. Though divided on just what "obscenity" was, the Court nevertheless supported the right of an individual to have "obscene" materials in his home.

Whatever may be the justification for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.¹⁷²

To get those obscene materials to his home suggests a right to create them in the first place, though the Court did not go this far. Rather, it centered its concern on a right to privacy, itself an implicitly protected constitutional right, and went no further. The step, though, from voluntarily watching a film in one's home to paying voluntarily to watch a film in a theater is not far.

In the area of obscenity "we have seen a variety of views among the members of the court unmatched in any other course of constitutional adjudication."¹⁷³ "As the court's many decisions in this area demonstrate, it is extremely difficult for judges or any other citizens, to

168 Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961).

169 Rowan v. Post Office Department, 397 U.S. 728 (1970).

170 See Manual Enterprises v. Day, 370 U.S. 478 (1962); Jacobellis v. Ohio, 378 U.S. 184 (1964); Ginzberg v. United States, 383 U.S. 463 (1966); A Book Named "John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts, 383 U.S. 413 (1966); Mishkin v. New York, 383 U.S. 302 (1966).

171 394 U.S. 557 (1969).

172 Id., at 564.

173 Miller v. California, 413 U.S. 15, 22 (1973), quoting Interstate Circuit, Inc. v. Dallas, 390 U.S. at 704-05.

agree on what is obscene.”¹⁷⁴ Indeed, “apart from the initial formulation in the Roth case, no majority of the Court has at any time been able to agree on what constitutes obscene, pornographic materials subject to regulation under the State’s police power.”¹⁷⁵ Mark Twain may have been contemplating the Court’s difficulties at definition when he remarked, “the more you explain it, the more I don’t understand it.” Or, as a court observer concluded, “the law of obscenity [can only be viewed] a Constitutional disaster area.”¹⁷⁶

Undaunted, the Court in 1973 once again attempted creation of "concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment.”¹⁷⁷ Three were established:

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest ... ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁷⁸

The hazardous removal of First Amendment protection from published material depends ultimately on a clear, unambiguous, narrowly limited definition of "obscene." The Court's repeated decisions that "obscenity" is constitutionally unprotected may in fact be premature and meaningless without clear understanding of just what it is.

In Marcus v. Search Warrant the Court warned that “a state is not free to adopt whatever procedures it pleases for dealing with obscenity... without regard to the possible consequences for constitutionally protected speech.”¹⁷⁹ By that and other statements, the Court indicated it would be very sensitive to encroachments and that sensitivity was given definite form when the Court stated that “any system of prior restraints comes...bearing a heavy presumption against its constitutional validity.”¹⁸⁰ It is in this context that the new standard must be weighted, for “the freedoms of expression...are vulnerable to gravely damaging yet barely visible encroachments.”¹⁸¹

By the new Miller test, the three guidelines must all coalesce before the existence of "obscenity" may be demonstrated. Failure to demonstrate any one would mean that a work was

174 U.S. v. Reidel, 402 U.S. 351, 379 (1971).

175 Miller v. California, 413 U.S. 15, 22 (1973).

176 C. Peter Magrath, “The Obscenity Cases: Grapes of Roth,” in Philip B. Kurland (ed.), The Supreme Court Review, 1966 (Chicago: The University of Chicago Press, 1966), p. 56.

177 Miller v. California, 413 U.S. 15, 29 (1973).

178 Id., at 24 (emphasis added).

179 367 U.S. 717, 731 (1961), quoted in Magrath, op. cit., p. 22.

180 Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963).

181 Id., at 66.

not obscene. In point of fact analysis of the Miller criteria suggests in application nothing will be found obscene, for they are nearly impossible to apply.

The first guideline contains four criteria, each compounding the problems of the others. The first question centers on who is an "average person." Roth first introduced the notion of judging the effect of questionable material on the average person though admitting the imprecision of the term.¹⁸² In a subsequent decision the Court acknowledged confusion about who was an average person, but refused to decide whether he was a person likely to receive the material in question (in this case, an "average" homosexual) or simply another, non-homosexual, "average" person.¹⁸³ The definition ultimately relies on variable personal intuitions of normalcy, hardly a standard for judicial determinations.

The second criterion involves considering a work "taken as a whole," and that, too, leaves important questions unanswered. In Ginzburg v. U.S. the Court based its five-to-four decision that a publication was obscene because of the manner in which it was advertised. Here, the work, taken as a whole, included the manner in which it reached the public, suggesting that if it had not been advertised it might well have been judged not to be obscene. A publication according to Ginzburg is obscene in some circumstances and not obscene in others, depending on whether it was "exploited entirely on the basis of its appeal to prurient interest."¹⁸⁴ And so the Court heaped vagueness on top of vagueness, leading Justice Black to protest that

The criteria declared by a majority of the Court today as guidelines [for determining] obscene material are so vague and meaningless that they practically leave the fate of a person charged with violating censorship statutes to the unbridled discretion, whim, and caprice of the judge and jury which tries him.¹⁸⁵

Justice Harlan agreed on the ground that what the Court had "done is in effect to write a new statute, but without the sharply focused definitions and standards necessary in such a sensitive area."¹⁸⁶ The "taken as a whole" test has served to protect works from censorship when isolated passages are challenged. It has also permitted a broadened, unrestricted interpretation to include evidence apart from the material itself that taints the material as obscene.

"Contemporary community standard" is no less ambiguous. From Roth to Miller, just which community was to establish the standard was uncertain. Miller concluded that it was not a "national" community standard. Within two weeks a Georgia court established that the community standard to be applied was a "local" one in upholding the conviction of one Billy Jenkins for violating a censorship statute by showing the film "Carnal Knowledge." By the local community standard the movie was obscene. The intention of the Miller decision was to protect all but "hard core pornography," in which category Carnal Knowledge fell for one local community. It did so in spite of the fact that

182 Roth v. United States, 354 U.S. 476, 491 (1957).

183 Manual Enterprises v. Day, 370 U.S. 478, 482 (1962).

184 Ginzburg v. U.S., 383 U.S. 463, 474 (1966).

185 Id., at 478.

186 Id., at 494.

Carnal Knowledge is a motion picture which was acclaimed critically as one of the "10 Best" films of the year 1971. Actress Ann-Margaret received an Academy Award nomination for her performance. The film enjoyed popular acceptance throughout the nation, including many cities and towns within the State of Georgia.¹⁸⁷

Thus, what for one local community is obscene may be worthy of highly critical praise from its neighbors. The contemporary community standard does not refine serious attempts at definition of obscene.

The "prurient interest" criterion is similarly vague and imprecise. Justice Douglas noted in *Roth* that appeal to such interest is a commonly used technique for the marketing of many consumer products. "The arousing of sexual thoughts and desires happens every day in normal life in dozens of ways."¹⁸⁸ Indeed, "The advertisements of our best magazines are chock full of thighs, ankles, calves, bosoms, eyes, and hair to draw the potential buyer's attention to lotions, tires, liquor, clothing, autos, and even insurance policies."¹⁸⁹ In point of fact, prurient interest refers to commonplace occurrences of everyday life, but what precisely it is remains vague and unclear. What is clear is that what is of prurient interest for one person, or justice, may or may not be for another.¹⁹⁰

The second guideline contains two criteria, "patently offensive" and "specifically defined by ... state law." The patently offensive portrayals of sexual conduct test was first introduced in *Manual Enterprises v. Day* (370 U.S. 478) by a divided Court and applied in *Ginzburg*. It defies precise definition, abstractly or in application. *Miller*, however, makes the attempt:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.¹⁹¹

The attempt appears to be unhelpful. It does not appear substantively to enlighten the uninitiated about what actually is patently offensive obscenity. As with community standards, what is offensive to one may be commonplace with another, especially during this enlightened sexual era. Thus, greater specificity is needed and is required by the second criterion which requires a state specifically to define what is patently offensive.

State attempts at definition have resulted in very lengthy dissertations on what is patently offensive. Examination of the relevant Massachusetts statute suggests that its attempt at comprehensiveness actually raises as many questions as it resolves and virtually makes discourse

187 Brief for the Appellant, Jenkins v. Georgia (No. 73-557), p. 6.

188 Dissenting, 354 U.S. at 509.

189 Ginzburg v. U.S., dissenting, 383 U.S. at 482.

190 See Alpert, "Judicial Censorship of Obscene Literature," 52 Harvard Law Review 40, 73.

191 413 U.S. at 25.

on sexual subjects suspect. It also arouses pity for the poor author or bookseller who must wade through it to ascertain his legal liability.

Finally, in the third concrete guideline the Court would apply a "social value" criterion. First used in Jacobellis v. Ohio, 378 U.S. 184 (1964), the test has proved as elusive of precision as the others. In an attempt to be more specific, the Court in Memoirs v. Massachusetts established that a work must be "utterly without social value"¹⁹² before censorship would be permitted. Miller rejected this standard on the ground that it constituted "a burden virtually impossible to discharge under our criminal standards of proof."¹⁹³ It took a divided Court nine years to reach this startling conclusion.

In its place Miller proposed that a work must maintain a minimal level of "serious literary, artistic, political or scientific value."¹⁹⁴ The new version represents a dubious improvement. It is only through a very individualized, subjective analysis that an absence of value may be shown, for what may have no value for one may have high virtue for the next. There is no clear, comprehensive understanding of what is "valuable" either within communities or among them. Equally, how is a demonstration of "serious" to be made in the absence of common understanding of "serious," itself? This question is particularly troublesome in the subject-matter of sex where emotions are involved and opinions vary widely.

Sex, a great and mysterious motive force in human life has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.¹⁹⁵

The value of sexual material is not clear, but discussions of sex may in fact be valuable. They may be serious. They may not be obscene no matter how they are articulated or depicted, for "What is pornography to one man is the laughter of genius to another."¹⁹⁶ The value criterion makes a mockery in its pretense to precision.

Whether a particular treatment of a particular subject is with or without social value in this evolving dynamic society of ours is a question upon which no uniform agreement could possibly be reached among politicians, statesmen, professors, philosophers, scientists, religious groups or any other type of group.¹⁹⁷

The value of a work is partly determined by the audience that reads it. That is, a work of great value to a physician, an historian, a marriage counselor or a congressman may become

192 383 U.S. at 419.

193 413 U.S. at 22.

194 Id., at 24.

195 Roth v. U.S., 354 at 487-88.

196 Magrath, op. cit., pp. 7 and 71, ft. 277, quoting D.H. Lawrence.

197 Justice Black, dissenting in Ginzburg v. U.S., 383 U.S. at 480.

"obscene" in the hands of another.¹⁹⁸ Thus, a work could be serious, have value, be simultaneously obscene, and be subject to censorship. Yet to deprive the doctor, lawyer or Indian chief of that serious work because it might land in the hands of someone who would view it as lacking serious value would be akin to what Justice Frankfurter once described as burning the house to roast the pig.

Instead of concrete guidelines the Court appears to have constructed its obscenity foundation in sand. In the final analysis the "right to receive information and ideas, regardless of their social worth... is fundamental to our free society."¹⁹⁹ The Court's purported differentiation between information of social value and that of no such value is tautological, an exercise in futility. In its attempt to create a test of obscenity, the Court has so muddied the waters as to make understanding all but impossible. It has not been an enlightening exercise, especially in the face of the First Amendment's strong language that restrictions upon expression may not be imposed.

"The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid...may be as much a trap for the innocent as the ancient laws of Caligula."²⁰⁰ By the vagueness of its newly created test, the Court appears to have violated a basic principle of democratic law, precision of prohibition. One expressing himself about things sexual cannot know how the test will be applied, and consequently is in legal jeopardy any time he addresses the subject. The Court "has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having potentially inhibitory effects on speech..."²⁰¹ Indeed, "because First Amendment rights need breathing space to survive, government may regulate in the area only with narrow specificity."²⁰² That is hardly the case here. Any attempt at ascertaining what might be censored through a test upon which a majority of the Court might agree shows only the futility of the exercise, an exercise that itself has little redeeming social value. Prior to Roth/Miller, the Court had held that the "lewd" and the "obscene" were within that group of "certain well defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem."²⁰³ There is nothing defining and narrowly limiting by the new test, and there is everything to suggest that the Court has been unable to find a reasonable way through the quagmire it created.

As with the clear and present danger standard and most others, this test serves only to justify judicial approval of a result. Reviewing the creation of the clear and present danger test and the application of the Roth/Miller formulation shows how dependent the nation is upon the government for protection of rights. The Constitution established what they are; the Court establishes in practice what they are at a given moment.

198 Ginzburg v. U.S., 383 U.S. 463 (1966).

199 Stanley v. Georgia, 394 U.S. 557, 564 (1969).

200 U.S. v. Cardiff, 344 U.S. 174, 176 (1952).

201 Smith v. California 361 U.S. 147, 151 (1959).

202 NAACP v. Button, 371 U.S. 415 (1963).

203 Chaplinsky v. New Hampshire, 315 U.S. at 571-72.

Free speech and free press issues extend far beyond questions of obscenity or leaflet distributions. Libel and slander laws confront the reality of the First Amendment command. If one has a constitutionally protected right to free speech, why may he not with impunity slander those whom he chooses? Equally, questions involving picketing or demonstrations as expression have had to be resolved by the Court. For example, may a crowd gather at a jail house and march back and forth carrying signs and singing in protest to the jailing of one of its members for allegedly disturbing the peace as a leader of a previous demonstration? May a person protesting the war in Viet Nam sew a United States flag on the seat of his pants as an expression of his feelings? Similarly, may a person walk through public streets and buildings wearing the message "Fuck the Draft" on his jacket as an expression of his views? Is that message even speech or press? In the face of these problems it nevertheless remains clear that both society and the Court value speech and press as fundamental to liberty. When confronted with issues raising these First Amendment questions, the Court must weigh the societal and individual conflicting claims. With this insight into and understanding of how the judiciary deals with similar issues, a summary of our rights may be undertaken.

Freedom and Establishment of Religion

Two clauses of the First Amendment deal with religion. They deny Congress authorization to establish a religion or to abridge its free exercise. The Establishment Clause means more than that the government cannot establish an official religion. It also generally forbids any action by the government which would aid or support religion of any particular sect. By its terms the separation of church and state is incorporated into the First Amendment.

The Supreme Court has applied various tests in ascertaining whether the government has in certain instances breached the "wall of separation"²⁰⁴ between church and state. One method has involved determining whether an enactment advances or inhibits religion rather than maintaining a neutral stance toward it. To withstand the test of constitutionality, there must be a demonstrated secular interest underlying legislation which may be construed as aiding religion.²⁰⁵

Another judicial approach to the meaning of the Establishment Clause involves examination of a governmental enactment to determine if it produces "an excessive government entanglement with religion."²⁰⁶ When continuing official supervision is mandated, the Court tends to strike the legislation down. The difficult questions, though, concern the degree of involvement of government and religion. The Court has had to decide whether there is "excessive entanglement" or really only governmental "neutrality" toward religion. The principal area where the Court has confronted these questions of the degree of entanglement has occurred in the field of public education.

204 Everson v. Board of Education, 330 U.S. 1 (1947).

205 Abington School District v. Schempp, 374 U.S. 203 (1963).

206 Walz v. Tax Comm. of City of New York, 397 U.S. 664 (1970).

Federal aid to parochial schools has highlighted this issue. For example, may local authorities provide free public transportation for students attending parochial schools? The Court has held that they could on the ground that the transportation was for the welfare of the children and similar to police and fire protection; it was not public aid to a religious institution contrary to the Establishment Clause.²⁰⁷ In like manner the Court reasoned that a state loan of textbooks to parochial school students was not prohibited by the First Amendment because the books were of secular, not religious, benefit to the students.²⁰⁸

On the other hand the Court has concluded that too much governmental entanglement in religious matters existed in a program which in effect subsidized parochial schools by supplementing teachers' salaries for the instruction of non-religious subjects and by reimbursing the schools for other expenses in the teaching of non-religious material. The justices maintained that in order to insure that these funds were not involved in the religious activities of the parochial schools the state would be required to apply continuing surveillance and that constituted too much involvement.²⁰⁹ Such involvement, though, would not apply to Federal construction grants to church-affiliated colleges. Once construction was completed, no governmental surveillance would be necessary.²¹⁰

Released time programs in public schools for purposes of religious instruction have also raised serious constitutional questions under the Establishment Clause. The Court has distinguished between released time programs operating physically within the schools and those outside school property. When the religious instruction conducted by teachers from outside the public system occurred within a school building, the wall of separation was impaired.²¹¹ Religious instruction which did not involve use of public school facilities or property and which had no appearance of public accommodation, however, was deemed constitutional.²¹²

A closely related issue has centered on whether prayers may be recited and the Bible read in public schools. Here the Court has unequivocally maintained a strong separating boundary. Bible reading has been held clearly repugnant to Establishment Clause requirements.²¹³ Even the recitation of a non-denominational prayer devised by public authorities has been viewed unfavorably.²¹⁴ However much local authorities have encouraged or authorized prayer recitation and/or Bible reading, the Court has adjudged it to be a prohibited establishment of religion.

207 Everson v. Board of Education, 330 U.S. 1 (1947).

208 Board of Education v. Allen, 392 U.S. 236 (1968).

209 Lemon v. Kurtzman, 408 U.S. 602 (1971).

210 Tilton v. Richardson, 403 U.S. 672 (1971);

211 McCollum v. Board of Education, 333 U.S. 203 (1948).

212 Zorach v. Clauson, 343 U.S. 306 (1952).

213 Abington Township School District v. Schempp, 374 U.S. 203 (1963).

214 Engel v. Vitale, 370 U.S. 421 (1962).

Other questions of separation given recent judicial consideration have involved tax exemptions for religious groups. The Court has held that such exemptions do not violate the Establishment Clause, reasoning that religious groups are like charities, hospitals, and libraries, all of which provide communities with important, non-profit services deserving of tax favors. By granting the tax exemption the community has not unconstitutionally entangled itself with religion.²¹⁵ School vouchers, allowing school choice, raise First Amendment issues when used to attend a parochial school.

The second First Amendment provision concerning religion is its Free Exercise Clause. It prohibits the government from regulating or interfering with religious freedom. The government may not require the possession of certain, or any, religious views, or the participation in religious activities. However, if certain religious practices have secular overtones, they may be regulated though founded in religious belief.

A large body of cases has come before the Supreme Court concerning the religious freedom of the Jehovah's Witnesses. It has struck down solicitation statutes that allow inquiry into the religious nature of a group,²¹⁶ licensing fees applied to sellers of religious literature,²¹⁷ and ordinances interfering with the ability of members of religious groups to advertise a meeting door-to-door.²¹⁸ Other cases involving members of other religious sects have held unconstitutional a requirement of taking a religious oath to obtain public employment²¹⁹ and the withholding of unemployment compensation from a person whose religion forbade working on Saturday.²²⁰

Not all regulations challenged as violating the Free Exercise Clause have been overturned by the Court. Bigamy, though founded on religious grounds, has been outlawed as against a claim that it was constitutionally protected. State statutes aimed at prohibiting this practice by Mormons have consistently been sustained.²²¹ The Court has also affirmed the state's interest in maintaining child labor laws even if the child were engaged in religious work.²²² Finally, the government's need to provide for and supervise in an orderly fashion a day when businesses are closed was asserted in the Sunday Closing Law cases. Store owners who were members of the Orthodox Jewish religion which has a Saturday Sabbath claimed that Sunday closing requirements discriminated against them, for they had the effect of compelling them to be closed five days a week when combined with their Sabbath. In order to remain open the sixth day they

215 Walz v. Tax Comm. of City of New York, 397 U.S. 664 (1970).

216 Cantwell v. Connecticut, 310 U.S. 296 (1940).

217 Jones v. Opelika, 319 U.S. 103 (1943).

218 Martin v. City of Struthers, 319 U.S. 141 (1943).

219 Torcase v. Watkins, 367 U.S. 488 (1961).

220 Sherbert v. Verner, 374 U.S. 398 (1963).

221 Reynolds v. United States, 98 U.S. 145 (1849); Murphy v. Ramsey, 114 U.S. 15 (1885); Davis v. Beason, 133 U.S. 333 (1890).

222 Prince v. Massachusetts, 321 U.S. 158 (1944).

would have to violate their right to the free exercise of religion on that day. Although the cases did not turn on grounds of religion, the effect of the Court decision was not to support their claims.²²³

It is evident that securing First Amendment protections of religion is not an easy task. The drawing of distinctions which maintain a proper wall of separation between church and state and distinguish the state's legitimate regulatory interests from encroachments upon religion and its exercise is difficult. They will continue to be made on a case-by-case basis which weighs the interests of the individual and the obligations of the state which so frequently appear to be in conflict with one another.

Freedom of Assembly and Petition - Association

The final mandate of the First Amendment is a guarantee to the rights of assembly and petition. They are designed to secure citizens the right of access to their government. Historically this right was designed to enable the citizenry to assemble in order to petition their government. It was a political right. Over time, however, the provision has been expanded to a more generalized right of assembly.

In Hague. v. C.I.O., in which an ordinance provided a city official with wide discretion to refuse a permit for any gathering in a public place when he concluded that the assembly might induce disturbances, the Supreme Court said:

Wherever the title of street and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, discussing public questions.²²⁴

The right of assembly was viewed as extending well beyond discussion of public concerns or the functioning of government: it included gathering to examine issues of general interest between people. Thus the modern derivative of freedom of assembly was denominated as the right of association.

Over time many attempts to abridge this right have been challenged in the courts. The Smith Act, for example, contained a provision proscribing membership in organizations which advocated the overthrow of government by force. Members of the Communist Party sought to have it declared unconstitutional on the ground that it violated the First Amendment by making guilty by association all members of the organization. The Court did not support the contention. It held that membership in an organization formed for the purpose of forcefully overthrowing the government constituted an association for illegal ends. Thus the Communist Party did not have constitutional protection and could be legitimately regulated by government.²²⁵

²²³ Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Koshers Market, 366 U.S. 617 (1961).

²²⁴ 307 U.S. 496, (1939).

²²⁵ Scales v. United States, 367 U.S. 203 (1961).

A successful defense against state regulation of the right to association occurred when the State of Alabama sought to have made public the membership lists of the National Association for the Advancement of Colored People. The Court agreed with the NAACP that “inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”²²⁶ The right to associate here was upheld since the Court found no substantial state interest in obtaining the names of the members of the NAACP.

Similarly, the Court voided a state requirement that teachers disclose the name of every organization to which they had belonged over a five year period. Though the state's interest in determining the fitness of teachers was acknowledged, the Court found this sweeping inquiry extended beyond permissible First Amendment limits.²²⁷

In the final analysis the right to assembly is tied closely to the other First Amendment protections and may be viewed as an integral part of expression. People do not assemble for its own sake. That assembly constitutes expression of some sort, ranging from overt articulation of controversial political views to silent protestation before the Pentagon of a foreign war. So closely intertwined with the other protections as essentially to be inseparable from them, the right to association is with them at the heart of individual liberty.

Criminal Justice

It is manifest in the Constitution that both the framers and subsequent amenders were concerned about the rights of individuals accused of crime. They viewed essential certain minimal protections against societal encroachment for persons involved in criminal proceedings. Anticipating that an individual would be alone in his legal battle against the massed resources of society, they sought to insure that fair and equal treatment would exist in criminal actions. That was achieved through an elaboration of the process that would be due an accused:

The requirement of “due process” is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But “due process,” unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, “due process” cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, “due process” is compounded of history, reason, the past course of

²²⁶ NAACP v. Alabama, 357 U.S. 449, (1958).

²²⁷ Shelton v. Tucker, 364 U.S. 479 (1960).

decisions, and stout confidence in the strength of the democratic faith which we profess. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.²²⁸

Though unfolding over time, minimal standards of that process which was due process were written into the Constitution.

Article I, Section 9 of the Constitution declares that the writ of habeas corpus, designed to prevent arbitrary or unlawful arrest or detention, cannot be suspended except when required for public safety. The most definitive statement of when habeas corpus might be suspended occurred during the period of the Civil War. The Supreme Court declared in Ex parte Milligan that the President had gone beyond constitutional bounds in suspending the writ of habeas corpus

²²⁸ Justice Frankfurter, concurring, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162-63.

in areas not directly involved in the actual rebellion.²²⁹ The fact that this decision was made from the vantage point of 1866, after the war, may have had something to do with the outcome. In any case, this has been the precedent upon which the courts have relied.²³⁰ No really substantial threat to this right has occurred since the Civil War.

The right to a jury trial in criminal proceedings is specified in Article III, Section 2. The Sixth Amendment furthers this right by mandating that the jury be impartial and that the accused shall have a speedy and public trial. The Seventh Amendment extends the right to a jury to civil as well as criminal cases.

The Eighth Amendment suggests one has a right to bail in its command that "excessive bail shall not be required...." It also prohibits the imposition of cruel and unusual punishments. Much litigation has occurred over this provision, for how much bail is excessive is as subjective as the degree of punishment which is cruel and unusual. What may be judged reasonable in one day and age may take a different coloration with the passing of time. Thus, capital punishment, once completely accepted as proper retribution for certain crimes, has recently been subjected to careful judicial scrutiny on the ground that it constitutes a cruel and unusual punishment.²³¹ An extraordinary test of this provision occurred in 1947 when one Willie Francis, convicted of murder and sentenced to death, was placed in the electric chair. When the switch was pulled, he received a mild current, but because of some mechanical failure was not electrocuted. He argued that if a second electrocution were attempted, it would be a cruel and unusual punishment. The Court, though, did not agree, and held that the constitutional protection extended to the method of punishment (and electrocution was not a cruel method), not to a problem of applying the method. A strong dissent argued that this was of the very essence of a cruel and unusual punishment -- it constituted punishment by installments -- and that the Amendment was intended to protect how the punishment was administered to one convicted.²³²

The Sixth Amendment extends other guarantees to an accused which are designed to give ample opportunity to defend himself. It requires notice of the charges against him, confrontation with witnesses against him, compulsory process for obtaining witnesses on his behalf, and counsel. The importance of counsel has in recent years been stressed by the courts again and again. In a landmark case, Gideon v. Wainwright, the Court maintained "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."²³³ Since that decision in 1963, the right has been extended to the beginning of the confrontation between the police and the accused.

²²⁹ 4 Wallace 2 (1866). This case emanated from President Lincoln's decision to suspend the writ. When tested in court, Chief Justice Taney on circuit found against the President (Ex parte Merryman, 17 Fed. Cases 144 [No. 9487 C.C.D. Md. 1861], whereupon the President requested Congress to authorize the suspension, which it did).

²³⁰ The question arose during World War II whether martial law might be imposed in Hawaii. In Duncan v. Kahanamoku, 327 U.S. 304 (1946), the Court held that the circumstances did not warrant it.

²³¹ Furman v. Georgia, 408 U.S. 238 (1972).

²³² Louisiana ex. rel. Francis v. Resweber, 329 U.S. 459 (1947).

²³³ 372 U.S. 335, 344 (1963).

The Fifth Amendment contains several important protections against government encroachment during a criminal process. Its first clause, in order to protect the innocent from an ordeal of an unnecessary trial, guarantees the right to an indictment by grand jury. This means that probable cause must be found that a crime has in fact been committed before a trial may be had. The double jeopardy clause means that no retrial of the same offense may occur. However, the setting aside of an original guilty verdict based on procedural errors does not prevent the initiation of a second trial by the prosecution.²³⁴ The Fifth Amendment further prohibits compelled self-incrimination and makes the encompassing demand that due process of law be followed before a person may be deprived of life, liberty, or property.

The self-incrimination clause has in recent years been substantially expanded from initial determinations. It was initially designed to guard against the sort of "Star Chamber" proceedings that had occurred in England and from which many had fled in coming to the new land. In the Star Chamber a person was subjected to severe inquisition while given no formal charges or opportunity to defend himself. It was an accusatory, inquisitory method of resolving questions of wrongdoing, applied when the accused did not know enough of the charges that he could defend himself. The accused became in effect his own worst witness, for anything he said could be used against him. The Fifth Amendment sought to remedy this. By its initial interpretation an accused in a criminal case could not be forced by the prosecution to take the witness stand and answer questions.

The Court soon found that in the face of modern approaches to crime solving and law enforcement the scope of this protection needed to be widened to include more than proceedings which occur within an actual courtroom. In the landmark *Miranda* decision the Court maintained that "the [self-incrimination] privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chose to speak in an unfettered exercise of his own will."²³⁵ The Court further noted that "today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect all persons in all settings in which freedom of action is curtailed from being compelled to incriminate themselves."²³⁶ The Court then specified certain procedural safeguards to protect a suspect's self-incrimination right which the police would have to follow during in-custody interrogation. Soon known as the *Miranda* rules, inevitably carried on a card in each policeman's pocket, the police were obliged to recite them at time of arrest to an accused. They stipulate that the accused must be informed that he may remain silent, that if he chooses to speak it can and will be used against him, and that he has a right to counsel at every step of the process.

The right has been extended to matters not directly pertaining to criminal investigations. A section of a city charter was struck down as abridging the self-incrimination clause by providing that any city employee who invoked the privilege to avoid answering questions relating to his official conduct would have his employment terminated. A tenured member of the faculty of a city college who claimed Fifth Amendment protection against questioning by a congressional committee investigating subversive activity in education was discharged. The

234 Powell v. Alabama, 287 U.S. 45 (1932).

235 Miranda v. Arizona, 384 U.S. 436, 460 (1966).

236 Id., at 467.

Court did not agree with that action, holding that his exercising his constitutional right had been transformed “into a conclusive presumption of guilt,”²³⁷ precisely what the provision was designed to prevent.

In the same vein the Court held that a state judicial inquiry into allegations of professional misconduct lodged against a lawyer could not threaten him with disbarment unless he waived the privilege.²³⁸ And the Court concluded that the self-incrimination clause was infringed when policemen, under state investigation for suspected obstruction of the administration of traffic laws, were told they would lose their jobs if they refused to answer the questions put to them.²³⁹

While the issue of how far away from the witness stand in a criminal case the self-incrimination privilege may properly be applied has been under deliberation, another interesting problem has arisen. It centers on the extent to which the privilege encompasses more than verbal testimony. It is clear that compelled verbal communication is prohibited if it tends to incriminate, but is non-verbal communication similarly proscribed? Confronting the problem, the Court has differentiated between the compelling of a “confession” through tests and analyses which result in “communication” or “testimony” from an accused, and obliging an accused to be a source of real or physical evidence through fingerprinting, photographing, or measurement.²⁴⁰ Thus, a person may be compelled to provide a sample of his handwriting,²⁴¹ to speak,²⁴² or to exhibit his body for identification.²⁴³ At the same time the Court has noted that some tests seemingly directed at obtaining physical evidence might actually be aimed at extracting essentially testimonial responses from an individual. “To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to invoke the spirit and history of the Fifth Amendment.”²⁴⁴ It is on this reasoning that the use of a lie detector, not least its reliability, is judicially suspect.

The Fourth Amendment is the final constitutional provision protecting the individual in the criminal process. It prohibits unreasonable searches and seizures and is closely connected to the privilege against self-incrimination. Evidence illegally seized frequently is incriminating, or it probably would not have been seized in the first place. The Fourth Amendment protects property rights, the securing of individuals and their property from trespass unless there is probable cause of a crime. A warrant must be issued which describes carefully what is to be searched and/or seized. By this provision fishing expeditions, in which a place is thoroughly and generally searched and anything really or potentially damaging is seized, are prohibited. It applies:

237 Slochower v. Board of Higher Education, 350 U.S. 551 (1956).

238 Spovak v. Klein, 385 U.S. 511 (1967).

239 Garrity v. New Jersey, 386 U.S. 493 (1967).

240 Schmerber v. California, 384 U.S. 757 (1966).

241 Gilbert v. California, 388 U.S. 263 (1967), U.S. v. Wade, 380 U.S. 218 (1967).

242 United States v. Dioniso, 410 U.S. 1 (1973).

243 United States v. Vack, 388 U.S. 218 (1967).

244 Schmerber v. California, 384 U.S. at 764 (1966).

to all invasions on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitute the essence of the offense, but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense.... Any forcible and compulsory extortion of a man's own testimony or of his papers to be used as evidence to convict him of a crime or to forfeit his goods is within the condemnation of ... [the Fourth Amendment].²⁴⁵

The Fourth Amendment, like all others, was not created in a vacuum. It was based on the framers' experiences with governments which had little regard for a right of privacy. The framers had experienced the indignity of their privacy of person and possession's being invaded and trespassed by the actions of the King's forces in colonial America. They intended that their new government have no power to commit such travesties against individuals.

Most infringements of the guarantee have been made by law enforcement officials while investigating the extent of the protection. For example, in Chimel v. California the Court declared that a search by the police of the petitioner's entire three bedroom house incident to his arrest was too broad and general to be reasonable.²⁴⁶ In another case the police, believing that a suspect was hiding in a house, broke into it and searched the entire premises. Instead of finding the suspect, they found some lewd and lascivious publications, the possession of which they subsequently used as a basis for prosecuting the owner. The Court reversed her conviction and held the seized materials inadmissible. Applying the so-called exclusionary rule (evidence illegally seized may not be introduced at a trial), it concluded that such an exclusion was the most important judicial way to provide Fourth Amendment protection. It was the essential judicial method by which to protect the right of privacy guaranteed by it.²⁴⁷

The protection extends to persons as well as places²⁴⁸ and it is not limited to searches of a person or his property within his home. "This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs."²⁴⁹ However, when a policeman stopped and frisked two men whose behavior in looking over a store had appeared suspicious, though he found them carrying a concealed weapon, for which they were subsequently convicted, his search and seizure was found reasonable on grounds of officer safety.²⁵⁰ The taking of fingernail scrapings²⁵¹ and the use of electronic listening devices²⁵² have been held to fall within the ban of the Fourth

245 Boyd v. United States, 116 U.S. 616 (1886).

246 395 U.S. 752 (1969).

247 Mapp v. Ohio, 367 U.S. 643 (1961).

248 Katz v. United States, 389 U.S. 347 (1967).

249 Id., at 351.

250 Terry v. Ohio, 392 U.S. 1 (1968).

251 Capp v. Murphy, 412 U.S. 291 (1973).

252 Katz v. United States, 389 U.S. 347 (1967).

Amendment. Stomach pumpings²⁵³ and extracting blood samples, with or without the permission of the defendant,²⁵⁴ have invoked questions of the reasonableness of the search and seizure.

Even beyond the criminal process a person retains the protection. When a homeowner refused to permit a health inspector to enter and inspect her premises, the Court noted that “It is surely anomalous to say that the individual and his property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.”²⁵⁵

Coupling this Fourth Amendment protection of person and property with a number of other constitutional provisions suggests that the state must have a strong need to impair it to obtain court approval. The Fifth Amendment’s provisions that private property may not “be taken for public use without just compensation” and that a person may not “be deprived of life, liberty, or property, without due process of law” protect property rights against government infringement. Article I, Section 10 stipulates that “No state shall ... pass any ... law impairing the obligation of contracts” and the Third Amendment proscribes forced quartering of troops in homes. The sum of these, and other constitutional protection, provides significant protection of privacy from government intrusion. In combination beyond these specifically mentioned, the constitutional provisions provide more formal restraints on government and protections of civil rights than any other governmental system known to man.

Conclusion

The American system of government provides for a protection of individual rights that is unfamiliar to most forms of government. It reflects a profound respect for an individual who will reach his potential only with liberty and freedom. It is from the interplay between the exercise of rights by individuals and the regulation of that exercise by society and government that freedom in the United States has emerged. The boundaries of those freedoms are continually being changed, frequently in fundamental ways. As with a jeweler’s scale that never hangs in the balance, rights tend to be significantly more restricted in times of national stress such as war,²⁵⁶ and more liberalized in times of tranquility.²⁵⁷ If there is no threat directly

253 Rochin v. California, 342 U.S. 165 (1952).

254 Schmerber v. California, 384 U.S. 757 (1966).

255 Camara v. Municipal Court, 386 U.S. 523, 530 (1967).

256 For example, in Korematsu v. United States, 323 U.S. 214 (1944), the case that Justice Black described to a national television audience as the most difficult in which he had participated, the Court, 6-3, went to “the very brink of constitutional power” (Justice Murphy, dissenting) in upholding the Japanese exclusion program. That program, initiated in 1942 to meet possible espionage and sabotage on the West Coast during World War II, excluded all persons of Japanese ancestry from the Pacific coast area on the ground that the military had concluded that there might be some disloyal persons within the group and the exigencies of war prevented the military’s taking the time to sort the loyal from the disloyal by more conventional measures. Even with the benefit of hindsight in 1944 when the Court heard the case and when it was clear that the threat of invasion from Japan was minimal, if non-existent, and that Japanese citizens were not disloyal, the Court was able to conclude that:

...hardships are part of war, and war is an aggregation of hardships.***Citizenship has its responsibilities as well as its privileges and in time of war the burden is always heavier.

Compulsory exclusion of large groups of citizens from their homes, except under circumstances of

perceived to the public weal, the Court will not only protect, but also will expand individual rights. While in wartime citizens may be removed from their homes on grounds of national security, in peacetime even wiretaps may not be used “to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of government.”²⁵⁸

Those invested with the creation of the new American society clearly had a vision of human nature, the purpose of society, and the function of government that emphasized the importance of the individual. Freedom and liberty were essential to his fulfillment. Society as an extension of individual man into a group of men had as its principal obligation the task of facilitating man’s existence and survival while maintaining the integrity of his nature through guaranteeing his freedom. Through a system of government ruled by law, the framers sought to provide a stable, vital society that would secure better than individuals could the substance of human freedom.

Those who won our independence believed that the final end of the state was to make men free to develop their faculties: and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and a means. ...[T]hey knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government.²⁵⁹

Thus, our governmental system emphasizes individual liberties. It professes that what is best for the individual is best for society. It is a system premised on extraordinary faith in the worth of the individual.

direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

For a well-written account of this frightening episode in modern American history, see Grodzins, Morton, Americans Betrayed: Politics and the Japanese Evacuation (Chicago: The University of Chicago Press, 1949). For a more general discussion of how the Constitution contracts in time of war, see Corwin, Edward S., Total War and the Constitution (New York: Alfred A. Knopf, Inc., 1947).

²⁵⁷ An interesting comparison may be made between the Japanese exclusions during World War II and how the Court will otherwise protect the sanctity of the home. From 1866, when the Court in Boyd v. United States, 116 U.S. 616, held that the Fourth and Fifth Amendments “apply to all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life,” to 1961, when in Mapp v. Ohio, 367 U.S. 643, the Court concluded that freedom from unreasonable searches and seizures was within “the concept of ordered liberty” and protected against state encroachment, the trend has steadily been to further the concept of a right to privacy. Indeed, in 1967, the Court extended the privacy of words to a public telephone booth (Katz v. U.S., 389 U.S. 347) and in 1972 rejected unanimously the President’s assertion that he could authorize electronic surveillance without a warrant in domestic security cases (United States v. U.S. District Court, 407 U.S. 297).

²⁵⁸ United States v. U.S. District Court, 407 U.S. 297 (1972).

²⁵⁹ Justice Holmes, dissenting, Abrams v. United States, 250 U.S. 616, 630 (1919).

VI. Selected Precedent-Setting Cases

Reading Case Law²⁶⁰ R. Bruce Carroll

Given the power of judicial review, in the final analysis the Constitution is what the Court says it is. To be sure, the Court has "neither the sword nor the purse, only the power of judgment," but what a power it is. In exercising that power, the court has addressed the major issues of the nation and the other branches, sometimes with enthusiasm and sometimes with grumbling, have followed along. Some of the greatest cases in the history of the Nation are reported here, but first a word in order.

Article III specifies that the Court will hear cases and controversies and it is under that authority that the Court renders its decisions. Reading and understanding those decisions is easy after confronting the stiff hurdle of the language of the law. Certain elementary facts help the uninitiated.

First, a case is simply an incident in the process of judicial interpretation of the Constitution. It consists of the decision of the Court and the reasoning which is employed to support that decision. Sometimes the reasoning of a dissenting minority is appended, either because it is interesting in itself or because it expresses a point of view which may later become the opinion of the majority. A justice who joins in the result of the case, but disagrees with the reasoning of the majority, may state his views in a concurring opinion.

Each case was originally a simple controversy between private individuals or between individuals and the government (see the Constitution, III, 2). The controversy has its own setting, not only in law, but also in economics and politics. As a Federal manager, the entire background of the case, the practical as well as the constitutional issues which it raised, may be more important than the individual controversy or the language in which the decision is clothed. Read the decision with care, but also read it with imagination and understanding of these wider issues. Note the date when the case was decided and reconstruct the temper of those times and the nature of the problems which faced the nation. See how the particular case fits into the fabric

260 With thanks to Herman Pritchett.

of the particular period and, though it may not appear to make sense today, contemplate how it may have in fact reflected the times in which it was decided.

Above all, do not fall into the error of thinking that a case is a little piece of wisdom set apart, a tiny segment of a static pattern. Constitutional decisions are living things, having their origins in the practical controversies of men, and each one marks a change, sometimes subtle, sometimes abrupt, in the framework of American government. The process of change is carried forward by judges whose attitudes are shaped by the pattern of ideas and the economic forces which make up the background of our national life. Consider the "principles" which the case establishes and reflect upon their application in everyday realities.

Cases are cited in the following manner: names of the parties (the one bringing the case is always first, the defendant second) to the controversy, followed by the volume number of the

he page number at which the case beings, and the date of the decision. For example, the opinion of the Supreme Court in a Texas abortion prosecution is cited as Roe v. Wade 410 U. S. 113 (1973). Here the "410" denotes the volume number of the United States Supreme Court Reports (the official government publication), "Roe" and "Wade" are the parties to the dispute, "113" is the page number, and "(1973)" is the date of the case [two commercial houses also publish case law, cited either as S.Ct. or L.Ed./L.Ed. 2d, so that a complete Roe citation might read 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) all reporting the same case]. All Supreme Court cases may be found on the Net, keyword "United States Supreme Court Reports."

Certain information should be derived from each case: (1) what is being sought, otherwise called the character of the action; (2) the facts of the case; (3) the issues and the answers given; (4) the decision of the Court (usually "affirmed" or "reversed"); (5) the opinion(s) or reasons for the decision; (6) any dissenting or concurring opinion(s); and (7) your comments.

Marbury v. Madison, 1 Cranch 137 (1803)

Although judicial review is discussed approvingly in Federalist Paper 78, it is not expressly conferred in the Constitution. On several occasions prior to Marbury, the constitutionality of legislation was upheld by the Court, but here, for the first time, it was not.

Involving major conflict between the Federalist Chief Justice John Marshall and a cousin, Republican President Thomas Jefferson (whom Marshall viewed a draft dodger and held in low esteem), the issue centered on whether Jefferson was obliged to finalize several Federalist appointments to judicial positions. The outgoing Adams administration had failed at the last minute to deliver the commissions of office to the deserving Federalists they sought to provide jobs. Jefferson, assuming office, was not inclined to staffing the judiciary with Federalists and consequently declined to complete the appointment process. One of the disappointed office seekers then brought suit in the Supreme Court, asking the Court to order Jefferson to deliver the commission and in the process setting the stage for the most important decision in American jurisprudence.

The case can only accurately be read in the context of the political times. Marshall knew he could not force Jefferson to deliver the commissions and did not want to show the weakness of the judiciary by issuing a decree the Court could not enforce. In an extraordinary tour de force, Marshall proceeded to lecture Jefferson, finding that nominated William Marbury had been wronged, there was a remedy, and then concluding the Court could not provide the remedy because it did not have the power to hear the case. This was so because Section 13 of the Judiciary Act of 1789, giving the Court jurisdiction in this kind of case, was unconstitutional.

* * * * *

On Petition for Mandamus.

{William Marbury was among those named a justice of the peace for the District of Columbia at the very close of the Federalist Administration of President John Adams, during a rash of last minute judicial appointments in March 1801. The incoming Jefferson Administration chose to disregard those appointments for which formal commissions had not been delivered before the end of Adams' term. Marbury and some disappointed colleagues then appealed to the Supreme court asking it to compel Jefferson's Secretary of State Madison to deliver their commissions.

* * *

The...opinion of the Court was delivered by the Chief Justice {MARSHALL}:

Opinion of the Court.

... [T]he present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded.

* * *

In the order in which the court has viewed this subject, the following questions have been considered and decided:

- 1st. Has the applicant a right to the commission he demands?
- 2nd. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
- 3rd. If they do afford him a remedy, is it a mandamus issuing from this court?

First,... has the applicant a right to the commission he demands?

It is...decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state....

Mr. Marbury...since his commission was signed by the President and sealed by the Secretary of State, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second enquiry;.... If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

* * *

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

* * *

Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which entire confidence is place by our Constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy.

That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted....

It follows, then, that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act....

By the Constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy....

It is, then, the opinion of the court [that Marbury has a] right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

This depends on - 1st. The nature of the writ applied for, and, 2dly. The power of this court. 3dly. He is entitled to the remedy for which he applies.

* * *

1st. The nature of the writ....

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, 'to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined or at least supposes to be consonant to right and justice.' Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

These circumstances certainly concur in this case.

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1st. With respect to the officer to whom it would be directed. The intimate political relation, subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination; and it is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court.

But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet, it respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject, over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim; or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress and the general principles of law?

If one of the heads of departments commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right to be done to an injured individual, than if the same services were to be performed by a person not the head of a department....

This, then, is a plain case of a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court 'to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.'

The secretary of state, being a person, holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The Constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that 'the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction.'

It has been insisted at the bar, that as the original grant of jurisdiction to the supreme and inferior courts is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the Constitution has declared their jurisdiction shall be original; and original jurisdiction where the Constitution has declared it shall be appellate; the distribution of jurisdiction made in the Constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the Constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it.

* * *

The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to

be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.

This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution: if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do

what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions--a written constitution, would of itself be sufficient, in America where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the Constitution which serve to illustrate this subject. It is declared that 'no tax or duty shall be laid on articles exported from any state.' Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law.

The Constitution declares that 'no bill of attainder or ex post facto law shall be passed.'

If, however, such a bill should be passed and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve?

"No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these and many other selections which might be made, it is apparent, that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: 'I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as--according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States.'

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government? If it is closed upon him and cannot be inspected by him.

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

McCulloch v. Maryland, 4 Wheat. 316 (1819)

One of the great Marshall decisions, McCulloch raised the question of whether the Constitution includes implied powers or whether Federal power is restricted to the express grants stipulated in it. At issue was the Congressional creation of the Bank of the United States, a power not explicit in the Constitution. Marshall's answer is among the classic statements about the living Constitution, one that is intended to endure for the ages and to be adapted to the needs of the day, not one to be placed in a straightjacket by narrow interpretation of its terms.

Federalism is also under judicial scrutiny, for the specific issue was whether Maryland could tax the national bank, which led Marshall to discussion of Federal-State relations. He concluded that the power to tax includes the power to destroy: therefore, Maryland could not levy the tax. Marshall's opinion stands to this day as the classic statement on American federalism.

* * * * *

[Congress chartered the Second Bank of the United States in 1816. The Bank soon established branches in many states. Its branch in Baltimore quickly became the most active of all. In April 1818, the Maryland legislature adopted "An Act to impose a Tax on all Banks or Branches thereof in the State of Maryland, not chartered by the Legislature." The law provided that any banks operating in Maryland "without authority from the State" could issue bank notes only on stamped paper furnished by the State upon payment of a fee varying with the denomination of each note; but any bank subject to that requirement could "relieve itself" from it "by paying annually, in advance, . . . the sum of fifteen thousand dollars." The statute also provided for penalties for violators: for example, the president, cashier and all other officers of the bank were to "forfeit" five hundred dollars "for each and every offense." The penalties were enforceable by indictment or by "action of debt, in the County Court," "one half to the informer, and the other half to the use of the State."

[This action for the statutory penalty was brought in the County Court of Baltimore County by one John James, suing for himself and the State, against James McCulloch, the Cashier of the Baltimore branch of the Bank of the United States. It was admitted that the Bank was doing business without authority from the State and that McCulloch had issued bank notes without complying with the Maryland law. The case was decided against McCulloch on the

basis of the agreed statement of facts, and the decision was affirmed by the Maryland Court of Appeals. From there, the case was taken by writ of error to the Supreme Court.]

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

In the case now to be determined, the defendant, a sovereign State, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State.... The conflicting powers of the government of the Union and of its members...are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty.

The first question ... is, has Congress power to incorporate a bank?

* * *

The power now contested was exercised by the first Congress elected under the present Constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance.

* * *

The government of the Union... is emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, {is} now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise, as long as our system shall exist.

The government of the United States, [though] limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described.

* * *

Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulp of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the Constitution to be

preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction, (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means?

* * *

But the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

* * *

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive should be understood in a more mitigated sense...which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary,

absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This comment on the word is well illustrated by the passage cited at the bar, from the 10th section of the first article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "Imposts, or duties on imports or exports except what may be *absolutely* necessary for executing its inspection laws, with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying Into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it.

* * *

In ascertaining the sense in which the word "necessary" is used in this clause of the constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and *proper* to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the Convention, as manifested in the whole clause. To waste time and argument in proving that, without it, Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun.

* * *

We think so for the following reasons:

- 1st. The clause is placed among the powers of congress, not among the limitations on those powers.

- 2nd. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted..... Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

* * *

But, were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

* * *

After the most deliberate consideration, it is the unanimous and decided opinion of this Court, that the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional... The great duties of the bank are prescribed; those duties require branches; and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the Court, that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire whether the State of Maryland may, without violating the Constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the Constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded, if it may restrain a State from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a State from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

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...The Constitution and the laws made in pursuance thereof are supreme; ... they control the Constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. that a power to create implies a power to preserve. 2nd. that a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. that where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme....

That the power of taxing [the bank] by the States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by, the Constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the Constitution.

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We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States is unconstitutional and void.

This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional. {Reversed}.

Gibbons v. Ogden, 9 Wheat. 1 (1824)

In this case Chief Justice Marshall established a very expansive view of the commerce the Congress might regulate under Article 1, sec. 8, cl.3, on the basis of which much of the post-1930's expansion of the Federal government occurred. At issue was whether the State of New York could require a steamboat licensed in New Jersey to pay a tax for the privilege of operating in New York. Did this constitute a state regulation of commerce among the states? In the first detailed construction of the commerce clause, Marshall thought that it did and in the process established the "effect on commerce" doctrine used to this day to regulate commerce.

* * * * *

[The New York legislature granted to Robert Livingston and Robert Fulton the exclusive right to operate steamboats in New York waters. In turn, they gave, Aaron Ogden monopoly rights to operate steamboats between New York and New Jersey. Thomas Gibbons, a former partner of Ogden, began operating two steamboats between New York and Elizabethtown, New Jersey, in violation of Ogden's monopoly. Gibbons' boats were enrolled and licensed as "vessels employed in the coasting trade" under a federal law of 1793. Ogden obtained an injunction ordering Gibbons to stop operating his ferries in New York waters. The highest New York court affirmed. On appeal, the Supreme Court reversed. Only a part of Chief Justice Marshall's opinion sustaining Gibbons' appeal and discussing the national commerce power is reproduced below.]

Mr. Chief Justice MARSHALL delivered the opinion of the Court....

The {Constitution} contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they be so construed? Is there one sentence in the Constitution which gives countenance to this role? ... What do gentlemen mean, by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistence with the general views and objectives of the instrument; for that narrow construction, which would cripple the government, and render it

unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded... If, from the imperfection of human language, there should be serious doubt respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction...

The words are, "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The subject to be regulated is commerce and to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and, has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense; because all have understood it in that sense, and the attempt to restrict it comes too late.

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes."

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied, is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to things not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere,

for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State....

We are now arrived at the inquiry -What is the power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that for example of declaring war the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

This principle is, if possible, still more clear, when applied to commerce “among the several States.” They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie between them. What is commerce “among” them; and how is it to be conducted? Can a trading expedition between two adjoining States, commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a State. The power of Congress,

then, whatever it may be, must be exercised within the territorial jurisdiction of the several States....

The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with “commerce with foreign nations, or among the several States, or with the Indian tribes.” It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies....

[The Court then held that the Federal law took precedence over Ogden’s monopoly claim under New York law and that Gibbons properly was licensed to engage in coastal trade.]

Champion v. Ames, 188 U.S. 321 (1903)

Illustrative of how the commerce clause may be used to regulate an activity which may appear to be intrastate in character, the case raises the issue of whether the Federal government in enacting the Lottery Act of 1895 was infringing on the state police power under the Tenth Amendment. The Court, moving toward the virtual elimination of the distinction between intrastate and interstate commerce, was clear that the Act was an appropriate exercise of Congressional authority.

* * * * *

[Appellant was arrested in Chicago to assure his appearance in a federal court in Texas, where he had been indicted for conspiracy to violate the Federal Lottery Act of 1895. The law prohibited importing, mailing, or transporting "from one State to another in the United States " any "ticket, chance, share or interest in or dependent upon the event of a lottery . . . offering prizes dependent upon lot or chance." The indictment charged shipment by Wells Fargo Express, from "Texas to California, of a box containing Paraguayan lottery tickets. Appellant challenged the constitutionality of the Act by seeking release on habeas corpus in Chicago. The Circuit Court dismissed the writ.]

Mr. Justice HARLAN delivered the opinion of the Court.

We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States.

But it is said that the statute in question does not regulate the carrying of lottery tickets from State to State, but by punishing those who cause them to be so carried Congress in effect prohibits such carrying; that in respect of the carrying from one State to another of articles or things that are, in fact, or according to usage in business, the subjects of commerce, the authority given Congress was not to *prohibit*, but only to *regulate*.

* * *

Are we prepared to say that a provision which is, in effect, a *prohibition* of the carriage of such articles from State to State is not a fit or appropriate mode for the *regulation* of that particular kind of commerce? If lottery traffic, *carried on through interstate commerce*, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the States, and under the power to regulate interstate commerce, devise such means within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the States?

In determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of May 2, 1895, to suppress cannot be overlooked. When enacting that statute Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this court. In Phalen v. Virginia, 8 How. 163, 168, after observing that the suppression of nuisances injurious to public health or morality is among the most important duties of Government, this court said: "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple."

* * *

If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. {S}urely it will not be said to be a part of any one's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals.

* * *

Congress [does] not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any State, but has in view only commerce of that kind among the several States. It has not assumed to interfere with the completely internal affairs of any State, and has only legislated in respect of a matter which concerns the people of the United States. As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the "widespread pestilence of lotteries" and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States-perhaps all of them-which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end.

It is said, however, that if, in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce, that principle leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the States any article, commodity or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one State to another. It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the States. [T]he possible abuse of a power is not an argument against its existence.

Wickard v. Filburn, 317 U.S. 111 (1942)

In one of its most expansive interpretations of the reach of the commerce clause, the Court held that Congress under the Agricultural Adjustment Act of 1938 could limit the production of wheat that was entirely destined for domestic consumption. None was to be shipped in commerce among the states and none was imported as seed for planting, but the Federal government nevertheless had the authority to regulate the wheat product.

* * * * *

{ Filburn, a farmer in Ohio, sued Wickard, the Secretary of Agriculture, to enjoin enforcement of a marketing penalty imposed under the Agricultural Adjustment Act of 1938 “upon that part of his 1941 wheat crop which was available for market in excess of the market quota established for his farm.” He attacked the marketing quota provisions of the Act as beyond the commerce power. The lower court enjoined enforcement on other grounds, and Secretary Wickard appealed. }

Mr. Justice JACKSON delivered the opinion of the Court.....

The appellee for many years past has owned and operated a small farm in Montgomery County, Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. It has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding.

* * *

In July of 1940, pursuant to the Agricultural Adjustment Act of 1938, as then amended, there were established for the appellee's 1941 crop a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. He was given notice of such allotment in July of 1940 before the Fall planting of his 1941 crop of wheat, and again in July of 1941, before it was harvested. He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239 bushels, which under the terms of the Act as amended on May 26, 1941, constituted farm marketing excess, subject to a penalty of 49 cents a bushel, or \$117.11 in all. The appellee has

not paid the penalty and he has not postponed or avoided it by storing the excess under regulations of the Secretary of Agriculture, or by delivering it up to the Secretary.

* * *

The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce.

It is urged that under the Commerce Clause of the Constitution, Article I, 8, clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration since our decision in United States v. Darby, except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm.

* * *

The sum of this is that the Federal Government fixes a quota including all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty or except it is stored as required by the Act

Appellee says that this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of Congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are at most 'indirect.' In answer the Government argues that the statute regulates neither production nor consumption, but only marketing; and, in the alternative, that if the Act does go beyond the regulation of marketing it is sustainable as a 'necessary and proper' implementation of the power of Congress over interstate commerce.

The Government's concern lest the Act be held to be a regulation of production or consumption rather than of marketing is attributable to a few dicta and decisions of this Court which might be understood to lay it down that activities such as 'production,' 'manufacturing,' and 'mining' are strictly 'local' and, except in special circumstances which are not present here, cannot be regulated under the commerce power because their effects upon interstate commerce are, as matter of law, only 'indirect.' Even today, when this power has been held to have great latitude, there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof. We believe that a review of the course of decision under the Commerce Clause will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect'

and foreclose consideration of the actual effects of the activity in question upon interstate commerce.

* * *

The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause ... has made the mechanical application of legal formulas no longer feasible. Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be 'production' nor can consideration of its economic effects be foreclosed by calling them 'indirect.'

* * *

Whether the subject of the regulation in question was 'production,' 'consumption,' or 'marketing' is, therefore, not material for purposes of deciding the question of federal power before us.

* * *

But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'

* * *

The wheat industry has been a problem industry for some years. Largely as a result of increased foreign production and import restrictions, annual exports of wheat and flour from the United States during the ten-year period ending in 1940 averaged less than 10 per cent of total production, while during the 1920's they averaged more than 25 per cent. The decline in the export trade has left a large surplus in production which in connection with an abnormally large supply of wheat and other grains in recent years caused congestion in a number of markets; tied up railroad cars; and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion.

* * *

In the absence of regulation the price of wheat in the United States would be much affected by world conditions. During 1941 producers who cooperated with the Agricultural

Adjustment program received an average price on the farm of about \$1.16 a bushel as compared with the world market price of 40 cents a bushel.

* * * The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such [home-grown] wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices

Reversed.

Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964)

The Civil Rights Act of 1964 is one of the most important legislative accomplishments of the Twentieth Century, yet it came only after great controversy. Congress, finally ready to address problems of race relations in the nation, found Constitutional authority to prohibit racial discrimination in places of public accommodation in both the Fourteenth Amendment (Section V and the Equal Protection clause) and Article I's commerce clause.

The Heart of Atlanta Motel, arguing that at root it was an intrastate business and therefore beyond the reach of the Civil Rights Act, attacked its constitutionality. Though a majority of its clients came from out-of-state and though it advertised nationally, it argued that the Federal government lacked authority to require it to be non-discriminatory in its admissions policies.

Relying only on the commerce clause and taking it a step further, the Court disagreed. Defining commerce as that which concerns more than one State and has a substantial relation to the national interest, the Court legitimized the Federal government's move into the arena of race relations in places of public accommodation.

* * * * *

Justice Clark delivered the opinion of the Court.

This is a declaratory judgment action...attacking the constitutionality of Title II of the Civil Rights Act of 1964.... Appellant owns and operates the Heart of Atlanta Motel which has 216 rooms available to transient guests. The motel is located on Courtland Street, two blocks from downtown Peachtree Street. It is readily accessible to interstate highways 75 and 85 and state highways 23 and 41. Appellant solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation; it maintains over 50 billboards and highway signs within the State, soliciting patronage for the motel; it accepts convention trade from outside Georgia and approximately 75% of its registered guests are from out of State. Prior to passage of the Act the motel had followed a practice of refusing to rent rooms to Negroes, and it alleged that it intended to continue to do so. In an effort to perpetuate that policy this suit was filed.

It is admitted that the operation of the motel brings it within the provisions of §§ 201 (a) of the Act and that appellant refused to provide lodging for transient Negroes because of their race or color and that it intends to continue that policy unless restrained.

The sole question posed is, therefore, the constitutionality of the Civil Rights Act of 1964 as applied to these facts. The legislative history of the Act indicates that Congress based the Act on §§ 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, §§ 8, cl. 3, of the Constitution.

The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." At the same time, however, it noted that such an objective has been and could be readily achieved "by congressional action based on the commerce power of the Constitution." S. Rep. No. 872, supra, at 16-17. Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone. Nor is §§ 201 (d) or §§ 202, having to do with state action, involved here and we do not pass upon either of those sections....

While the Act as adopted carried no congressional findings, the record ... is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce This testimony included the fact that our people have become increasingly mobile with millions of people of all races traveling from State to State; that Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight...; and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself "dramatic testimony to the difficulties" Negroes encounter in travel.... These exclusionary practices were found to be nationwide, the Under Secretary of Commerce testifying that there is "no question that this discrimination in the North still exists to a large degree" and in the West and Midwest as well.... This testimony indicated a qualitative as well as quantitative effect on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community. We shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.

The power of Congress to deal with these obstructions depends on the meaning of the Commerce Clause. [T]he determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is "commerce which concerns more States than one" and has a real and substantial relation to the national interest....

The same interest in protecting interstate commerce which led Congress to deal with segregation in interstate carriers and the white-slave traffic has prompted it to extend the exercise of its power to gambling; to criminal enterprises; to deceptive practices in the sale of products;

to fraudulent security transactions; to misbranding of drugs; to wages and hours; to members of labor unions; to crop control; to discrimination against shippers; to the protection of small business from injurious price cutting; to resale price maintenance; to professional football; and to racial discrimination by owners and managers of terminal restaurants.

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, "if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Mfrs. Assn.*, 336 U.S. 460, 464 (1949).

* * *

Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may -- as it has -- prohibit racial discrimination by motels serving travelers, however "local" their operations may appear.

We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years.

Affirmed.

Missouri v. Holland, 252 U.S. 416 (1920)

Missouri sought to regulate migratory birds when they were within its borders in the face of a treaty between the United States and Great Britain which sought to protect the birds in their flight from Canada to the south. Federal enforcement of the treaty conflicted with the State claim under the Tenth Amendment, leaving the resolution to the Supreme Court. See, too, Martin v. Hunter, 1 Wheat 314 (1816).

* * * * *

Mr. Justice HOLMES delivered the opinion of the court.

This is a bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of July 3, 1918.... The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment. A motion to dismiss was sustained by the District Court on the ground that the Act of Congress is constitutional.

On December 8, 1916, a treaty between the United States and Great Britain was proclaimed by the President. It recited that many species of birds in their annual migrations traversed many parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. It therefore provided for specified closed seasons and protection in other forms, and agreed that the two powers would take or propose to their lawmaking bodies the necessary measures for carrying the treaty out. The act of July 3, 1918, entitled an act to give effect to the convention, prohibited the killing, capturing or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations compatible with those terms, to be made by the Secretary of Agriculture. [T]he question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States.

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article 2, Section 2, the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do.

* * *

Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-- making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found.

* * *

We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.

* * *

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld.

Decree affirmed.

Dred Scott v. Sanford, 15 How. 393 (1857)

This is the first case after Marbury v. Madison in which the Court struck down legislation on grounds of unconstitutionality. The Court held that Congress had exceeded its Constitutional authority in enacting the Northwest Ordinance which banned slavery within the territory ceded to the United States by France under the name of Louisiana. Chief Justice Taney for the Court wrote one of the most controversial opinions in its history, in the process writing blacks from the rights and privileges of the Constitution and providing one of the precipitants to the Civil War. Under this ruling, a Negro could not be a citizen within the meaning of the Constitution and therefore had no Constitutional rights. Taney, an otherwise distinguished jurist, found his reputation ruined by this opinion.

* * * * *

Mr. Chief Justice TANEY delivered the opinion of the court.

* * *

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

* * *

It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves.

* * *

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endue him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court thinks the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

* * *

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognised as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

* * *

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

* * *

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.

* * *

.....upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous.

* * *

[Had Dred Scott become free by living in a free state or territory? Was Congress empowered to pass legislation to exclude slavery from certain lands?]

In considering this part of the controversy, two questions arise: 1. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States hereinbefore mentioned? And 2. If they were not, is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, as stated in the above admissions?

We proceed to examine the first question.

The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the difficulty which meets us at the threshold of this part of the inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under the have of any one of the States.

The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers on Congress the power 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;' but, in the judgment of the court, that provision has no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States, and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign Government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more.

* * *

The language used in the clause, the arrangement and combination of the powers, and the somewhat unusual phraseology it uses, when it speaks of the political power to be exercised in the government of the territory, all indicate the design and meaning of the clause to be such as we have mentioned. It does not speak of any territory, nor of *Territories*, but uses language which, according to its legitimate meaning, points to a particular thing. The power is given in relation only to the territory of the United States - that is, to a territory then in existence, and then known or claimed as the territory of the United States.

Now, as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to

traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words-too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.

Schenck v. United States, 249 U.S. 47 (1919)

Mr. Schenck was alleged to have distributed over 15,000 leaflets objecting to the draft during World War I. A Socialist, Mr. Schenck was arrested and indicted for violating the Espionage Act of 1917 by obstructing recruitment, by wrongly using the mails to distribute the product, and by advocating insubordination by military personnel. Convicted on all three counts, he appealed to the Court, arguing that the Act violated his First Amendment rights to freedom of speech and press.

The First Amendment appears to prohibit any Congressional regulation of speech and press (“Congress shall make no law...), but the Court, Justice Holmes, formulated a new test of when the Congress could in fact impose restrictions. This is the case in which the “clear and present danger” test was created. See, too, Gitlow v. New York, 268 U.S. 652 (1925), Holmes dissenting.

* * * * *

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment in three counts. The first charges a conspiracy to violate the Espionage Act of June 15, 1917, c. 30, §§ 3, 40 Stat. 217, 219, by causing and attempting to cause insubordination in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire ... by printing and circulating to men who had been called and accepted for military service under the Act of May 18, 1917, a document set forth and alleged to be calculated to cause such insubordination and obstruction.

* * *

The second count alleges a conspiracy to commit an offence against the United States, to-wit, to use the mails for the transmission of matter declared to be nonmailable by Title XII, §§ 2 of the Act of June 15, 1917, to-wit, the above mentioned document The third count charges an unlawful use of the mails for the transmission of the same matter and otherwise as above. The defendants were found guilty on all the counts. They set up the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech, or of the press, and bringing the case here on that ground have argued some other points also of which we must dispose.

* * *

Schenck ... was general secretary of the Socialist party, and had charge of the Socialist headquarters from which the documents were sent. He identified a book found there as the minutes of the Executive Committee of the party. The book showed a resolution of August 13, 1917, that 15,000 leaflets should be printed on the other side of one of them in use, to be mailed to men who had passed exemption boards, and for distribution. Schenck personally attended to the printing. On August 20, the general secretary's report said "obtained new leaflets from printer and started work addressing envelopes" &c., and there was a resolve that Comrade Schenck be allowed \$125 for sending leaflets through the mail. He said that he had about fifteen or sixteen thousand printed. There were files of the circular in question in the inner office which he said were printed on the other side of the one sided circular, and were there for distribution. Other copies were proved to have been sent through the mails to drafted men. Without going into confirmatory details that were proved, no reasonable man could doubt that the defendant Schenck was largely instrumental in sending the circulars about....

The document in question, upon its first printed side, recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act, and that a conscript is little better than a convict. In impassioned language, it intimated that conscription was despotism in its worst form, and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said "Do not submit to intimidation," but in form, at least, confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that anyone violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain." It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, &c., &c., winding up, "You must do your share to maintain, support and uphold the rights of the people of this country." Of course, the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose We admit that, in many places and in ordinary times, the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done ... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre

and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force ... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right.

Griswold v. Connecticut, 381 U.S. 479 (1965)

Connecticut law prohibited the provision of advice on the use and the actual use of contraceptives. The Executive Officer and a staff physician of a planned parenthood league office in New Haven gave information, instruction, and medical advice to a married couple on contraception and were charged with and found guilty of violating the law.

The case provided the Court an opportunity to examine the question of whether privacy exists as a Constitutional right and whether a state might regulate doctor-client and husband-wife relationships. It is the basis for one of the most contentious issues of contemporary times, legalized abortion.

* * * * *

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School, who served as Medical Director for the League at its Center in New Haven - a center open and operating from November 1 to November 10, 1961, when appellants were arrested.

They gave information, instructions, and medical advice to *married persons* as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free.

The statutes whose constitutionality is involved ... are Sections 53-32 and 54-196 of the General Statutes of Connecticut (1958 rev.). The former provides: "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

Section 54-196 provides: "Any person who assists, abets, counsels, causes, hires, or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

The appellants were found guilty as accessories and fined \$100 each.

* * *

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York*, 198 U.S. 45, should be our guide. But we decline that invitation We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice - whether public or private - or parochial is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By *Pierce v. Society of Sisters*, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska*, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge

In *NAACP v. Alabama*, 357 U.S. 449, 462, we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid "as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." *Ibid.* In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members.

Those cases involved more than the "right of assembly" - a right that extends to all irrespective of their race or ideology. The right of "association," like the right of belief is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra

of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

* * *

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights, older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Reversed.

United States v. Nixon, 418 U.S. 683 (1974)

The so-called Watergate tapes case raised the issue of the Court's authority to oblige the President to disclose the contents of conversations with subordinates which he secretly taped in the privacy of his office. The President resisted on grounds of executive privilege. It illustrates judicial review and the system of separation of powers in practice.

* * * * *

Mr. Chief Justice BURGER delivered the opinion of the Court.

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment charging seven named individuals²⁶¹ with various offenses, including conspiracy to defraud the United States and obstruct justice. Although he was not designated as such in the indictment, the grand jury named the President, among others, as an unindicted coconspirator. On April 18, 1974, upon motion of the Special Prosecutor, a subpoena *duces tecum* was issued... to the President by the United States District Court and made returnable on May 2, 1974. This subpoena required the production, in advance of the September 9 trial date, of certain tapes, memoranda, papers, transcripts, or other writings relating to certain precisely identified meetings between the President and others. The Special Prosecutor was able to fix the time, place, and persons present at these discussions because the White House daily logs and appointment records had been delivered to him. On April 30, the President publicly released edited transcripts of 43 conversations; portions of 20 conversations subject to subpoena in the present case were included. On May 1, 1974, the President's counsel filed a "special appearance" and a motion to quash the subpoena under Rule 17 (c). This motion was accompanied by a formal claim of privilege....

On May 20, 1974, the District Court denied the motion to quash. [It] further ordered "the President or any subordinate officer, official, or employee with custody or control of the documents or objects subpoenaed" to deliver to the District Court, on or before May 31, 1974, the originals of all subpoenaed items, as well as an index and analysis of those items, together with tape copies of those portions of the subpoenaed recordings for which transcripts had been released to the public by the President on April 30. The District Court rejected [the] contention that the judiciary was without authority to review an assertion of executive privilege by the President.

The District Court held that the judiciary, not the President, was the final arbiter of a claim of executive privilege. The court concluded that, under the circumstances of this case, the

²⁶¹ The seven defendants were John N. Mitchell, H.R. Haldeman, John D. Ehrlichman, Charles W. Colson, Robert C. Mardian, Kenneth W. Parkinson, and Gordon Strachan. Each had occupied either a positional of responsibility on the White House staff or a position with the Committee for the Re-election of the President. Colson entered a guilty plea on another charge and is no longer a defendant. [Footnote by the Court.]

presumptive privilege was overcome by the Special Prosecutor's prima facie "demonstration of need sufficiently compelling to warrant judicial examination in chambers."

* * *

The case was set for argument on July 8, 1974.²⁶²

A

{We} turn to the claim that the subpoena should be quashed because it demands "confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce." The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President's claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena duces tecum .

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of {Marbury v. Madison} that "is emphatically the province and duty of the judicial department to say what the law is."

No holding of the Court has defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential Presidential communications for use in a criminal prosecution, but other exercises of power by the Executive Branch and the Legislative Branch have been found invalid as in conflict with the Constitution. In a series of cases, the Court interpreted the explicit immunity conferred by express provisions of the Constitution on Members of the House and Senate by the Speech or Debate Clause. Since this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has authority to interpret claims with respect to powers alleged to derive from enumerated powers.

Our system of government "requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch."

²⁶² This case was decided on July 24, 1974. Before the decision in the case, the President and his representatives had left it unclear whether he would obey an adverse Court decision. In the oral argument before the Supreme Court, for example, Presidential Counsel St. Clair had emphasized that the President "has his obligations under the Constitution." But eight hours after the Court decision was announced, President Nixon's office issued a statement reporting that he would comply. Among the 64 tape recordings to be turned over to Judge Sirica as a result of the decision was a particularly damaging one of the conversations on June 23, 1972, six days after the Watergate burglary. On August 5, President Nixon released transcripts of those conversations. On August 8, President Nixon announced that he would resign on the next day.

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"Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."

Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, §§ 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. [The Federalist, No. 47.] We therefore reaffirm that it is the province and duty of this Court "to say what the law is" with respect to the claim of privilege presented in this case....

B

In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process.²⁶³ Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of

constitutional duties. Certain powers and privileges flow from the nature of enumerated powers;²⁶⁴ the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

²⁶³ There is nothing novel about government confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy. Moreover, all records of those meetings were sealed for more than 30 years after the Convention. Most of the Framers acknowledged that without secrecy no constitution of the kind that was developed could have been written.

²⁶⁴ The Special Prosecutor argues that there is no provision in the Constitution for a presidential privilege as to his communications corresponding to the privilege of Members of

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications.

However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence....To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.

C

Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the Judiciary from according high respect to the representations made on behalf of the President.

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a

Congress under the Speech or Debate Clause. But the silence of the Constitution on this score is not dispositive. "The rule of constitutional interpretation announced in *McCulloch v. Maryland* that that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it.

way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution. In *Nixon v. Sirica*, 487 F.2d 700 (1973), the Court of Appeals held that such Presidential communications are “presumptively privileged,” and this position is accepted by both parties in the present litigation....

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that “the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.” We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

* * *

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.

No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality....

In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice.²⁶⁵ The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of

²⁶⁵ We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, not with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality against the constitutional need for relevant evidence in criminal trials.

law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice....

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

Affirmed.

Barron v. Baltimore, 7 Pet. 243 (1833)

In order to build roads, the City of Baltimore diverted certain streams which had the effect of leaving Barron's wharf high and dry. He sued for recovery under the Fifth Amendment, claiming this was a taking without just compensation. At issue was whether the Fifth Amendment applied to the city (and the state), for if it did not, Barron would have no claim. Marshall for the Court held that it did not, in effect holding that the Bill of Rights restrained only the Federal Government, not the States. See Gitlow v. New York, 268 U.S. 652 (1925) and Mapp v. Ohio, 367 U.S. 643 (1961).

* * * * *

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

* * *

The question [is] ... of great importance, but not of much difficulty. The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated: The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes....

If these propositions be correct, the fifth amendment must be understood as restraining the power of the General Government, not as applicable to the States. In their several Constitutions, they have imposed such restrictions on their respective governments, as their own wisdom suggested, such as they deemed most proper for themselves....

The ninth section [of Art. 1] having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the General Government, the tenth proceeds

to enumerate those which were to operate on the State legislatures. These restrictions are brought together in the same section, and are by express words applied to the States. "No State shall enter into any treaty," &c. Perceiving, that in a constitution framed by the people of the United States, for the government of all, no limitation of the action of government on the people would apply to the State government, unless expressed in terms, the restrictions contained in the tenth section are in direct words so applied to the States....

If the original Constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the General Government and on those of the State; if, in every inhibition intended to act on State power, words are employed which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments before that departure can be assumed.

We search in vain for that reason.

* * *

But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the General Government -- not against those of the local governments.

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress and adopted by the States. These amendments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them.

We are of opinion that the provision in the Fifth Amendment to the Constitution declaring that private property shall not be taken for public use without just compensation is intended solely as a limitation on the exercise of power by the Government of the United States, and is not applicable to the legislation of the States. We are therefore of opinion that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by

the defendants at the trial of this cause, in the court of that State, and the Constitution of the United States.

* * *

Mapp v. Ohio, 367 U.S. 643 (1961)

Freed from the constraint of the Fourth Amendment by Barron v. Baltimore, Cleveland police, believing Mrs. Mapp was harboring a fugitive, entered her home and searched it without a warrant. They did not find a fugitive, but did find some lewd and lascivious books, pictures, and photographs, the possession of which violated Ohio law. She was arrested and successfully prosecuted in State courts.

At issue is whether the seized materials on the basis of which she convicted should be admissible in a state prosecution. Interpreting the due process clause of the Fourteenth Amendment as including protection from an illegal search and seizure, the Court incorporated the Fourth Amendment search and seizure protection into it. See, too, Gideon v. Wainwright, 372 U.S. 335 (1963), Malloy v. Hogan, 378 U.S. 1 (1964), Benton v. Maryland, 395 U.S. 784 (1969), Pointer v. Texas, 380 U.S. 400 (1965), et. al, Duncan v. Louisiana, 391 U.S.145 (1968).

* * * * *

Mr. Justice CLARK delivered the opinion of the Court.

Appellant stands convicted of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs [in violation of Ohio law]. [T]he Supreme Court of Ohio found that her conviction was valid though based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant's home.

* * *

The State says that even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial, citing Wolf v. Colorado. [I]t is urged once again that we review that holding.

* * *

The Court in Wolf first stated that “{t}he contrariety of views of the States” on the adoption of the exclusionary rule of Weeks was “particularly impressive.” While in 1949, prior to the Wolf case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the Wolf case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the Weeks rule.

* * *

[T]he second basis elaborated in Wolf {was} that “other means of protection” have been afforded “the right to privacy.”

* * *

The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States.

Likewise, time has set its face against what Wolf called the “weighty testimony” of People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926). There Justice (then Judge) Cardozo, rejecting adoption of the Weeks exclusionary rule in New York, had said that “{t}he Federal rule as it stands is either too strict or too lax.” However, the force of that reasoning has been largely vitiated by later decisions of this Court.

* * *

Today we once again examine Wolf’s constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very

same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, [the] freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."

* * *

In extending the substantive protections of due process to all constitutionally unreasonable searches - state or federal - it was logically and constitutionally necessary that the exclusion doctrine - an essential part of the right to privacy - be also insisted upon as an essential ingredient of the right newly recognized by the Wolf case. In short, the admission of the new constitutional right by Wolf could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.

* * *

[Our holding is] not only the logical dictate of prior cases, but it also makes very good sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. [Under] the double standard recognized until today, [in] non-exclusionary States, federal officers, being human, were by it invited to and did, as our cases indicate, step across the street to the State's attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated.

There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." People v. Defore, 242 N. Y., at 21, 150 N. E., at 587. In some cases this will

undoubtedly be the result. But, as [has been said], “there is another consideration-the imperative of judicial integrity.”

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States,... we can no longer permit that right to remain an empty promise....

Reversed and remanded.

Brown v. Board of Education, 347 U.S. 483 (1954)

Confronting segregated schools based on its separate but equal ruling in Plessy v. Ferguson (1896), the Court unanimously found that separate schools are inherently unequal under the Fourteenth Amendment's Equal Protection clause and ordered the integration of the Nation's schools. Among the most important decisions of the Twentieth Century, the decision signaled the commitment of the Federal government to addressing race relations in the Nation.

* * * * *

Mr. Chief Justice WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware....

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases, {the court below relied on} the so-called "separate but equal" doctrine announced by this Court in Plessy v. Ferguson.

* * *

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then-existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-

War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history with respect to segregated schools is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences, as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states, and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race.²⁶⁶ The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of Plessy v. Ferguson, involving not education but transportation.²⁶⁷ American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. In Cumming v. County Board of Education, 175 U.S. 528, and Gong Lum v. Rice, 275 U.S. 78,

²⁶⁶ Slaughter-House Cases, 16 Wall. 36, 67-72 (1873); Strauder v. West Virginia, 100 U.S. 303, 307-308 (1880)

²⁶⁷ The doctrine apparently originated in Roberts v. City of Boston, 59 Mass. 198, 206 (1850), upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. But elsewhere in the North segregation in public education has persisted until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

the validity of the doctrine itself was not challenged.²⁶⁸ In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. Missouri ex rel. Gaines v. Canada, 305 U.S. 337; Sipuel v. Oklahoma, 332 U.S. 631; Sweatt v. Painter, 339 U.S. 629; McLaurin v. Oklahoma State Regents, 339 U.S. 637. In none of these cases was it necessary to reexamine the doctrine to grant relief to the Negro plaintiff. And in Sweatt v. Painter, supra, the Court expressly reserved decision on the question whether Plessy v. Ferguson should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike Sweatt v. Painter, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be

²⁶⁸ In the Cumming case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the Gong Lum case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro children and requiring him to attend a Negro school.

equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In Sweatt v. Painter, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In McLaurin v. Oklahoma State Regents, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: "... his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."²⁶⁹ Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority.²⁷⁰ Any language in Plessy v. Ferguson contrary to this finding is rejected.

We conclude that, in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of

²⁶⁹ A similar finding was made in the Delaware case: "I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated."

²⁷⁰ K.B. Clark, *Effect of Prejudice and Discrimination on Personality Development* (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, *Personality in the Making* (1952), c. VI; Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 *J. Psychol.* 259 (1948); Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 *Int. J. Opinion and Attitude Res.* 229 (1949); Brameld, *Educational Costs, in Discrimination and National Welfare* (McIver, ed., 1949), 44-j48; Frazier, *The Negro in the United States* (1949), 674-681. And see generally Myrdal, *An American Dilemma* (1944). [Footnote by the Court.]

the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

* * *

It is so ordered.

Barron v. Baltimore held that the Fifth Amendment, and by extension the Bill of Rights, applied only to the Federal government and was not a restriction on the States, leaving the States constrained only by their respective laws and Constitutions. The Fourteenth Amendment imposed new constitutional limitations upon the States, but in ambiguous ways. What, for example, does the due process clause of that Amendment mean? How does it restrict the states?

The *Gitlow* case marks the beginning of contemporary definition. A State prohibition against criminal advocacy (here, advocating the violent overthrow of the government) was challenged in court on First Amendment grounds. The Court proceeded to include the First Amendment within the meaning of the Fourteenth Amendment's due process clause, imposing a new Constitutional restriction on the States. The *Holmes - Brandeis* dissent is a classical defense of freedom of expression.

* * * * *

MR. JUSTICE SANFORD delivered the opinion of the Court.

Benjamin Gitlow was indicted in the Supreme Court of New York, with three others, for the statutory crime of criminal anarchy. He was separately tried, convicted, and sentenced to imprisonment. The judgment was affirmed by the Appellate Division and by the Court of Appeals. The case is here on writ of error to the Supreme Court.

The contention here is that the statute, by its terms and as applied in this case, is repugnant to the due process clause of the Fourteenth Amendment.

* * *

The following facts were established on the trial by undisputed evidence and admissions: The defendant is a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of "moderate Socialism." Membership in both is open to aliens as well as citizens. The Left Wing Section was organized nationally at a conference in New York City in June, 1919, attended by ninety delegates from twenty different States. The conference elected a National Council, of which the defendant was a member, and left to it the adoption of a "Manifesto." This was published in *The Revolutionary Age*, the official organ of the Left Wing. The defendant was on the board of managers of the

paper and was its business manager. He arranged for the printing of the paper and took to the printer the manuscript of the first issue which contained the Left Wing Manifesto, and also a Communist Program and a Program of the Left Wing that had been adopted by the conference. Sixteen thousand copies were printed, which were delivered at the premises in New York City used as the office of the Revolutionary Age and the headquarters of the Left Wing, and occupied by the defendant and other officials. These copies were paid for by the defendant, as business manager of the paper. Employees at this office wrapped and mailed out copies of the paper under the defendant's direction; and copies were sold from this office. It was admitted that the defendant signed a card subscribing to the Manifesto and Program of the Left Wing, which all applicants were required to sign before being admitted to membership; that he went to different parts of the State to speak to branches of the Socialist Party about the principles of the Left Wing and advocated their adoption; and that he was responsible for the Manifesto as it appeared, that "he knew of the publication, in a general way and he knew of its publication afterwards, and is responsible for its circulation."

There was no evidence of any effect resulting from the publication and circulation of the Manifesto.

* * *

The precise question presented, and the only question which we can consider under this writ of error, then is, whether the statute, as construed and applied in this case by the state courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment.

The statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means. These words imply urging to action. Advocacy is defined in the Century Dictionary as: "1. The act of pleading for, supporting, or recommending; active espousal." It is not the abstract "doctrine" of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose. It was so construed and applied by the trial judge, who specifically charged the jury that: "A mere grouping of historical events and a prophetic deduction from them would neither constitute advocacy, advice or teaching of a doctrine for the overthrow of government by force, violence or unlawful means. [And] if it were a mere essay on the subject, as suggested by counsel, based upon deductions from alleged historical events, with no teaching, advice or advocacy of action, it would not constitute a violation of the statute...."

The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government. It concludes with a call to action in these words: "The proletariat revolution and the Communist reconstruction of society -- *the struggle for these* -- is now indispensable.... The Communist International calls the proletariat of the world to the final struggle!" This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement.

* * *

For present purposes we may and do assume that freedom of speech and of the press -- which are protected by the First Amendment from abridgment by Congress -- are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States....

By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight.

* * *

The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency.

* * *

And finding, for the reasons stated, that the statute is not in itself unconstitutional, and that it has not been applied in the present case in derogation of any constitutional right, the judgment of the Court of Appeals is *Affirmed.*

Mr. JUSTICE HOLMES, dissenting.

MR. JUSTICE BRANDEIS and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States. If I am right, then I think that the criterion sanctioned by the full Court in Schenck v. United States, 249 U.S. 47, 52, applies. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the State] has a right to prevent." It is true that in my opinion this criterion was departed from in Abrams v. United States, 250 U.S. 616, but the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that it and Schaefer v. United States, 251 U.S. 466, have settled the law. If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more.

VII. Federal Administration in the Constitutional System

FEDERAL ADMINISTRATION IN THE CONSTITUTIONAL SYSTEM

by David Rosenbloom

Effectively integrating large-scale public administration into the constitutional system has been one of the major governmental challenges faced by the United States during the twentieth century. The effort to achieve a harmony between constitutional governance and vigorous federal administration has frequently involved attempts to further subordinate the career federal executive to the President and his political appointees, to Congress, and to the courts. Beginning in the 1950s, a complementary approach has evolved—that of “constitutionalizing” public administration, or infusing it with constitutional values and requirements. This approach has changed the content of public administration in a very fundamental way. Understanding the structure of individuals’ constitutional rights has become part of the knowledge base that many federal administrators must have. In addition to being competent in administration, management, or a professional area, public administrators now must be constitutionally competent as well. This chapter provides a framework for thinking about these developments and outlines those constitutional rights that, in general, are most salient to contemporary federal administration. The chapter completes the introductory knowledge federal executives should have in further developing their constitutional literacy.

PUBLIC MANAGEMENT AND CONSTITUTIONAL GOVERNANCE

There are several reasons why it has been difficult to integrate large-scale public administration into the constitutional system. Each emphasizes different values. Public administration is concerned with managerial efficiency, cost-effectiveness, and successful

implementation of public policy. But from a constitutional perspective, these values are often suspect. Hear the Supreme Court in Stanley v. Illinois (1972):

“The Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones...”

Put differently, constitutional values are a constraint on public administration. As Justice William Douglas wrote in dissent in Spady v. Mount Vernon (1974), “today’s mounting bureaucracy, both at the state and federal level, promises to be suffocating and repressive unless it is put into the harness of procedural due process.” But as emphasized earlier, the constitutional system also depends on efficient public administration for its success.

There is also a tension between the Constitution’s commitment to government by the people and public administration’s reliance on a career service imbued with apolitical, technical and managerial expertise. Justice Lewis Powell made this point well in his dissenting opinion in Garcia v. San Antonio Metropolitan Transportation Authority (1985):

“Federal departments and agencies customarily are authorized to write regulations. Often these are more important than the text of the statutes. As is true of the original legislation, these are drafted largely by staff personnel. The administration and enforcement of federal laws and regulations necessarily are largely in the hands of staff and civil service employees. These employees may have little or no knowledge of the States and localities for which they are responsible...

“...My point is simply that members of the immense federal bureaucracy are not elected, know less about the services traditionally rendered by States and localities, and are inevitably less responsive to recipients of such services, than are state legislatures, city councils, boards of supervisors, and state and local commissions, boards, and agencies. It is at these state and local levels—not in Washington...that “democratic self-government” is best exemplified.”

Federal administrators are thus caught in a double tension: they are neither elected nor politically appointed and they are far removed from grass roots democracy.

A second type of conflict between public administration and the Constitution is structural. It has not been easy to fold public administration into the separation of powers. As Justice Robert Jackson stated in FTC v. Ruberoid Co. (1952), administrative agencies “...have become a veritable fourth branch of the Government, which has deranged our three branch legal theories as much as the concept of a fourth dimension unsettles our three dimensional thinking.” Almost everyone would agree with Justice Byron White’s assessment in Buckley v. Valeo

(1976), that “there is no doubt that the development of the administrative agency in response to modern legislative and administrative need has placed severe strain on the separation-of-powers principle in its pristine formulation.”

Public administration compromises the separation of powers by combining legislative (rulemaking), executive, and judicial (adjudicatory) functions in the same agencies. However, the separation of powers sometimes makes effective public administration difficult because administrators are subordinate and responsible to Congress, the President, and the courts. Unless all three branches, but especially the legislative and executive, are sufficiently coordinated, public administrators can be subject to unclear and contradictory direction.

Congress has a great deal of authority over agencies’ structure, budget, mission, personnel, and legal powers. Yet the President is charged with faithful execution of the laws. A great deal of what has become known as “bureaucratic politics” involves effort precisely to achieve coordination sufficient to make the constitutional system work. In the nineteenth century, coordination was largely through political parties. In practice, partisan political machines also hired and fired large numbers of federal employees. Ironically, in today’s politics, when Congress and the presidency are so frequently dominated by different parties, it is members of the merit-oriented apolitical federal service who often do the coordinating.

Short of constitutional amendment, it is unlikely that these tensions between the Constitution and public administration can be resolved fully. Dynamic temporary political adjustments, such as the now defunct legislative veto, are frequently adopted. Today’s emphasis, though, is on a more fundamental effort to constitutionalize public administration so that public administrator maybe able to make the Constitution and public administration more fully compatible in their day-to-day practice.

CONSTITUTIONALIZING PUBLIC ADMINISTRATION

Although all public administrator take an oath to support the Constitution, it has only been since the 1950s and 1960s that public administration has been constitutionalized, that is, infused with constitutional values, principles, and methods of reasoning. Constitutionalization was most substantially promoted by the federal courts during the Chief Justiceships of Earl Warren and Warren Burger (1953-1969 and 1969-1985, respectively). It consisted primarily of three elements.

First, the federal courts found or declared constitutional rights for individuals vis-a-vis public administration that had not previously existed or been articulated. Thus, clients of

administrative agencies, such as welfare recipients and children in public schools, were afforded far-reaching protection of their substantive, procedural, and equal protection rights. Brown v. Board of Education of Topeka (1954), contained in this volume, is a stellar example. The constitutional rights of public employees were also strengthened as due process was applied to dismissals, greater freedom of association (including with labor unions) and speech was granted, and equal protection became an important barrier against racial and other prohibited kinds of discrimination.

Continuing in the same vein, individuals involuntarily confined to public mental health facilities were given a constitutional right to treatment or habilitation for the first time. The Eighth Amendment Rights of prisoners against cruel and unusual punishment were strengthened considerably. Persons involved in street-level encounters with police and other public administrators also obtained a variety of new protections, especially with regard to the constitutional rights to privacy and due process. These developments were dramatic—indeed, revolutionary in terms of constitutional doctrine. They could not be ignored by public administrators.

Second, the courts became far more inclined to intervene in public administrative institutions and processes to remedy breaches of these newly declared rights. Many local governmental public personnel systems, public schools, prisons and jails, public mental health facilities, and public housing agencies have been virtually taken over by courts. In the process, public administrators became more cognizant of how the Constitution is interpreted to affect a wide range of administrative practices, including such routine ones as staffing. For their part, many judges seem to have gained a greater appreciation of the practical constraints faced by public administrators.

Finally, there was a radical transformation of the doctrines concerning public officials' legal immunity. Until the 1970s, most public administrators were presumed to be absolutely immune from civil suits for money damages arising out of their official performance. But during that decade, the presumption was changed generally to one of only qualified immunity. As a result, today most public administrators—including federal employees—who violate individuals' constitutional rights, of which they reasonably should be aware, may be held personally liable for compensatory and possibly punitive money damages. Municipalities and administrative agencies throughout all levels of government also face new liabilities.

The switch from absolute to qualified official immunity is the capstone of the process of constitutionalization of public administration. It requires public administrators, as a matter of their job competence, to have reasonable awareness of and respect for the constitutional rights of the individuals upon whom they act. Otherwise, public administrators run real risks of being sued for damages. In Carlson v. Green (1980), the Supreme Court explained that qualified immunity "...in addition to compensating victims, serves a deterrent purpose" that should reduce violations of individuals' constitutional rights. But since the Constitution as applied goes well beyond the specific letter of the document, what constitutionalization really demands is that public administrators have broad constitutional literacy. They must understand landmark court decisions and the style of judicial reasoning, as well as constitutional values and principles.

Much of the necessary is conveyed by the materials in this volume. The following section rounds out this introduction to constitutional literacy by outlining the general structure of those individual constitutional rights that are of most concern generally to federal executives.

THE STRUCTURE OF CONSTITUTIONAL RIGHTS

It is useful to think of constitutional rights as having a structure, or a pattern of thought through which they are analyzed by the judiciary. In considering these structures, it is important to remember that although constitutional rights may be strongly defended by the courts, they are not considered to be absolute. In theory, they can be abridged under appropriate circumstances, though in practice such circumstances may never arise.

The next sections of this chapter outline and diagram the general structure of individuals' substantive, privacy, procedural, and equal protection rights. While thinking about these rights, it is important to remember that although these outlines capture the basics, the constitutional law is more fluid than they suggest, and exceptions to the general patterns of reasoning may be found.

Substantive Rights. For substantive rights, such as freedom of speech, association, and exercise of religion, the general structure is as follows:

1. What is the governmental practice at issue?
2. Does it infringe upon or abridge an individual's constitutional right?
3. If it does not, there is no violation of the Constitution.
4. If there is an infringement or abridgment, what is the nature of the government's interest in the practice?
 - A. Is the practice rationally connected to the government's interest?
 - i) If not, the practice is unconstitutional in this context.
 - ii) If it is rationally connected, then the inquiry continues.
 - B. Is the government's interest compelling or paramount?

- i) If not, the practice is unconstitutional in this context.
 - ii) If it is compelling or paramount (terms used somewhat interchangeably, then the inquiry continues.
- 5. Is the method of achieving the government's compelling or paramount interest the least restrictive of the individual's constitutional right?
- 6. What are other available alternative methods and are they more or less restrictive of the constitutional right?
 - i) If the practice is not the least restrictive alternative, then it is unconstitutional.
 - ii) If the practice is the least restrictive alternative, then it is constitutional.

Figure one presents the structure of the individuals' substantive rights in the form of a flow chart.

Privacy Rights. For privacy rights, the structure varies with the context of the search. Law enforcement searches face more substantial barrier than do administrative ones. However, in general terms, the structure is as follows:

- 1. Did a governmental practice have implications for an individual's privacy rights under the Constitution?
 - A. If not, then the practice is not unconstitutional.
 - B. If there were implications, then the inquiry continues.
- 2. Did the individual challenging the governmental practice have a reasonable expectation of privacy in the specific circumstances in which the encounter occurred?
 - A. If not, the practice is not unconstitutional.
 - B. If the individual did have such an expectation, then the inquiry continues.

3. Did the government officials engaging in the search have:
 - A. A warrant for search?
 - B. Probable cause for the search?
 - C. A reasonable basis for undertaking the search and for its scope?
 - i) If the officials had none of the above, the search is unconstitutional.
 - ii) If there was a valid warrant, the search is constitutional.
 - iii) If the government action is based on a claim of probable cause or reasonability, its constitutionality will depend on the specific circumstances involved.

Figure two presents the structure of privacy rights in flow chart form.

Procedural Due Process. For procedural due process, the structure involves a weighing of three considerations:

1. The private interest, such as liberty or property interests, affected by the government's action;
2. The risk that the procedures used will result in an error, and the probable value of additional or other procedures in reducing the error rate;
3. The government's interest in using the procedures afforded, including the administrative and financial burdens that other procedures would entail.

In any given set of circumstances, due process requires that an appropriate balance among these factors be reached. Thus, the more substantial the private interest, the more elaborate the procedures required are likely to be in order to avoid errors. At some point, though, additional or substitute procedural protections may become so costly that they will not be required.

Figure 3 presents the structure of procedural due process rights graphically.

Equal Protection Rights. For equal protection of the laws, the structure of analysis is the following:

1. Does the governmental policy or practice intentionally classify individuals in an invidious or benign way?
 - i) If not, there is no violation of equal protection.
 - ii) If so, then the inquiry continues.
2. Does the classification involve race or ethnicity?
 - i) If so, it is “suspect” and either “invidious” or “benign”
 - A) If invidious, then the government will need a compelling interest to support it, and
 - B) The government’s claim of a compelling interest will be subject to strict judicial scrutiny (that is, the court will not give deference to the government’s claim or judgment)
 - ii) If the classification is “benign” (e.g., some forms of affirmative action), then
 - C) A state policy will be subject to strict scrutiny.
 - D) A federal policy will be subject to the national basis test.
3. If the classification involves another factor, such as age or sex, it is not considered suspect and
 - A) The government will have to show a rational basis for it, and
 - B) The government’s claim will be subject to ordinary, rather than strict, scrutiny.
4. Invidious suspect classifications serving a compelling state interest in the least restrictive way will be constitutional.
5. Benign suspect classifications will be constitutional if they are narrowly tailored (that is, limited in scope and duration, realistic, of little or no burden to any group of individuals and rationally related to a legitimate governmental purpose).
6. Non-suspect classifications will be constitutional if there is a rational basis for them.

Figure four maps out the general structure of the right to equal protection.

In thinking about equal protection it is important to remember that the issues of classification and intention are critical. If two individuals who are essentially identical are treated differently by the government, the appropriate constitutional category is due process rather than equal protection. Policies that have a harsher impact on member of one race than another are not in violation of equal protection unless the disparate effect is intentional.

Again, the outlines presented above are only guides; they are not definitive or applicable in all circumstances. The constitutional law is always in flux. That is how a society on the threshold of the twenty-first century adapts an eighteenth century charter to its contemporary

needs. For example, in view of dramatic changes in the legal rights of women and in sex roles during the past three decades, it would not be surprising if sex were eventually considered a suspect classification.

TOWARD CONSTITUTIONAL LITERACY FOR FEDERAL EXECUTIVES

There are many benefits to constitutional literacy among federal executives. Certainly among the most important are that it gives greater meaning to the oath of office, it emphasizes what is especially “public” in public administration, it is likely to lead to a public administration that comports better with the constitutional system, and that it enables public administrators to play a greater role in constitutional discourse. The United States needs both good constitutional government and good public administration. Constitutional purposes cannot be achieved without effective public administration. American public administration cannot be satisfactory if it stands apart from constitutional values. At this time in the nation’s history, federal executives have much to offer in the continuing effort to successfully integrate public administration more fully into the constitutional system. Constitutional literacy is both a prerequisite and a key to that endeavor.

The materials in this book provide the basis for constitutional literacy. They are arranged chronologically, thereby enabling the reader to see the flow of American constitutionalism: from the formative years in which the Union was forged; through the crisis of the Civil War and the constitutional reconstruction that followed it; to the Progressive and New Deal Eras, in which our contemporary public administrative processes and patterns were established; and then to World War II and beyond, when a whole host of present-day civil rights and liberties became one focal point of constitutional debate and the constitutional aspects of foreign affairs became another. The book’s selections are invaluable for constitutional literacy.

VIII. Toward a Public Service Ethic

Toward a Public Service Ethic

John H. Johns

There are those who think we bureaucrats are—or at least should be—an endangered species. My message tonight is that this is not true...it takes people to run government, inevitably a lot of people.

To do the job at all well requires professionalism, impartiality, strong ethical standards and a commitment to public service...our basic goal must be to restore public trust. We need a renewed sense of a public service ethic, a code of conduct that emphasizes again the priority of the public interest and dedication to the missions set by the Congress and the President.

Paul A. Volcker, Address to
Washington Chapter of ASPA
June 1997.

Introduction:

The first several presidents, all of whom had been instrumental in founding the new nation, emphasized that public officials must be honest, capable, and faithful to the Constitution. They recognized that the democratic system demanded a certain amount of public spirit, honor, and commitment to justice on the part of those who served. Washington said that the appointment to office of a man who is unfriendly to the Constitution and laws derived from that document must be considered an “act of governmental suicide.” John Adams, the second president, said “...public virtue is the only Foundation of Republics...no republican government can last unless there is a positive Passion for the public good, the public interest, established in the Minds of the People...Superior to all private Passions.” Jefferson looked for rectitude, fitness of character, and allegiance to the Constitution. Those early leaders also applied these requirements to appointed administrators.

This desire for virtuous officials continued pretty much through the administration of John Q. Adams. Later, however, the criterion for selecting public servants through most of the 19th century was largely loyalty or contributions to the office holder, known as the “spoils” system. It has continued in one degree or another since, though there have been several actions designed to ensure that administrators would serve the public interest. In 1883 Congress passed the Civil Service Act (the Pendleton Act), which was designed to select and promote civil servants on the basis of merit, especially technical competence. Until lately, however, little emphasis has been placed on the ethical component of professional civil service.

In 1988 the White House perceived a serious loss of trust and confidence in government and a consequent “quiet crisis” in the civil service. The National Commission on the Public Service, chaired by Paul A. Volcker and Elliot Richardson, was appointed to examine the problem and recommend ways to enhance the prestige of public service. The report of the Commission concluded, among other things, that civil service was no longer an attractive career for many of our most talented youth. The Commission recommended a number of things that needed to be done to restore public trust in the Federal Government and, by association, the civil servants who administered the public policy. Many of the recommendations dealt with structural changes such as how the government is organized, the budget process, cutting red tape, personnel policies, and decentralization of decision making. In the end, it concluded, the test will be the restoration of public trust and this would require going beyond structural changes.

In an address to the Washington Area Chapter of the American Society of Public Administration in June 1997, Mr. Volcker called for the restoration of public confidence in the Civil Service. He went on to say “and it requires leadership and courage.... There are those opinion polls that indicate that trust and confidence in government are at a low point. Only 25 percent or so think government can be counted on to do the right thing most of the time. And we don’t need polls to confirm what we know in our daily lives: the drumbeat of complaints in the press, the sense of growing corruption of the political process, the relative lack of interest in public service by most college graduates.” Volcker discussed some of the causes of this lack of respect for government service, pointing out that a recent conference at Harvard came up with a list of over forty plausible hypotheses. Not the least of the causes is our historical resentment of central authority and the growth of programs run by the Federal Government, giving more targets at which to shoot. He acknowledged that there is a need for society to address those external causes to the crisis in public service. But, he said, we (civil servants) ought to focus on the things we professionals in the public service can do to remedy the decline in professionalism, commitment, and quality in the civil service itself, a matter over which we should be expert. He reiterated what the National Commission had said—our basic goal must be to restore public trust, and career civil servants must do their part.

Arguably, the public’s loss of trust and confidence in government poses the greatest threat to our national security and well being. Nations cannot endure when the people can no longer trust their government to meet their needs.

The people who crafted the Constitution (Framers) realized they were parting from the form of government that had dominated history—rule by an autocratic political elite, usually in close alliance with religious leaders. They knew that it was a gamble to put power in the hands of the people. As Alexander Hamilton put it in the first paragraph of Federalist 1:

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 constitutions on accident and force.

Many of the Framers, like Hamilton, were skeptical of the ability of the people to make the right selection of people to run their government and to possess the necessary civic virtue to sacrifice for the common good. The Framers were also skeptical about the people who would be in government; would they have an ethic that emphasized public service over personal gain? In the end, they designed a Constitution that gave much freedom and power to the people and discretionary judgment to government officials, but they also provided safeguards in the way they structured the government. As Madison said, “if men were angels, there would be no need for government.” But since men are not angels, Madison concluded, **“ambition must be made to counteract ambition....In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place to control itself”** (Federalist 51). Notwithstanding the checks and balances and divided sovereignty they put in the government structure, they knew it would work only if the people possessed a certain level of **civic virtue** and government officials had a strong **public service ethic**.

Societal Values, Civic Virtues, and the Constitution:

The Framers were concerned that the patriotism demonstrated during the long struggle for independence would evaporate in peacetime and people would resort to selfish, divisive behavior at odds with the common welfare. If that happened, the Framers feared, there would be a need to resort to a political system based on autocratic, imposed **political order** backed by force. They hoped, however, that common values and virtues that emphasized the common welfare and voluntary compliance with societal norms (**moral order**) would be instilled by the family, the schools, and religious organizations. The national government, of course, was to have no way to influence directly these institutions. As we know, they wanted religion separate from government and left responsibility for education to the States.

The Framers knew that social order in the new nation would be maintained by a blend of legal and moral order, but the philosophy underlying the Constitution emphasized moral order. “The least government is the best government” summarizes this philosophy, which is still the dominant view in this country. Individual freedom and privacy (except, of course, for slaves and native Americans) was the bedrock of the original Constitution and they took measures to protect those rights from government intrusion. Sections nine and ten of Article I, the first ten amendments, and several subsequent amendments focus on a guarantee that government will not infringe on those freedoms. This philosophy implies that social order is best left to the people and as a result, the Constitution says little about specific values. The Framers realized the nation would be a diverse mixture of ethnic groups, religions, and cultures; specific values were left to the people to decide. The philosophy of individual freedom and “least government,” however, works *only* if individual freedom does not infringe on the “common good.” The common good is implied in such words in the Preamble as “to form a more perfect Union establish Justice, insure domestic Tranquility...promote the general Welfare and secure the Blessings of Liberty.” These abstract values emphasizing the common good are often in conflict with individual freedom and these conflicts can have far-reaching implications.

Societal Values, The Constitutional Process, and Government Activities.

In addition to the cited fundamental substantive values, the Constitution established a **process** for the people to express their “will.” The process itself reflects a fundamental value (giving power to the people), and is perhaps the most important of all the values expressed in the Constitution, because it establishes procedures for transforming the people’s values into government action. The process goes something like this: The values of a society tend to crystallize into a “public philosophy” that reflects the will of the people regarding what they want their society to be and the government’s role in shaping that society. This philosophy leads to the election of representatives, who presumably share that philosophy and develop public policy to reflect the people’s “will.” This policy is then translated into legislative acts. Government Agencies then establish rules, regulations, and administrative laws to carry out the legislation. Administrators then implement those rules, regulations, and laws. Each step in this process, theoretically, represents the “will of the people.”

At each step of this complex process, however, there are “contaminating variables” and room for judgment about what the public “will” is. Individual values and beliefs about what is in the public interest often differ. Moreover, the end product must conform to the values and process set forth in the Constitution. There are, as we know, differences as to what the Constitution means, with the Supreme Court through judicial review having the final say on this matter. All in all, the process has the potential of producing results that the people do not believe represents their interests. When the people no longer have trust and confidence that the process is meeting their needs, there is a constitutional crisis.

Much of the problem in determining what is in the public interest lies in the conflicting societal values themselves. The dominant individualistic values in economic, political, social, and religious matters are often in conflict with the values of justice, equity, general welfare, etc., which are also American values. At the core of individualism is the belief that each individual is responsible for his/her own welfare, as long as there are no discriminatory legal restrictions. However, the Government is often called on to intervene to balance individualism with the Preamble's competing values to "establish Justice," "promote the general Welfare," and "insure domestic Tranquility." The judicial system determines if these interventions are in accord with the Constitution. In general, the Constitution, largely defined by court decisions, says that individual freedom can be infringed only if there is a compelling government interest to secure the common good. Obviously, this is an ambiguous criterion. The "common good" is often defined according to one's own value system or political philosophy. Perhaps the most significant current difference between the two major political parties is the role of government in "establishing justice" and "promoting the general welfare." Moreover, the Constitution is a secular document, calling for rational analysis of controversial issues, while many of the conflicting values (such as abortion, assisted suicide, and prayer in schools) are based, at least in part, on religious beliefs. While rational analysis and religion are not necessarily incompatible, they often are, leading to discord.

As the Volcker Commission pointed out, there is a strong antipathy in this country to "big government." For many years after the founding of the republic, the Federal government was small and affected the public very little in a direct and visible way, since its basic purpose was to provide national defense, conduct foreign policy, and regulate commerce. As Government involvement in everyday life has grown over the years (at the insistence, incidentally, of the voting public), political rhetoric criticizing the "bureaucrats in Washington" has become the stock in trade of those who want to be elected. President Carter increased the bashing and President Reagan raised it several decibels. It is now standard political fare. While this is grist for the meal for politicians of both parties, there are real differences between the two parties regarding the role of government. Democrats generally believe in fostering national community and see a more active role for the Federal Government in "promoting the general welfare." Republicans favor the private sector for providing services to the people and if government is to be involved, it should be at the State or local level.

In sum, the Constitution established a political process within which the people can solve their problems in a peaceful, civil manner. It contains general values, deliberately avoiding specific answers to how people will live. It leaves to the people the freedom to evolve the societal values they choose within the **framework of the** constitutional guidelines. As much as possible, the framers wanted the people to solve their problems without involving the government. When this cannot be done, the political system allows the people to say how they want the government to intervene, as long as the solutions conform to the general guidelines of the Constitution.

The Public Service Ethic:

The role of the government, and thus the civil servant, is to help manage the constitutional process for the benefit of the people. This must be done in a manner that maintains the trust and confidence of the public. The abstract values and the complex political process for resolving societal value conflicts, however, leave public administrators with some discretion in carrying out their duties. In exercising this discretion—and in trying to be faithful to our constitutional oath—they face many ethical challenges. As government administrators, they live in a world where their personal values, organizational values, and professional values may compete with their obligations to the constitutional process. It is sometimes difficult to separate what the Constitution requires from competing value-sets. What are the ethical implications for the civil servant? Just what are the ethical obligations in executing our oath of office? These ethical implications go beyond just being “honest.”

Personal Conduct: Government officials, whether they are elected, appointed, or career civil servants, pledge to uphold the trust and confidence of the public. Is there a set of values, other than those each brings to our job, which can be said to represent a civil service profession?²⁷¹ At the core of any value system, of course, is the concept of honor, at the heart of which is honesty and trustworthiness in all interpersonal relations. This applies to the relationship with colleagues within the government and with the public, which we serve. Trust and confidence of the public is essential for effective government. If this trust is eroded, we are less effective; if it is destroyed, the nation is in peril. As the noted author Sissela Bok puts it:

Trust is a social good to be protected just as much as the air we breath or the water we drink. When it is damaged, the community as a whole suffers; and when it is destroyed, societies falter and collapse.

...Trust and integrity are precious resources, easily squandered, hard to regain.”

²⁷¹ By profession we mean a body of people who provide expert, trustworthy, service—requiring special education and training—to the public. The group must have corporate cohesion based on shared values and a code of behavior accepted by individual members. Members, individually and collectively, have a duty to ensure that all members are competent in the service they provide and that they are trustworthy in their relationships with their colleagues and the public. Implicit in this duty is the non-toleration of incompetence and unethical behavior of colleagues. This, of course, imposes ethical obligations that go beyond those of ordinary citizens.

Lying, Sissela Bok, 1978, p. 28.

We can all agree on the need for honor in our interpersonal relations, but this is not so simple in the real world of bureaucratic politics. For example, open, honest communication within an organization may be officially espoused, but the informal organizational culture may not reflect those official values (especially during budget battles and dealings with other perceived adversaries such as the media and Congress). This is often rationalized by pointing out that the perceived adversaries are less than forthright and one must respond in kind. This kind of thinking is reflected in “bureaucratic hardball.” With respect to values conflict within the organization, e.g., “killing the messenger of bad news,” standing firm for one’s personal values, even when it reflects loyal dissent, may entail personal cost.

Policy Decisions and Values: Honesty and trust are at the heart of interpersonal relations and personal conduct and while these are also critical in policy making, other values have to do with what is best for the public we serve. The constitutional process involves values at every step of converting public interests into government programs. People can honestly differ on their concepts of the public interest. The civil servant is faced with a choice of where to look, other than to one’s own set of values, for the values that will guide his/her actions in resolving these dilemmas. Professional codes are one source.

The differing philosophies/values about the role of government in regulating behavior, which come into play at each step of the political process, impact on the civil servant in several ways. Government agencies, particularly those providing such services as health, education, welfare, or equal opportunity which involve “distributing justice,” may come under pressure in a Republican Administration or from a Republican Congress, since that party tends to favor the private sector for such services. Outright elimination of certain agencies or programs is always an option.²⁷² On the other hand the civil servant may see a duty to protect the public from programs that waste taxpayers’ money, promote a “welfare mentality” that destroys individual initiative, or unfairly favor certain elements of society through preferential treatment. Nothing in what has been said here should be taken to endorse either philosophical view; rather, it is merely to point out a dynamic of which civil servants in policymaking positions need be aware. They sometimes get caught in the middle and need guidelines to assist in carrying out their oath of office.

One needs only to look at economic activity to see how government intervention divides on philosophical grounds. Until industrialization occurred, there was little government intrusion in economic activity. Laissez-faire capitalism was the guiding economic philosophy. Although many business practices clearly were not in the public interest, there was a hands-off attitude for a long time. It was only when there was strong

²⁷² Some argue that the Government Performance and Results Act has been used to reduce or eliminate programs when a direct attack fails.

public protest that the government stepped in to regulate economic affairs. Even then, the regulations were rarely enforced and when enforcement was attempted, the Supreme Court declared several of the laws to be unconstitutional. It was not until the late 1930s that the Court opened up government regulation to any extent. Since then, the regulation of economic activities has expanded from anti-trust legislation to labor laws, advertising, safety, equal opportunity, and a myriad of other areas. There is a sharp difference among the political parties, and the public, on how far the government should go in this regard.

Government has also become heavily involved with "social issues." Connecticut banned the sale and use of contraceptives, even among married couples. Was this an unconstitutional infringement of private behavior? The Supreme Court in **Griswold v. Connecticut** (1965) said yes. Later, Texas banned certain abortions. Was this an unwarranted intrusion in private behavior? The Supreme Court, in **Roe v. Wade**, said yes. As we know, these issues are very controversial. Prayer in the schools is another controversial issue, illustrating the tension between religious beliefs and the separation of church and state.

The easy solution for the career civil servant is to look only at the terminal output of the process as determined by his/her immediate supervisor. If the policy is legal, as determined by the legal counsel of the agency, the official executes the policy, regardless of her/his personal values and beliefs about the public interest. After all, the people have spoken through the election process, and the elected people speak for the public until the next election. "Theirs is not to reason why, but to do or die," a traditional military dictum, sums this view of loyalty. In the extreme, it reflects the Nuremberg defense of German officials tried for war crimes. "They were just following orders."

Others see the ethical obligation of civil servants to be different from that described above. They argue that career civil servants are more than automatons who blindly carry out policy without question. This view suggests civil servants have a professional ethical obligation to question policy through loyal dissent, jumping channels, and/or whistle blowing. According to this view, civil servants have an ethical obligation to serve the public interest as defined by the Constitution (as they understand it) and that interest may not be reflected in the policies of their agency, the administration, Congress, the Courts, or any other segment of the process. Even Supreme Court decisions are influenced by personal ideology, religious beliefs, and a perception of the public philosophy, so why shouldn't the career civil servant have a right to say what is in the public interest?

Those who support the second concept of public service acknowledge that it opens the door to zealots who have their own personal beliefs which may be contrary to the "public interest." Personal philosophy may be based on other than rational thought, or represent one's own self interest. Carried to the extreme, this can lead to anarchy within government agencies. On such controversial matters as abortion, prayer in schools, sexual orientation, affirmative action, or any other number of emotional issues, personal values may be based largely on non-rational thought. How far one goes in

advancing his/her own personal values is a matter of discretion. For example, recent revelations indicate senior officials knew very early that the Vietnam War was a mistake; yet, the American people were not informed of that and tens of thousands of young men died while the American people were kept in the dark. Daniel Ellsberg evidently believed the public had a right to know and “leaked” the secret Pentagon Papers that alerted the people. Was he disloyal, or did he have a moral obligation to inform the people? Oliver North insisted that his defiance of legislation and his lying to Congress about support for the Contras in Nicaragua were in the “public interest.” While it is difficult for one to know the validity of his/her convictions, the civil servant has an obligation to be as objective as possible in making policy.

The consensus of Public Administration scholars seems to come down in the middle. Certainly one should not be an automaton who carries out policy without question. One does have a moral obligation to speak up when he/she has serious question as to the moral consequences of a given policy. How far one goes in this “loyal dissent” depends on many factors. Thus, there is a continuum: on one end we are asked to do what is asked as long as it is legal. On the other end, we become the arbiters of what we think the Constitutional oath demands, perhaps irrespective of what elected officials decide.

As a general statement, a civil servant, after providing loyal dissent, has a **prima facie** duty to follow the policy of legitimate authority as long as the policy is legal. This prima facie obligation may be overridden in special circumstances, but the burden of prove is on the individual, especially if it involves whistle blowing. To assist in handling such dilemmas, some guidelines for loyal dissent (enclosure 1) and whistleblowing (enclosure 2) are provided.

Ethical Codes of Conduct for the Civil Service:

An ethical/moral code is a set of norms/standards of conduct that reflects the values shared by a group of people; it “operationalizes” the group’s shared values. If the civil service is to qualify as a profession as defined in the footnote on page six, it must have an ethical code that guides the behavior of its members. The code may be written or unwritten, but is usually a combination. Professional and religious organizations usually have written codes, although these organizations also have many unwritten norms of behavior. Written codes may involve sanctions to ensure compliance, or they may merely serve the purpose of clarifying norms of expected behavior. In the case of some professional codes, they are largely *proscriptive* and approach the status of legalistic documents, enumerating what is legally prohibited. There are several documents that one might consider in defining a set of standards of conduct for the civil servant.

In 1978, Congress passed the Ethics in Government Act to “preserve and promote the integrity of public officials and institutions” of the Federal government. The Code of Ethics for Federal Employees was published to complement that legislation. Most of

these standards listed in this code, however, focus on proscriptions against illegal acts punishable by law. The American Society for Public Administration (ASPA) has also published principles for public administrators and a code of ethics, Standards and Ethics in the 21st Century, that reflects those principles. These principles, and the code, are stated in a more aspirational and positive way than the standards in the official government employees' code. The Council for Excellence in Government has also published Ethical Principles for Public Officials that is also stated in aspirational and positive terms. In essence, these documents advocate the basic virtues of moral rectitude, honesty, trustworthiness, etc., and putting public service above private gain. The overarching value is loyalty to the Constitution and the democratic process. As we have seen in the foregoing discussion, this is a complex loyalty.

Publication of ethical principles and codes, even when stated in aspirational and ideal terms, are of little value unless they are internalized by members and institutionalized in the organization. Research shows that ethical codes are rarely internalized unless accompanied by frequent discussion (seminars) of ethical principles in small groups with the use of case studies based on real events in the workplace of the discussants. Therefore, managers should establish an ethical development program that employs such techniques if they want to have an effective program. This requires identification and training of discussion leaders and allocation of time to conduct the seminars.

Civil Service Education in Ethics:

Congress passed the Civil Service Act in 1883 to improve professionalism in the federal workforce. However, no provisions were made for education of civil servants, as the military had done with the establishment of the military academies at West Point and Annapolis. Two Hoover commissions, one in 1949 and another in 1953, recommended steps to improve professionalism, to include a systematic educational system. Congress passed the Government Education and Training Act in 1954, but education and training for civil servants has still lagged far behind the military.

Efforts to improve the performance of federal civil servants have generally focused on technical competence and managerial skills and it was not until recently that the education of civil servants in their ethical obligations was taken seriously. Even now, little has been done in the way of developing the "virtues" cited by the Founding Fathers and more recently by Paul Volcker and others. Federal employees are required to attend one hour of "ethics" training annually, but this is usually a perfunctory session where someone, usually a lawyer, reviews the legalistic "standards." While this may be of some value, it does not address the aspirational virtues of a true professional ethic.

Ethical Studies:

The professional obligation to support the content and process of the Constitution would be clear if everyone were in accord about the meaning of those features. However, we know there is sharp disagreement on the interpretation of the content, and even the process of resolving the disagreements. The Constitution itself is not a static document; rather it is a work in progress, for as Thomas Jefferson said, every generation reinvents the Constitution. Even the meanings of the terms in the Preamble, as well as other provisions of the main body, are subject to this reinvention. There are complex and elaborate processes for this reinvention. One process involves the everyday process where societal values, through elected representatives, are translated into action programs. The Supreme Court is the final arbiter of whether this process has conformed to the provisions of the Constitution and whether or not a more formal means of reinvention, i.e., amendment, is required. Obviously, this presents a dilemma for career administrators who may have different values and interpretations than those held by society, their agency, their superiors, Congress, and/or the Supreme Court. There are also honest differences about how to resolve these conflicts. These differences create ethical dilemmas about how to be faithful to one's oath. **The important thing to remember is that the Constitution is the standard reference, both in its content and process, for resolving differences in a peaceful manner.**

Ethical Temptations versus Ethical Dilemmas. Some ethical decisions involve tough choices between doing what is right and the personal costs associated with those decisions. One is often asked to pay a high price for standing up for what is right. Situations where the choice is clearly between right and wrong present what Rush Kidder calls "**moral temptations.**"²⁷³ One knows what is right, but is tempted to choose unethical behavior because of expediency. Many, but not all, of personal conduct decisions involve moral temptations. Being the bearer of bad news to a boss who "kills messengers" may clearly be the right thing to do, but carries a heavy personal cost. Padding travel vouchers may be tempting to "make up for low pay", but it violates basic honesty. Legal rules and the basic value of honesty are helpful in these kinds of decisions.

Other situations involve a genuine dilemma—a choice where what is right is a matter of judgment. In policy matters, there may be no clear-cut answers of right or wrong. Consequences may not be clear, all the facts may not be available, and the situation itself may involve conflicting principles, e.g., favoring welfare programs while avoiding the creation of a "welfare mentality," supporting Aid For Dependent Children without condoning children out of wedlock. Kidder calls these sorts of choices "**moral dilemmas.**" That is why it is important to understand the constitutional process and one's oath to respect that process. People differ in what they believe to be "right" on many of the issues in public policy.

273 Kidder, R.M., How Good People Make Tough Choices, NY: Simon and Schuster, 1995.

Nevertheless, senior officials should:

1. Consider the ethical dimension in all their actions and decisions
2. Maintain an ethical climate in their organization by:
 - a. Setting the example
 - b. Articulating values and norms of behavior
 - c. Rewarding ethical behavior and punishing unethical behavior
 - d. Non-tolerating unethical behavior by colleagues, whether they are superiors, peers, or subordinates²⁷⁴
3. Always put public service above personal gain
4. When making, or influencing, policy, be objective and rational, avoiding ideological dogma

Summary:

Trust and confidence of the American people in their government is critical to the welfare and survival of this nation as a democratic society. Gaining and maintaining that trust and confidence is perhaps the most important duty of each civil servant. Every act, whether it be personal conduct or influencing policy, impacts on that trust. Many factors that influence people's perception of their government are beyond our control, but what each of us does in our daily work and lives contributes to that perception for better or worse. Much of ethical behavior involves situations where the choice is clearly between right and wrong, but where it is often tempting to choose the convenient path for selfish reasons. The choices one makes about these moral "temptations" will reflect one's basic values of honesty. These basic values are part of one's personality and can be influenced little at this stage of life. The most one can do is reflect on the duty to be above reproach. "Moral dilemmas" are another matter. These situations are complex and require a well-developed moral decision-making calculus that requires understanding of one's

⁴ Non-toleration does not necessarily involve formal action. It can be nothing more than speaking to a colleague about something that bothers you. One of the most effective ways to give feedback is through discussion of case studies in seminars. This method has the advantage of "non-tolerating" without direct confrontation while at the same time sensitizing people to behaviors of which they may have been unaware.

constitutional oath and the process that the Constitution established for the people to solve their problems.

The higher one goes in the system, the greater the obligation to set the example and be above reproach. We have all seen the costs when senior officials breach trust. As someone has said, **“for if gold rusts, what can you expect of iron.”** And as Shakespeare said, **“to thine own self be true.”**

Enclosure 1

Guidelines for Loyal Dissent in Government

As a career civil servant, you have a professional obligation to stand on principle in your policymaking role. Even as a relatively junior member, you will have occasion to provide input on policy matters. There will be times when you find that you differ with your superiors; these differences may be on opinions about how best to implement a policy, or they may involve different beliefs about what policy should be. You may believe that you know best what is good for the country, what Congress intends by a given piece of legislation, or what the current administration's policy is. The difference may involve a question of what is ethical. Whatever the reason for differences, you should have the moral courage to give your honest opinion; indeed, I believe your oath of office imposes an ethical **obligation** to do so. This is a delicate matter, because even the most understanding superiors can tire of people who "fight the problem".

1. Choose your issues carefully. Dissent tries the patience of superiors. Use your credits for dissent judiciously. Some criteria in choosing issues:

- a. How important is it?
- b. What are your chances of success?
- c. What are the costs to your career and family in challenging my superiors?
- d. Do I have a moral responsibility to challenge?

2. Do your homework and think it over! Do not shoot from the hip every time you disagree with a position taken by your superiors.

3. Clearly take ownership for your dissent.

4. Don't personalize the challenge; focus on the issue. Remember that reasonable people can honestly differ, sometimes with strong conviction, on issues.

5. Be objective and balanced in your analysis of the issue. Each of us is a product of our own unique experiences and we view the world based on those experiences. Try to put yourself in the shoes of the opposition, remembering that higher officials tend to view issues in a broader context.

6. Don't paint your superiors into a corner by challenging their judgment in public (or at a staff meeting unless the superior asks for a discussion of the issue), especially if they have taken a public stance.

7. Do not expect radical change in opposing views.

8. Know your boss. What are his/her central values and does the issue at hand relate to those central values? If so, change will be difficult.

9. Provide alternatives to the position you are challenging, i.e., don't be merely negative.

10. Choose your time to challenge. In general, try to get your oar in the water before a position has been announced.

11. Recognize when you have pushed to the limit. Bosses differ in their tolerance of dissent, even when it is loyal.

12. Always remember that you may be wrong; you may even be ideologically biased.

13. Accept defeat graciously, i.e., don't pout. On the other hand, if you cannot live with the decision from a moral standpoint, you have the option of going to higher authority, or ultimately resigning. (You may also feel justified in contacting congress, interest groups, or the media. This **may** be loyal dissent in some instances, but it is often called "whistleblowing" and is judged by different criteria than what I am calling loyal dissent. Whistleblowing is discussed in enclosure 2)

*These guidelines are stated with the full knowledge that many lectures on ethics will urge subordinates to "always speak their piece" regardless of consequences. Often, seniors who offer such inspirational rhetoric to others would not be in their positions if they had followed such advice. This is not to suggest that one should let expediency be the dominant factor in governing his/her behavior; rather, it is to recognize consequences in the real world of bureaucratic behavior. Personally, I have found that some who strongly emphasized the need for subordinates to "speak their piece" were in fact the most intolerant of dissent.

Enclosure 2

Whistle Blowing in Government

Some of the most difficult ethical choices one can face in discharging one's oath of office are situations where the public's right to know override loyalty to the employee's organization and chain of authority. Going outside the organization in exposing policies or practices is commonly referred to as "whistle blowing". While some forms of whistle blowing may be classified as "loyal dissent", this form of dissent is best treated as a separate category, as will be shown in the following discussion.

During the Vietnam War, a government employee, Daniel Ellsberg, objected to U.S. policy. In a memo he prepared for the National Security Advisor to be given to President Nixon, he included withdrawal as one of the three policy options. The NSA deleted that option in the memo that went to the president. Although Ellsberg argued strongly that this option should be presented to the president, he did not go public with his dissent. Later, when he was working in the Pentagon on what came to be known as "The Pentagon Papers", Ellsberg became convinced that the war could not be won and that senior officials knew this. And yet, this knowledge was being withheld from the American Public. Ellsberg copied Top Secret documents and "leaked" them to the press. As we now know from books written by the senior players in the Pentagon, e.g., McNamara, Ellsberg's views were vindicated. A 1998 book by McMasters, Dereliction of Duty, castigates those officials who kept facts from the public while continuing to send young men to their deaths. Ellsberg was persona non grata in the government and in society at large.

When the Army decided to replace its M113 Armored Personnel Carrier (a vehicle designed to carry soldiers from one site to another where they would disembark to fight on foot), they developed the Infantry Fighting Vehicle (Bradley). This vehicle originally was designed to fight alongside tanks, with soldiers remaining at times to fire from ports in the vehicle. An Air Force colonel in the Office of the Secretary of Defense, who was charged with monitoring certain weapons research and development, was convinced that the vehicle, as designed, was a "rolling coffin". He cited placement of fuel tanks and ammunition; and armor composition and thickness as examples. He was unsuccessful in getting the Army to conduct live-fire tests to expose these weaknesses. He made these concerns known to congress, which led to live-fire tests and significant modifications to correct the flaws exposed by the tests. Also, the doctrinal role of the Bradley, with respect to fighting "alongside tanks", was modified to be a "stand off" vehicle. The colonel was persona non grata in the Pentagon.

Obfuscation and cover-up clouded the well-known case of the Challenger space vehicle disaster, even though the facts are now quite well established.

Engineers at Thiokol warned against the dangers of launching in cold weather (they had had trouble with the “O Rings” even at 53 degrees; the Challenger launch was at 29 Degrees). The two engineers who argued against the launch and made calls outside the chain of authority the night before seeking to delay the launch, were demoted (Thiokol was later forced to re-instate them, although they were never accepted as “team players” and one quit the company because of the stress).

The cases cited above are just a sample of instances in which federal and private professional employees are faced with the moral dilemma of loyalty to their superiors and loyalty to the American people. Of course, the officials who declared the whistle blowers *persona non grata* will give a different version of events. Rarely are these situations clear as to facts. When one decides to go public, he/she must go through a deliberate decision making process and weigh many factors, such as those discussed in the paper “Guidelines for Loyal Dissent in Government” (Guidelines). But the employee must also be prepared to face retribution, notwithstanding the Whistle-Blowing legislation passed by Congress to protect such people. In general, whistle blowers, regardless of the validity of their case, are never trusted by the organization and are generally unwelcome in other organizations.

While acknowledging the need for protection of whistle blowers, Weston²⁷⁵ offers the following factors that have to be taken into account in framing such public policy as represented by the Whistle-Blowing Act:

7. Not all whistle blowers are correct in what they allege to be the facts of management’s conduct, and determining the accuracy of whistle-blowing charges is not always easy.
8. There is always the danger that incompetent or inadequately performing employees will take up the whistle to avoid facing justified personnel sanctions.
9. Employees can choose some ways of blowing the whistle that would be unacceptably disruptive, regardless of the merits of their protest.
10. Some whistle blowers are not protesting unlawful or unsafe behavior but social policies by management that the employee considers unwise.

²⁷⁵ Alan Westin, *Whistle Blowing: Loyalty and Dissent in the Corporation*, (New York: McGraw-Hill, 1981).

- 11. The legal definitions of what constitutes a safe product, danger to health, or improper treatment of employees are often far from clear or certain.**
- 12. The efficiency and flexibility of personnel administration could be threatened by the creation of legal rights to dissent and legalized review systems.**
- 13. There can be risks to the desirable autonomy of the private sector in expanding government authority too deeply into internal business policies.**

It is clear that whistle blowing is an activity that should not be undertaken lightly. Not only is it hazardous to one's well being, it may do a disservice to the public. Having said that, I believe that a public servant is morally justified in blowing the whistle under certain circumstances. If you are convinced that a policy or activity poses a significant threat to the public's interests and welfare, you should report it to your immediate supervisor. If your immediate supervisor does not satisfy the concern, you should take the matter up the chain to exhaust the procedures in the organization. This may require that you alienate your immediate and intermediate supervisors. Only when you have exhausted internal procedures are you morally justified in taking your concern outside the organization, even to Congress. You are not morally required to go outside the organization if these steps fail. Depending on the seriousness of the issue and the level of evidence you have, you have moral discretion in this matter. Review the Guidelines for assistance in making such a decision

When are you morally obligated to go outside your organization to expose policy or practices? I believe your oath of office and professional duty places a moral obligation on you to blow the whistle if the following conditions are met:

- 1. You have documented evidence that would convince an impartial, reasonable person of your point of view.**
- 2. The policy or practice poses a serious threat to the public's interests or welfare.**
- 3. You have good reason to believe that by going public you will be successful in changing the policy or activity (as pointed out in the Guidelines, you must balance the risks you take against the likelihood of success and the seriousness of the issue).**

The standards for morally justified whistle blowing are quite naturally less stringent than those that require the action. Many factors must be taken into account in your decision-making calculus. People will have honest differences of opinion on each specific issue. One difference concerns the practice of taking your complaint to Congress. Is this whistle blowing, or is it within the boundaries of loyal dissent. One can argue that the oath of office is to the constitutional process and that elected representatives are entitled to full disclosure of everything the executive branch does. Personally, I endorse that view, but am aware it is not widely shared in the executive branch.

Whistle blowing is a difficult issue. Each person must weigh carefully the pros and cons of complex, ambiguous, uncertain factors. And yet, there comes a time when moral courage is required even if the costs are high. In making this decision, you might consider the attached summary of research on whistle blowers' experiences.

Attachment to Enclosure 2

Whistleblowing Experiences²⁷⁶

When employees publicly reveal hazardous, illegal, or fraudulent problems in their organizations, what can they expect? Although their colleagues, the public, and the press may applaud their revelations and their honesty, company management typically has a different reaction.

Why do people risk corporate wrath—which can include harassment, blackballing, intimidation, being transferred to jobs with less pay and status, loss of promotions, demotion, or even termination—and blow the whistle on mismanagement, corruption, and dishonesty?

A recent survey of 55 Whistleblowers, all with excellent employment records, found that their main motivation was a strong sense of responsibility and accountability, believing that if a system is unethical or corrupt the individual has to make a moral decision to be a part of it or not to be a part of it. The survey also found that whistleblowers often feel an ethical commitment to internal values, religious morals, or community bonds which drive their decisions to make a public disclosure. They make a decision not to go along and to accept the personal price they will most likely pay.

What advice do those who have lived through this experience give those who are considering whistleblowing?

- Find out what it takes to be a successful whistleblower**

- Find out the possible consequences in terms of your career, friendships, and health; and determine if you can cope with them and how you will cope.**

- Never act from an emotional or hasty response to an event**

- Go through channels first**

- Do not make the mistake of thinking that if the person in charge only knew what was going on it would be fixed or resolved**

²⁷⁶ From Myron P. Glazer and Penina M. Glazer's Whistleblowing in Psychology Today. August, 1986.

-Never make an accusation without complete documentation and unless you are prepared to go all the way

-Be prepared to be attacked, criticized, or embarrassed

-Do not threaten to go to the media, Congress, etc., unless you are really prepared to do so

-Rally your family support. What you are undertaking will affect not only you, your career, and your finances; it will affect the well being of each family member.

What about the psychological stress reactions most Whistleblowers experience?
Here are the most common stages:

- 1. Discovery. Denial followed by anger, shock, and a feeling of betrayal are experienced by the employee who discovers the corporate problem or mismanagement.**
- 2. Reflection. The employee weighs the costs and benefits of speaking out. This stage is often accompanied by fear, anxiety, tension, and obsession with the dilemma.**
- 3. Confrontation. Once the decision to act is made, fears about being found out or about retaliation are common.**
- 4. Retaliation. Most retaliation is designed to discredit the Whistleblower or to coerce him into retracting or withdrawing his accusation. The reality of retaliation is much harder to live with than the anticipation of it. This stage can be accompanied by feelings of regret and isolation.**
- 5. The long haul. It may take months or years before a resolution of the case. In the meantime the Whistleblower has to devote considerable time, energy, and often expense to proving his accusation. Usually, when it is finally resolved there is a period of relief and a final feeling of closure.**

Appendix: The Pre-Constitution

The Declaration of Independence

The Declaration of Independence: Today and in the Beginning

The Articles of Confederation

The "Liberty Pole" Letter of Excerpts

THE DECLARATION OF INDEPENDENCE

July 4, 1776

THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA,

When in the Course of human events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitle them, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.

We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness -- That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes; and accordingly all Experience hath shewn, that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed. But when a long Train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty, to throw off such Government, and to provide new Guards for their future Security. Such has been the patient Sufferance of these Colonies; and such is now the Necessity which constrains them to alter their former Systems of Government. The History of the present King of Great- Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid World.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing Importance, unless suspended in their Operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the Accommodation of large Districts of People, unless those People would relinquish the Right of Representation in the Legislature, a Right inestimable to them, and formidable to Tyrants only.

He has called together Legislative Bodies at Places unusual, uncomfortable, and distant from the Depository of their public Records, for the sole Purpose of fatiguing them into Compliance with his Measures.

He has dissolved Representative Houses repeatedly, for opposing with manly Firmness his Invasions on the Rights of the People.

He has refused for a long Time, after such Dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of the Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the Dangers of Invasion from without, and the Convulsions within.

He has endeavoured to prevent the Population of these States; for that Purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their Migrations hither, and raising the Conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.

He has erected a Multitude of new Offices, and sent hither Swarms of Officers to harrass our People, and eat out their Substance.

He has kept among us, in Times of Peace, Standing Armies, without the consent of our Legislatures.

He has affected to render the Military independent of and superior to the Civil Power.

He has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation:

For quartering large Bodies of Armed Troops among us;

For protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all Parts of the World:

For imposing Taxes on us without our Consent:

For depriving us, in many Cases, of the Benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended Offences:

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an arbitrary Government, and enlarging its Boundaries, so as to render it at once an Example and fit Instrument for introducing the same absolute Rules into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with Power to legislate for us in all Cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our Seas, ravaged our Coasts, burnt our Towns, and destroyed the Lives of our People.

He is, at this Time, transporting large Armies of foreign Mercenaries to compleat the Works of Death, Desolation, and Tyranny, already begun with circumstances of Cruelty and Perfidy, scarcely paralleled in the most barbarous Ages, and totally unworthy the Head of a civilized Nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the Executioners of their Friends and Brethren, or to fall themselves by their Hands.

He has excited domestic Insurrections amongst us, and has endeavoured to bring on the Inhabitants of our Frontiers, the merciless Indian Savages, whose known Rule of Warfare, is an undistinguished Destruction, of all Ages, Sexes and Conditions.

In every stage of these Oppressions we have Petitioned for Redress in the most humble Terms: Our repeated Petitions have been answered only by repeated Injury. A Prince, whose Character is thus marked by every act which may define a Tyrant, is unfit to be the Ruler of a free People.

Nor have we been wanting in Attentions to our British Brethren. We have warned them from Time to Time of Attempts by their Legislature to extend an unwarrantable Jurisdiction over us. We have reminded them of the Circumstances of our Emigration and Settlement here. We have appealed to their native Justice and Magnanimity, and we have conjured them by the Ties of our common Kindred to disavow these Usurpations, which, would inevitably interrupt our Connections and Correspondence. They too have been deaf to the Voice of Justice and of Consanguinity. We must, therefore, acquiesce in the Necessity, which denounces our Separation, and hold them, as we hold the rest of Mankind, Enemies in War, in Peace, Friends.

We, therefore, the Representatives of the UNITED STATES OF AMERICA, in GENERAL CONGRESS, Assembled, appealing to the Supreme Judge of the World for the Rectitude of our Intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly Publish and Declare, That these United Colonies are, and of Right ought to be, FREE AND INDEPENDENT STATES; that they are absolved from all Allegiance to the British Crown, and that all political Connection between them and the State of Great-Britain, is and ought to be totally dissolved; and that as FREE AND INDEPENDENT STATES, they have 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. And for the support of this Declaration, with a firm Reliance on the Protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.

The 56 signatures on the Declaration appear in the positions indicated:

[Column 1]

Georgia: Button Gwinnett Lyman Hall George Walton

[Column 2]

North Carolina: William Hooper Joseph Hewes John Penn

South Carolina: Edward Rutledge Thomas Heyward, Jr. Thomas Lynch, Jr. Arthur Middleton

[Column 3]

Massachusetts: John Hancock

Maryland: Samuel Chase William Paca Thomas Stone Charles Carroll of Carrollton

Virginia: George Wythe Richard Henry Lee Thomas Jefferson Benjamin Harrison Thomas Nelson, Jr. Francis Lightfoot Lee Carter Braxton

[Column 4]

Pennsylvania: Robert Morris Benjamin Rush Benjamin Franklin John Morton George Clymer James Smith George Taylor James Wilson George Ross

Delaware: Caesar Rodney George Read Thomas McKean

[Column 5]

New York: William Floyd Philip Livingston Francis Lewis Lewis Morris

New Jersey: Richard Stockton John Witherspoon Francis Hopkinson John Hart Abraham Clark

[Column 6]

New Hampshire: Josiah Bartlett William Whipple

Massachusetts: Samuel Adams John Adams Robert Treat Paine Elbridge Gerry

Rhode Island: Stephen Hopkins William Ellery

Connecticut: Roger Sherman Samuel Huntington William Williams Oliver Wolcott

New Hampshire: Matthew Thornton

The Declaration of Independence, Today and in the Beginning

Robert Maranto

Let interests clash and argument prosper. The vitality of the Declaration of Independence rests upon the readiness of the people and their leaders to discuss its implications and to make the crooked ways straight, not in the mummified paper curiosities lying in state at the Archives...

Pauline Maier²⁷⁷

The Declaration of Independence has been described as the best known and most loved document of American government. As Political Scientist John Rohr points out, many Americans are shocked to learn that the first lines of the Declaration of Independence are not part of the Constitution.²⁷⁸ Americans treat the Declaration as a saintly relic. The original document lies at the National Archives, protected within a massive, bulletproof glass container filled with inert helium. At night it is put to bed in a 55 ton vault meant to survive anything, including nuclear war. It is visited by thousands annually. As historian Pauline Maier has written, to many Americans, the Declaration of Independence, the Constitution, and the Bill of rights, are “sacred” texts handed down by the race of giants, the Founding Fathers.²⁷⁹

Yet the story of the actual Declaration is more complex and more interesting. The Declaration was not simply the work of Thomas Jefferson; rather it reflected the efforts of many thinkers and writers, and of a Continental Congress which, much to Jefferson’s chagrin, shortened and much improved his draft. The story of the Declaration shows that even from the beginning America was a restless nation. From the start, Americans were at work in their local communities supplying boundless energy and innovation to causes both local and national, in ways seldom controlled by government. The story also shows that whether in 1776 or 1999, American politics involves egos and ambition, but also ideas and idealism. Finally, the story of the Declaration shows that in any age, the efficient and honest administration of government matters. Most of the complaints against King George were administrative complaints. The Founders promised that they would do a better job of public administration than the King. This promise led to their success in battle and ultimately in building a new nation.

This essay will outline the causes of the Revolutionary War, the development of the Declaration of Independence, and what the Declaration’s history and content says about the American political system.

Causes of Revolution

²⁷⁷ Maier, Pauline. 1997. American Scripture: Making the Declaration of Independence. New York: Vintage Books, p. 215.

²⁷⁸ 1995. Founding Republics in France and America. Lawrence: University Press of Kansas, p. 148.

²⁷⁹ Maier, op.cit.

The war with Britain was long in coming. Particularly since 1764, Americans resented their British colonial governors, taxes and tax collectors, trade restrictions, and administrative inconveniences. Colonial governors were appointed by and accountable to the British government, and often clashed with locally elected colonial legislatures.²⁸⁰ In some respects, British-American success in the French and Indian War led to the American Revolution. Previously, Americans feared Catholic domination of the North American continent from the French or Spanish. After the French defeat, the colonists felt secure without British defense. And that defense was increasingly expensive. To pay its war debt, Britain levied expensive and highly inconvenient taxes on such staples as tea and molasses and on legal transactions. The British government also took a more direct role in American affairs. Parliament passed Quartering Acts in 1765 and 1774, requiring colonial subjects to quarter troops. Under the 1774 Administration of Justice Act, colonial offenders could be tried in Britain. This had the potential of undermining American judicial systems.²⁸¹

In short, Americans wanted to safeguard the self-government they had grown used to, resenting perceived incursions from the Crown. As deTocqueville wrote, “{t}he Revolution in the United States was caused by a mature and thoughtful taste for freedom, not by some vague, undefined instinct for independence.”²⁸² Perhaps even more important, as Political Scientist James Q. Wilson has pointed out, many of the colonists’ complaints against the King involved matters of public administration. To justify the American Revolution to the colonists and to the world, the Declaration of Independence denounced the King for numerous administrative and political failings, which Jefferson lists in ascending order of importance:

“he has called together legislative bodies at place unusual, uncomfortable & distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures...

he has obstructed the administration of justice by refusing his assent to laws for establishing judiciary powers.

he has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.

he has erected a multitude of new offices & sent hither swarms of officers to harass our people, and eat out their substance.

²⁸⁰ Carl Becker. 1970. The Declaration of Independence. New York: Vintage Books, pp. 80-83. See also pp. 21-24 in Charles S. Sydnor. 1965. American Revolutionaries in the Making. New York: Free Press.

²⁸¹ Maier, op.cit. 28-29, 118. Becker op.cit. 80-88.

²⁸² Alexis deTocqueville. 1988 (originally 1848). Democracy in American. New York: Harper & Row, p. 72.

he has kept among us, in time of peace, standing armies without the consent of our legislatures.

he has affected to render the military independent of, & superior to, the civil power...

he has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged²⁸³ by our laws; giving his assent to their acts of pretended legislation for quartering large bodies of armed troops among us; for protecting them by a mock-trial from punishment for any murders which they should commit on the inhabitants of these states; for cutting off trade with all parts of the world; for imposing taxes on us without our consent..."²⁸⁴

In the manner of a lawyer's brief, the founders justified their cause to other Americans and to the world. Theirs was a true revolution forced by principles, not a rebellion to satisfy individual ambition. Carl Becker writes:

The grievances against the King occupy so much space that one is apt to think of them as the main theme. Such is not the case. The primary purpose of the Declaration was to convince a candid world that the colonies had a moral and legal right to separate from Great Britain...the idea around which Jefferson built the Declaration was that the colonists were not rebels against established political authority, but a free people maintaining long established and imprescriptible rights against a usurping king.²⁸⁵

In short, King George III did not supply the sort of government Americans wanted and did not provide means to change that government. As the Declaration declares:

In every stage of the oppressions, we have petitioned for redress in the most humble terms; our repeated petitions have been answered only by a repeated injury. A prince whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of free people.

283 As commonly spelled in the 1700s.

284 As Maier (109-16) points out, many of the charges against the Crown were much vaguer, such as "he has forbidden his governors to pass laws of immediate & pressing importance, unless suspended in their operation till his assent should be obtained; and when so suspended, he has utterly neglected to attend to them...." Such charges puzzled pro-British Loyalists, and modern historians.

285 Becker, *op.cit.* 203. See also Bernard Bailyn. 1967. The Ideological Origins of the American Revolution. Cambridge: Harvard University Press, 152-57.

In fairness to George III, colonists never petitioned to change many of the complaints listed.²⁸⁶ Rather, by the time of the Declaration of Independence, Jefferson and other writers of the Declaration were seeking ways to justify a war which had already begun.

Indeed, the Revolutionary War started even though most of America's leaders (and perhaps most of the people) wanted to remain British, though with less control by Parliament. Initially, even relatively radical members of the Continental Congress such as Thomas Jefferson were reluctant to advocate separation from Britain. As Jefferson wrote in a letter to a friend in 1775, he wanted reunion and "would rather be in dependence on Great Britain, properly limited, than on any other nation on earth, or on no nation."²⁸⁷

The original purpose of the Continental Congress was not separation, but rather to petition for the settlement of grievances with the Crown. On adjourning in October 1774, the first Continental Congress determined to meet again the following year only if Britain did not address American grievances. Even such hotheads as John Hancock left wiggle room in their public and private statements, so as not to seem to lobby for war. Yet politicians' fears of war and desires to remain with Britain were overtaken by events: the actions and reactions of American patriots and British officers. In New England, in particular, thousands of men joined local militia units to protect their communities and states against British incursions. In April 1775, British troops clashed with local militia at Lexington and Concord. After the battles, some British troops committed atrocities while retreating to Charlestown. In May, troops under Ethan Allen and Benedict Arnold seized British Fort Ticonderoga, New York - without any instructions to do so from Congress. Indeed, Congress ordered that the ordinance taken from the Fort be catalogued for return to the British once the presumably brief unpleasantness was settled. It was not to be. The very next month, American militia besieged British forces in Boston, again on their own initiative, without congressional guidance. The British took Bunker Hill in response, suffering heavy losses. While the battle was going on, Congress passed a series of measures to bring the militia in New England under its control, to set up a military supply and personnel system, and to place a respected member of Congress with some military experience, George Washington, in charge of the new army.

Even then, most members of Congress did not favor independence. As John Adams complained at the time, and reformers even today lament:

American is a great, unwieldy body. Its progress must be slow. It is like a large fleet sailing under convoy. The fleetest sailors must wait for the dullest and slowest.²⁸⁸

²⁸⁶ Maier *op.cit.* 115-16. See also Becker, 1970.

²⁸⁷ Quoted in Maier, 21.

²⁸⁸ Maier, p. 17, see also pp. 9-19. Also see Becker *op.cit.* 125.

Increasingly, however, British military action and American reporting of it pushed elite and popular opinion towards revolution. King George III reacted to the American military moves, particularly a campaign to invade Canada, by raising taxes to enlarge his military. In August, he refused to receive formally an “Olive Branch Petition” from Congress. In November, British naval forces bombarded Falmouth (now called Portland) Maine. In December, George III approved a proclamation allowing the British navy to impress American ships and attack American ports. In January 1776, Virginia Colonial Governor Dunmore destroyed Norfolk. Pamphlets and newspapers spread news of the war across the colonies, inflaming passions.²⁸⁹ (Of course, the modern press is no more restrained.)

Most damning of all, in early May 1776, Congress learned from a British newspaper that George III paid German nobles (contractors, as it were) to send thousands of foreign troops to America to help subdue the colonists. A few weeks later, a British whistleblower provided the Continental Congress with copies of treaties between King George and his German partners. Almost immediately, the treaties were published in Pennsylvania newspapers! As result, for the first time the Continental Congress began to openly attack George III. Previously, the King had been above politics: Congress instead denounced Parliament or particular colonial governors and generals, while wishing the King success and good health. By attacking the King, the colonists were declaring their independence from the British empire. It was all the easier to renounce the King because Americans knew that many British politicians, intellectuals, and business leaders supported their demands. Only the stubborn George III and a parliamentary majority held firm.²⁹⁰

289 Ibid. 27-28.

290 Ibid. 35-39. For example, the father of economics and author of The Wealth of Nations, Adam Smith, backed American claims. There is some evidence that internal division kept the British from prosecuting the war as aggressively as George III wished.

The Drafting of the Declaration

Just as the war with Britain started in many places rather than at the direction of Congress, so too the Declaration of Independence bubbled up from localities more than it came down from the capital. As Pauline Maier finds, all across America, more than 90 states, cities, and local associations (such as militia units, guilds, and grand juries) issued their own declarations of independence from Britain in 1776 in the months before the Congressional version. These state and local declarations influenced congressional deliberations and actions. Some were patterned after the 1689 English Declaration of Rights, which formally ended closed the reign of King James II, or similar documents justifying regime changes throughout British history.²⁹¹

Once the Continental Congress decided on separation from Britain, members immediately realized the need to justify independence to their constituencies and to the world. Like modern federal executives, members of the Continental Congress were busy people juggling many tasks at once, in part because power was decentralized and broadly distributed. Government work was (and remains) work by committee. For example, John Adams found himself working eighteen hour days to keep up with the business of the ninety congressional committees on which he served!²⁹² On a very tight schedule and with no resources, on June 11 1776, Congress appointed a committee of five, Thomas Jefferson, John Adams, Benjamin Franklin, Robert R. Livingston,²⁹³ and Roger Sherman, to prepare a declaration of independence. Franklin, probably the best writer on the Committee, was so sick with gout that he missed most of the meetings. (Another good writer serving in Congress, Pennsylvania's John Dickinson, still opposed independence and thus did not serve on the Committee.) Accordingly, the Committee tasked Jefferson with the arduous work of drafting the Declaration, since he was the best writer available. As is often true of government today, representation was also a factor in Jefferson's selection. The North and particularly New England held much more support for independence than did the South. As a Virginian, Jefferson could gain more support for independence from reluctant southern delegations than could his Yankee peers.²⁹⁴

Jefferson was himself very busy and was given no respite from his work on thirty-four committees. Fortunately, Jefferson was a talented writer with a rare gift for adaptation. In the Eighteenth Century, originality was not prized as it is today. Rather, good writers were expected to borrow widely, integrating well known statements in new ways without the cumbersome

²⁹¹ Maier, 47-55.

²⁹² Michael Nelson. 1982. "A Short, Ironic History of American National Bureaucracy," Journal of Politics 44: 2, 747-78. See in particular pp. 750-51. In fairness, many of these committees lasted for only a few days or weeks.

²⁹³ Ancestor of the former Louisiana Congressman of the same name, who appeared ready to succeed Newt Gingrich as U.S. House Majority Leader before announcing his resignation in December 1998.

²⁹⁴ Becker, op.cit. 135-36; Maier, op.cit., 99-103.

requirements of citation. Jefferson had a number of well known models to draw upon.²⁹⁵ Many of his ideas came from English philosopher John Locke. Locke argued that the legitimacy of government came, not from the divine right of kings, but rather from the consent of the governed. When popular support for a ruler was gone, the people had the right to rebel and set up a new regime.²⁹⁶

More immediately, Jefferson had two texts from which he borrowed heavily. In May and June 1776, Jefferson wrote a preamble to the new Virginia constitution to justify the state's secession from Britain, and this served as a first draft of the Declaration of Independence. Second, Jefferson used a preliminary version of the Virginia Declaration of Rights, which Jefferson's friend, George Mason, wrote for the state's constitutional convention.²⁹⁷ Jefferson's reliance on these and other texts brought criticism from rivals. Of the Declaration of Independence, a jealous but probably accurate John Adams wrote in 1822 that: "There is not an idea in it but what had been hackneyed in Congress for two years before." Jefferson could respond with equal accuracy that:

Richard Henry Lee charged it as copied from Locke's treatise on Government...I know only that I turned to neither book nor pamphlet while writing it. I did not consider it as any part of my charge to invent new ideas altogether and to offer no sentiment which had ever been expressed before.

Though not new to British-American thought, Jefferson's writing certainly captured the sentiments of the day: he wrote a Declaration that expressed the will of the Continental Congress - no mean feat!²⁹⁸

Jefferson showed his draft to Franklin and Adams, and later to Sherman and Livingston. Together, they added three new paragraphs and made 23 additional changes, somewhat clarifying Jefferson's handiwork. The Committee finished its work on June 28. On July 2, Congress affirmed that "these United Colonies are, and of right, ought to be, Free and Independent States," and then sat as a Committee of the Whole to edit the draft Declaration. Surprisingly, Congress as a whole proved a better editor of Jefferson's text than its drafting committee had. Congress shortened the draft by 25%, making it more accurate and clear.²⁹⁹ For example, as Pauline Maier recounts, where Jefferson had accused the King of "unremitting" injuries, Congress changed this to "repeated" injuries, an accusation far easier to prove. Congress cut out the assertion that the King's conduct provided "no solitary fact to contradict the uniform tenor of the rest," again a difficult claim to prove. In general, Congress made

295 Maier, ibid. 103-05.

296 Becker, op.cit. 32-40; 72, 79. The Founders were particularly influenced by Locke's Second Treatise of Government. Political Scientist Donald Devine describes America as a "Lockean Liberal" nation.

297 Maier, op.cit. 104.

298 Becker, op.cit. 24-25.

299 Becker, op.cit. 150-93; Maier, op.cit. 143.

Jefferson's indictment against the King less extreme and more defensible. There was one notable exception: Jefferson's indictment of the King's use of foreign mercenaries to oppress Americans. Here, reflecting the outrage of constituents, Congress made Jefferson's charges more militant, adding a line describing the King's acts as "scarcely paralleled in the most barbarous ages." By modern standards, or even those of the day, not all of Congress's changes were so positive. At the behest of Georgia and South Carolina members, Congress eliminated Jefferson's paragraph attacking British tolerance of the slave trade.³⁰⁰

As a proud author, Jefferson did not appreciate the congressional edit, which he called "these mutilations." A more detached observer, Professor Maier, suggests that just as Jefferson did a fine job putting the sentiments of Congress into words, Congress did a fine job editing Jefferson's text so as to make it shorter and more powerful.³⁰¹ Further, like most government officials today, it was not in Jefferson's power to determine his charge: in drafting the Declaration, he had to act as the agent of the Continental Congress.

300 Maier, op.cit. 145-46.

301 Ibid. 148-49.

The Reception of the Declaration

Only July 4, the Committee of the Whole agreed on the final text of the Declaration of Independence almost unanimously, with only John Dickinson dissenting. John Hancock, the Congress's President, signed the text that day. It is not clear whether other delegates signed the document right away. Perhaps out of caution in the face of British military might, Congress did not send the states official copies of the Declaration of Independence affixed with the names of signers until January 1777, only after American military victories at Trenton and Princeton.³⁰²

Yet the Declaration had some impact almost immediately. Copies were leaked and read before public audiences in Philadelphia almost immediately. On July 8 the first official public readings and celebrations were held in Philadelphia, Easton, and Trenton. In accord with John Hancock's instructions, on July 9 General Washington had the Declaration of Independence read aloud to his officers and men. Through July and August, the Declaration was publicly proclaimed in cities and towns throughout the far-flung nation. Its readings were celebrated with toasts and festivities, and by raucous crowds destroying picture and statues of George III, royal crests, and other symbols of the Crown. One Georgia community staged a mock funeral for the King. Newspapers printed the Declaration, and many subscribers posted their copies at places of honor in their homes.³⁰³

Over the longer term, politics determined the fate of the Declaration. In the Revolutionary War the Declaration was paid little notice, as War events took center stage. After the War the Declaration was largely forgotten, as was Thomas Jefferson's crafting of the document. Through the 1780s, celebrations of July 4 were controlled by the Federalists of George Washington and John Adams. Eager to repair relations with Britain, and eschewing revolution in the wake of the French Revolution's bloody Reign of Terror, the Federalists disdained the Declaration as too "French" sounding and gave it short shrift. In contrast, the Republican (now called Democratic) led by Jefferson began to celebrate the document, and Jefferson's authorship of it. After Jefferson's Republicans came to power in 1800, Independence day ceremonies began to make use of the Declaration. By 1825, the Declaration was celebrated by increasing numbers of books and official portraits, and had become what Pauline Maier calls an "American scripture."³⁰⁴

The Declaration and American Political Thought

Since becoming a symbol of the Founding, and of American patriotism, the Declaration of Independence has served as a model for similar documents. For example, the preambles of

302 Ibid. 150-53.

303 Ibid. 155-60. While most newspapers were in English, at least one American German language paper printed the Declaration. The Marquis de Lafayette hung a copy in his home, leaving a space next to it for what he hoped would be a similar French declaration.

304 Ibid. 168-81. Becker, op.cit. P. 257.

more than 30 state constitutions in part copy the Declaration.³⁰⁵ Particularly familiar is its ringing pronouncement that:

We hold these truths to be self-evident; that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it....

Of course, America has not always lived up to these values. As Carl Becker wrote, even during the Revolutionary War English and American abolitionists were quick “to point out a certain discrepancy between the theory which proclaimed all men equal and the practice” which deprived African American slaves of their liberty.³⁰⁶ Indeed, civil rights movements throughout our history have declared America’s need to live up to her ideals as set out in the Declaration of Independence. Regarding the civil service, Professor David Rosenbloom notes that the ideals of the Declaration require commitment to equal hiring and equal treatment in government employment.³⁰⁷

Regarding the political system, the Declaration of Independence and the Constitution together show the so far successful contradictions of the American political system. Jefferson’s Declaration forcefully states that legitimacy is derived from the consent of the governed; failing that, governments can and must be overthrown. As Forrest McDonald has written, the Declaration of Independence sets out first principals for popular government, the values of change and equality. The Constitution fills in the details of how that government would work, a constitutional model to control and channel change, and avoid revolution.³⁰⁸ The tensions between the values of equality and change, and those of property and order, remain alive in American government. Each document has stood the test of time.

305 Becker, op.cit. 239-40.

306 Becker, op.cit. 227. As Becker goes on to note (248-54), slave holders reacted to such views by claiming that Negroes were not men, or that only those who join a contract in society are equal (but not those outside society), or that true equality can occur only in a state of nature. See also Bailyn, op.cit. 237, 246.

307 Rosenbloom, David H. 1971. Federal Service and the Constitution. Ithaca: Columbia University Press, p. 120.

308 Forrest McDonald. 1965. E Pluribus Unum: the Formation of the American Republic. Boston: Houghton Mifflin, 190-91, 235. For a less positive view of the Constitution and a more positive view of the Declaration and Jefferson’s thought generally, see Richard K. Mathews. 1984. The Radical Politics of Thomas Jefferson. Lawrence: University Press of Kansas.

THE ARTICLES OF CONFEDERATION

Agreed to by Congress November 15, 1777; ratified and in force, March 1, 1781

Congress resolved June 11, 1776, that a committee should be appointed to draw up articles of confederation between the Colonies. A plan proposed by John Dickinson formed the basis of the articles as proposed to Congress and, after some debate and a few changes, adopted, November 15, 1777. Representatives of the States signed the Articles during 1778 and 1779; Maryland alone refused to ratify the Articles until Congress had arrived at some satisfactory solution of the land question. The debates on the Articles, Jefferson's Notes on the Debates, and the Official Letter of Congress accompanying the Articles, can be found in Elliot's *Debates* (1861 ed.) Vol. I, p. 69 ff. The Articles of Confederation constituted the first effort of Americans to solve the problem of imperial order, and should be studied in comparison with the Albany Plan of Union and the Constitution. On the Articles of Confederation see, R. Frothingham, *Rise of the Republic of the United States*, ch. Xii; G. Bancroft, *History* Author's last rev. Vol. V, ch. Xiv; A. C. McLaughlin, *Confederation and Constitution*, ch. iii; G. T. Curtis, *Constitutional History of the United States*, Vol. I.

TO ALL TO WHOM these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting. Whereas the Delegates of the United States of America in Congress assembled did on the fifteenth day of November in the Year of our Lord One Thousand Seven Hundred and Seventy seven, and in the Second year of the Independence of America agree to certain articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South- Carolina and Georgia in the Words following, viz. "Articles of Confederation and perpetual Union between the states of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.

Art. I. The Stile of this confederacy shall be "The United States of America."

Art. II. Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

Art. III. The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

Art. IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from Justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other states, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any state, to any other state of which the Owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any state, on the property of the united states, or either of them.

If any Person guilty of, or charged with treason, felony, or other high misdemeanor in any state, shall flee from Justice, and be found in any of the united states, he shall upon demand of the governor or executive power, of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offence.

Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state.

Art. V. For the more convenient management of the general interests of the united states, delegates shall be annually appointed in such manner as the legislature of each state shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each state, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the Year.

No state shall be represented in Congress be less than two, nor by more than seven Members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the united states, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each state shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of the states.

In determining questions in the united states, in Congress assembled, each state shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any Court, or place out of Congress, and the members of congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on congress, except for treason, felony, or breach of the peace.

Art. VI. No state without the Consent of the united states in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, or alliance or treaty with any King, prince or state; nor shall any person holding any office of profit or trust under the united states, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the united states in congress assembled, or any of them, grant any title of nobility.

No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the united states in congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No state shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the united states in congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any state, except such number only, as shall be deemed necessary by the united states in congress assembled, for the defence of such state, or its trade; nor shall any body of forces be kept up by any state in time of peace, except such number only, as in the judgment of the united states, in congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such state; but every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No state shall engage in any war without the consent of the united states in congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay, till the united states in congress assembled can be consulted: nor shall any state grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the united states in congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the united states in congress assembled, unless such state be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the united states in congress assembled shall determine otherwise.

Art. VII. When land-forces are raised by any state for the common defence, all officers of or under the rank of colonel, shall be appointed by the legislature of each state respectively by whom such forces shall be raised, or in such manner as such state shall direct, and all vacancies shall be filled up by the state which first made the appointment.

Art. VIII. All charges of war, and all other expences that shall be incurred for the common defence or general welfare, and allowed by the united states in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state, granted to or surveyed for any Person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the united states in congress assembled, shall from time to time direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states within the agreed upon by the united states in congress assembled.

Art. IX. The united states in congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article-of sending and receiving ambassadors-entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever-of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the united states shall be divided or appropriated-of granting letters of marque and reprisal in times of peace-appointing courts for the trial of piracies and felonies committed on the high seas on establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of congress shall be appointed a judge of any of the said courts.

The united states in congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any state in controversy with another shall present a petition to congress stating the matter in question and praying for a hearing, notice thereof shall be given by order of congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, congress shall name three persons out of each of the united states, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as congress shall direct, shall in the presence of congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without shewing reasons, which congress shall judge sufficient, or being present shall refuse to strike, the congress shall proceed to nominate three persons out of each state, and the secretary of congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear to defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to congress, and lodged among the acts of congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the state, where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope or reward:" provided also that no state shall be deprived of territory for the benefit of the united states.

All controversies concerning the private right of soil claimed under different grants of two or more states, whose jurisdictions as they may respect such lands, and the states which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the congress of the united states, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different states.

The united states in congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states-fixing the standard of weights and measure throughout the united states-regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated-establishing and regulating post-offices from one state to another, throughout all the united states, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expences of the said office-appointing all officers of the land forces, in the service of the united states, excepting regimental officers-appointing all the officers of the naval forces, and

commissioning all officers whatever in the service of the united states-making rules for the government and regulation of the said land and naval forces, and directing their operations.

The united states in congress assembled shall have authority to appoint a committee, to sit in the recess of congress, to be denominated "A Committee of the States," and to consist of one delegate from each state; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the united states under their direction-to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of Money to be raised for the service of the united states, and to appropriate and apply the same for defraying the public expences-to borrow money, or emit bills on the credit of the united states, transmitting every half year to the respective states an account of the sums of money so borrowed or emitted,-to build and equip a navy-to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state; which requisition shall be binding, and thereupon the legislature of each state shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expence of the united states, and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the united states in congress assembled: But if the united states in congress assembled shall, on consideration of circumstances judge proper that nay state should not raise men, or should raise a smaller number than its quota, and that nay other state should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such state, unless the legislature of such state shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed and equipped, shall march to the place appointed, and within the time agreed on by the united states in congress assembled.

The united states in congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expences necessary for the defence and welfare of the united states, or any of them, nor emit bills, nor borrow money on the credit of the united states, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine states assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the united states in congress assembled.

The congress of the united states shall have power to adjourn to any time within this year, and to any place within the united states, so that no period of adjournment be for a longer duration than the space of six Months, and shall publish the Journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations as in their judgment require secrecy; and the yeas and nays of the delegates of each state on any question shall be entered on the Journal, when it is desired by any delegate; and the delegates of a state, or any of them, at his or their request shall be furnished with a transcript of the said Journal, except such parts as are above excepted, to lay before the legislatures of the several states.

Art. X. The committee of the states, or any nine of them, shall be authorised to execute, in the recess of congress, such of the powers of congress as the united states in congress assembled, by the consent of nine states, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine states in the congress of the united states assembled is requisite.

Art. XI. Canada acceding to this confederation, and joining in the measures of the united states, shall be admitted into, and entitled to all the advantages of this union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.

Art. XII. All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of congress, before the assembling of the united states, in pursuance of the present confederation, shall be deemed and considered as a charge against the united states, for payment and satisfaction whereof the said united states, and the public faith are hereby solemnly pledged.

Art. XIII. Every state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state.

AND WHEREAS it hath please the Great Governor of the World to incline the hearts of the legislatures we respectively represent in congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. KNOW YE that we under-signed delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and very of the said articles of confederation and perpetual union, and all and singular the matter and things therein contained: And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the united states in congress assembled, on all questions, which by the said confederation are submitted to them. And that the articles thereof shall be inviolably observed by the states we respectively represent, and that the union shall be perpetual. In Witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the state of Pennsylvania the ninth Day of July in the Year of our Lord one Thousand seven Hundred and Seventy-eight, and in the third year of the independence of America.

Hamilton's Concerns About the Articles of Confederation

The following is excerpted from a letter Alexander Hamilton wrote to Congressman James Duane. In it, Hamilton presents his critique of the Articles of Confederation.

*To James Duane*³⁰⁹

[Liberty Pole, New Jersey, September 3, 1780]

Dr. Sir

Agreeably to your request and my promise I sit down and give you my ideas of the defects of our present system, and the changes necessary to save us from ruin. They may perhaps be the reveries of a projector rather than the sober views of a politician. You will judge of them, and make what use you please of them.

The fundamental defect is a want of power in Congress. It is hardly worth while to show in what this consists, as it seems to be universally acknowledged, or to point out how it has happened, as the only question is how to remedy it. It may however be said that it has originated from three causes—an excess of the spirit of liberty which has made the particular states show a jealousy of all power not in their own hands; and this jealousy has led them to exercise a right of judging in the last resort of the measures recommended by Congress, and of acting according to their own opinions of their propriety or necessity, a diffidence in Congress of their own powers, by which they have been timid and indecisive in their resolutions, constantly making concessions to the states, till they have scarcely left themselves the shadow of power; a want of sufficient means at their disposal to answer the public exigencies and of vigor to draw forth those means; which have occasioned them to depend on the states individually to fulfil their engagements with the army, and the consequences of which has been to ruin their influence and credit with the army, to establish its dependence on each state separately rather than *on them*, that is rather than on the whole collectively.

It may be pleaded, that Congress had never any definitive powers granted to them and of course could exercise none—could do nothing more than recommend. The manner in which Congress was appointed would warrant, and the public good required, that they should have considered themselves as vested with full power *to preserve the republic from harm*. They have done many of the highest acts of sovereignty, which were always cheerfully submitted to—the declaration of independence, the declaration of war, the levying an army, creating a navy,

309 This letter was enclosed in another from Hamilton to Duane, September 6, 1780.

emitting money, making alliances with foreign powers, appointing a dictator &c. &c.-all these implications of a complete sovereignty were never disputed, and ought to have been a standard for the whole conduct of Administration. Undefined powers are discretionary powers, limited only by the object for which they were given-in the present case, the independence and freedom of America. The confederation made no difference; for as it has not been generally adopted, it had no operation. But from what I recollect of it, Congress have even descended from the authority which the spirit of that act gives them, while the particular states have no further attended to it than as it suited their pretensions and convenience. It would take too much time to enter into particular instances, each of which separately might appear inconsiderable; but united are of serious import. I only mean to remark, not to censure.

But the confederation itself is defective and requires to be altered; it is neither fit for war, or peace. The idea of an uncontrollable sovereignty in each state, over its internal police, will defeat the other powers given to Congress, and make our union feeble and precarious. There are instances without number, where acts necessary for the general good, and which rise out of the powers given to Congress must interfere with the internal police of the states, and there are as many instances in which the particular states by arrangements of internal police can effectually though indirectly counteract the arrangements of Congress. You have already had examples of this for which I refer you to your own memory.

The confederation gives the states individually too much influence in the affairs of the army; they should have nothing to do with it. The entire formation and disposal of our military forces ought to belong to Congress. It is an essential cement of the union; and it ought to be the policy of Congress to destroy all ideas of state attachments in the army and make it look up wholly to them. For this purpose all appointments promotions and provisions whatsoever ought to be made by them. It may be apprehended that this may be dangerous to liberty. But nothing appears more evident to me, than that we run much greater risk of having a weak and disunited federal government, than one which will be able to usurp upon the rights of the people. Already some of the lines of the army would obey their states in opposition to Congress notwithstanding the pains we have taken to preserve the unity of the army-if anything would hinder this it would be the personal influence of the General, a melancholy and mortifying consideration.

The forms of our state constitutions must always give them great weight in our affairs and will make it too difficult to bend them to the pursuit of a common interest, too easy to oppose whatever they do not like and to form partial combinations subversive of the general one. There is a wide difference between our situation and that of an empire under one simple form of government, distributed into countries provinces or districts, which have no legislatures but merely magistral bodies to execute the laws of a common sovereign. Here the danger is that the sovereign will have too much power to oppress the parts of which it is composed. In our case, that of an empire composed of confederated states each with a government completely organised within itself, having all the means to draw its subjects to a close dependence on itself-the danger is directly the reverse. It is that the common sovereign will not have power sufficient to unite the different members together, and direct the common forces to the interest and happiness of the whole.

The leagues among the old Grecian republics are a proof of this. They were continually at war with each other, and for want of union fell a prey to their neighbours. They frequently held general councils, but their resolutions were no further observed than as they suited the interests and inclinations of all the parties and at length, they sunk intirely into contempt.

The Swiss-cantons are another proof of the doctrine. They have had wars with each other which would have been fatal to them, had not the different powers in their neighbourhood been too jealous of one-another and too equally matched to suffer either to take advantage of their quarrels. That they have remained so long united at all is to be attributed to their weakness, to their poverty, and to the cause just mentioned. These ties will not exist in America; a little time hence, some of the states will be powerful empires, and we are so remote from other nations that we shall have all the leisure and opportunity we can wish to cut each others throats.

The Germanic corps might also be cited as an example in favour of the position.

The United provinces may be thought to be one against it. But the family of the stadtholders whose authority is interwoven with the whole government has been a strong link of union between them. Their physical necessities and the habits founded upon them have contributed to it. Each province is too inconsiderable by itself to undertake any thing. An analysis of their present constitutions would show that they have many ties which would not exist in ours; and that they are by no means a proper mode for us.

Our own experience should satisfy us. We have felt the difficulty of drawing out the resources of the country and inducing the states to combine in equal exertions for the common cause. The ill success of our last attempt is striking. Some have done a great deal, others little or scarcely any thing. The disputes about boundaries &c. testify how flattering a prospect we have of future tranquility, if we do not frame in time a confederacy capable of deciding the differences and compelling the obedience of the respective members.

The confederation too gives the power of the purse too intirely to the state legislatures. It should provide perpetual funds in the disposal of Congress-by a land tax, poll tax, or the like. All imposts upon commerce ought to be laid by Congress and appropriated to their use, for without certain revenues, a government can have no power; that power, which holds the purse strings absolutely, must rule. This seems to be a medium, which without making Congress altogether independent will tend to give reality to its authority.

Another defect in our system is want of method and energy in the administration. This has partly resulted from the other defect, but in a great degree from prejudice and the want of a proper executive. Congress have kept the power too much into their own hands and have meddled too much with details of every sort. Congress is properly a deliberative corps and it forgets itself when it attempts to play the executive. It is impossible such a body, numerous as it is, constantly fluctuating, can every act with sufficient decision, or with system. Two thirds of the members, one half the time, cannot know what has gone before them or what connection the

subject in hand has to what has been transacted on former occasions. The members, who have been more permanent, will only give information, that promotes the side they espouse, in the present case, and will as often mislead as enlighten. The variety of business must distract, and the proneness of every assembly to debate must at all times delay.

Lately Congress, convinced of these inconveniences, have gone into the measure of appointing boards. But this is in my opinion a bad plan. A single man, in each department of the administration, would be greatly preferable. It would give us a chance of more knowledge, more activity, more responsibility and of course more zeal and attention. Boards partake of a part of the inconveniences of larger assemblies. Their decisions are slower their energy less their responsibility more diffused. They will not have the same abilities and knowledge as an administration by single men. Men of the first pretensions will not so readily engage in them, because they will be less conspicuous, of less importance, have less opportunity of distinguishing themselves. The members of boards will take less pains to inform themselves and arrive to eminence, because they have fewer motives to do it. All these reasons conspire to give a preference to the plan of vesting the great executive departments of the state in the hands of individuals. As these men will be of course at all times under the direction of Congress, we shall blend the advantages of a monarchy and republic in our constitution.

A question has been made, whether single men could be found to undertake these offices. I think they could, because there would be then every thing to excite the ambition of candidates. But in order to this Congress by their manner of appointing them and the line of duty marked out must show that they are in earnest in making these offices, offices of real trust and importance.

I fear a little vanity has stood in the way of these arrangements, as though they would lessen the importance of Congress and leave them nothing to do. But they would have precisely the same rights and powers as heretofore, happily disencumbered of the detail. They would have to inspect the conduct of their ministers, deliberate upon their plans, originate others for the public good—only observing this rule that they ought to consult their ministers, and get all the information and advice they could from them, before they entered into any new measures or made changes in the old.

A third defect is the fluctuating constitution of our army. This has been a pregnant source of evil; all our military misfortunes, three fourths of our civil embarrassments are to be ascribed to it. The General has so fully enumerated this mischief of it in a late letter of the 310 to Congress³¹¹ that I could only repeat what he has said, and will therefore refer you to that letter.

310 Space left blank in MS.

311 Washington to President of Congress, August 20, 1780 (George Washington Papers, Library of Congress).

The imperfect and unequal provision made for the army is a fourth defect which you will find delineated in the same letter. Without a speedy change the army must dissolve; it is now a mob, rather than an army, without clothing, without pay, without provision, without morals, without discipline. We begin to hate the country for its neglect of us; the country begins to hate us for our oppressions of them. Congress have long been jealous of us; we have now lost all confidence in them, and give the worst construction to all they do. Held together by the slenderest ties we are ripening for a dissolution.

The present mode of supplying the army-by state purchases-is not one of the least considerable defects of our system. It is too precarious a dependence, because the states will never be sufficiently impressed with our necessities. Each will make its own ease a primary object, the supply of the army a secondary one. The variety of channels through which the business is transacted will multiply the number of persons employed and the opportunities of embezzling public money. From the popular spirit on which most of the governments turn, the state agents, will be men of less character and, ability, nor will there be so rigid a responsibility among them as there might easily be among those in the employ of the continent, of course not so much diligence care or economy. Very little money raised in the several states will go into the Continental treasury, on pretence, that it is all exhausted in providing the quotas of supplies, and the public will be without funds for the other demands of governments. The expense will be ultimately much greater and the advantages much smaller. We actually feel the insufficiency of this plan and have reason to dread under it a ruinous extremity of want.

These are the principal defects in the present system that now occur to me. There are many inferior ones in the organization of particular departments and many errors of administration which might be pointed out; but the task would be troublesome and tedious, and if we had once remedied those I have mentioned the others would not be attended with much difficulty.

I shall now propose the remedies, which appear to me applicable to our circumstances, and necessary to extricate our affairs from their present deplorable situation.

(Editor's Note: The remainder of the letter, not printed here, consists of Hamilton's suggestions on how to correct the flaws in the existing Articles of Confederation.)