The American Revolution and the Constitution

This book is the seventh in a series in AEI's
"We Hold These Truths: America at 250" initiative.

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The American Revolution and the Constitution

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Introduction

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July 4, 2026, will mark the 250th anniversary of the Declaration of Independence and, therefore, of the United States of America. In political terms, the Declaration may be said to have marked the beginning of the American founding era. The end of that era might be most plausibly marked by the enactment of the United States Constitution—which was written in 1787 and ratified the following year. The years that separated the adoption of these two documents were tumultuous and consequential. But the thread that connects them is clear and firm. The Constitution was very much a product of the lessons learned during the Revolutionary War and in its wake.

The Constitution, like the Declaration, came together in a Philadelphia summer, in what we now call Independence Hall. The two documents were debated and approved in the same room, 11 years apart. Those were seven years of war and four years of peace. The American Revolution began as a revolt against abuses of power by a regime that was not sufficiently accountable to the people it governed. By the war's end, in 1783, the Revolution was understood as a struggle for democratic self-rule. The forms of government established in the states during and immediately after the war therefore tended to be radically democratic: strong legislatures kept close to the people and a kind of thoroughgoing majority rule.

There was widespread agreement in the new United States that these republican forms were necessary, and in some respects that they were key to what the Revolution was about. But especially in the first few years of peace, it also became increasingly clear that these modes of government were not working well. They didn't govern effectively, and they also didn't

protect the rights of the people effectively. The populist governance of those years regularly devolved into mob rule, which led to widespread instability and dysfunction in government—and to some instances of outright political violence.

The Constitution was therefore produced in light of both fears of excessive government power and fears of disorder and mob rule. The experience of the revolutionary era sent the authors of the Constitution searching for a balanced medium between two excesses of political power. And it helped them understand that such a medium would have to be a mode of political life, not just a structure of institutions—it would be sustained as a dynamic tension more than a fixed balance.

The conflicting, if not contradictory, demands that the Declaration of Independence makes of government were a key reason for that approach. The Declaration illuminates the truth that we are all created equal, asserts that governments are instituted to protect the equal rights of all, and insists that such a government can rule only by the consent of the governed. As a practical matter, consent is achieved by majority rule. But what if the ruling majority wants to invade the rights of a minority or an individual citizen? How can one government balance majority rule with minority rights? This, in no small measure, was the question the Constitution was created to answer. The challenge posed by the Declaration was the challenge picked up by the Constitution. We therefore cannot hope to really understand our constitutional order without grasping its connection to the ideas and events of the American Revolution.

Better understanding those ideas and events, and their ongoing significance to us, is precisely the purpose of the American Enterprise Institute's "We Hold These Truths: America at 250" initiative, an ambitious celebration of the founding of which this volume forms a part. Over several years leading up to the anniversary of the Declaration of Independence, we have invited scholars both within AEI and from other institutions to take up a series of themes important to understanding the American Revolution. These scholars represent a variety of fields and viewpoints, so they will approach each of these themes from various angles. The papers

they produce are being published in a series of edited volumes intended to help Americans think more deeply and clearly about our nation's origins, character, and prospects.

The American Revolution and the Constitution is the seventh of those books. Its chapters began as papers presented at a conference held at the American Enterprise Institute in Washington, DC, on June 17, 2025. Other volumes in the series consider the American Revolution in relation to other themes, such as democracy, religion, natural rights, and global affairs. In each case, our goal is to help reintroduce readers to their nation's history, thereby enabling them to maturely appreciate the reasons for celebrating the extraordinary milestone of its 250th anniversary.

In the chapters that follow, five eminent scholars of history, law, and government consider how we ought to understand the Revolution's relationship to the constitutional order under which we live.

Jack N. Rakove describes the intense flurry of constitution-making that swept through North America from 1765 until 1787 and shows how it prepared the ground for the Constitution.

Akhil Reed Amar traces how the American Revolution pulled together the disparate strands of republicanism, constitutionalism, independence, and union and how the combination ultimately came to be expressed in the Constitution.

Adam J. White illuminates the connection between the Declaration's principles and the Constitution's conception of the rule of law and the nature of administration.

Colleen A. Sheehan highlights the deep ties between the political visions of the Declaration of Independence and the Constitution and reveals their common roots in a classical understanding of natural law.

Harvey C. Mansfield explores the meaning of the concept of "regime" in the Western political tradition and asks whether the American Revolution and the Constitution might be said to have produced a new kind of regime.

All of these authors suggest that the American Constitution, and indeed the American experience itself, could never be understood apart from the Revolution that gave rise to our nation.

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The Invention of American Constitutionalism

JACK N. RAKOVE

The quarter century separating the Stamp Act crisis of 1765–66 from the adoption of the Constitution in 1787–88 marked the most creative moment in American constitutional history. Midway through this period, the crisis of independence also decisively shifted the tenor and substance of American thinking. Before the outbreak of hostilities in April 1775, colonial leaders' primary objective was to restore the status quo ante, the situation existing before the Seven Years' War. By the fall of 1775, they knew the colonies' independence had become the most likely outcome of the great imperial quarrel. That would entail writing new charters of government to form not only a confederation for all 13 states but also legal government in the states individually.

These new governments were avowedly republican in character. They would draw their authority from the people themselves, and the crux of that authority was broadly defined in the constitutions that the provincial conventions drafted. These constitutions were one element in a cluster of decisions that revolutionary leaders deemed essential to declare independence. They directly embodied the outcome demanded by one of the fundamental rights that the Declaration of Independence affirmed: the collective authority of a people "to alter or to abolish" governments that no longer secured their rights and then "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."

How to secure this safety and happiness became the great challenge state governments faced after 1776. The early state constitutions reflected

the belief that republics relied on their citizens' public virtue, on their capacity to subordinate private interest to public good. But the demands of wartime governance sorely taxed that ideal, forcing state assemblies to legislate far more actively and onerously than their colonial predecessors had ever done. The new constitutions and the governments they created were thus exposed to mounting criticism.

The hard-earned lessons learned from this experience shaped the agenda upon which the framers of the Constitution acted in 1787. They applied those lessons to multiple concerns. Some involved the respective powers that national and state governments should wield, others the institutional design of the truly national government that the Constitution proposed. Many commentators also wondered about the republican character of the citizenry at large, recalling how the sunshine patriotism of 1775 had given way to the self-interested motives upon which most Americans now seemed to be acting.

The critical point is that this second decade-long interval helps explain how the debates of 1787–88 took their reflective form. These debates' first phase occurred behind the sealed doors (and windows) of the legislative chamber of Independence Hall, then known as the Pennsylvania State House. James Madison's notes of the debates, supplemented by other delegates' scattered notes, remain the best historical source for the framers' concerns, goals, and disagreements. While Mary Sarah Bilder has keenly scrutinized the precise composition of Madison's notes and raised some questions about their accuracy, they remain the essential document for our understanding of the convention's politics.[1]

The records of the public debate over the ratification of the Constitution are far more substantial. Three dozen volumes of *The Documentary History of the Ratification of the Constitution* are now in print, with a few stragglers yet to come.[2] Beyond these volumes dedicated to the deliberations of 1787–88, numerous other projects recording the documentary history of the revolutionary era amplify our understanding of its politics. Viewing the constitution-making process as a whole while grasping its numerous distinct components is thus both a daunting and enticing

project. With historians having pursued both approaches for the past half century, four suppositions seem especially relevant to any effort to describe the invention of American constitutionalism.

First, the project was inherently experimental in nature, because Americans not only were acutely aware of the historical novelty of their activity but also drew lessons from their experience conducting a revolution.

Second, the most important issues they faced involved political representation, or, more specifically, the working of legislative or deliberative bodies—initially at the state level, then nationally as well. Their views about the other two branches of government, the executive and judiciary, primarily reflected their critiques of the legislatures.

Third, Americans puzzled about the exact nature and authority of the constitutions they began drafting in 1776. Were these the equivalent of what we now call "super-statutes," acts that are essentially legislative in character but have some superior authority over other statutes? Or were these constitutions instead a different form of law—a fundamental charter adopted through some direct expression of popular sovereignty that was superior to ordinary elections and simultaneously empowered but limited the governments being created?

Fourth, the question of how this popular sovereignty could be expressed also proved puzzling. There was no historical example of how a people dispersed in 13 autonomous states could collectively agree on a national constitution in a mere 11 months. Many latter-day commentators think this outcome pivoted on persuading the Constitution's Federalist supporters to add a bill of rights to the main text. That claim, though not wholly mistaken, overlooks other critical aspects of the Federalist strategy for securing an unequivocal ratification of the Constitution.

Although this framework is not comprehensive, it provides a coherent perspective for conceptualizing this quarter century of history in terms of its most remarkable achievement: the invention of American constitutionalism as an innovative and distinct way of thinking about fundamental problems of republican governance.

Starting Points

Historians always have multiple options for when to start their study of the origins of great events, but at some point they simply need to make a choice.. A complete history of American constitutionalism could easily begin with the great political controversies that racked 17th-century England. It could also reckon with the potent legacy of Machiavelli, the great 16th-century political thinker and statesman, and not merely because the Second Amendment echoes his attachment to the virtues of a citizens' militia.

But for all practical purposes, the Stamp Act crisis of 1765–66 remains the best point of departure. This is not because visions of political independence were already dancing in Americans' heads. The idea of declaring complete independence from British rule emerged only after civil war erupted in Massachusetts in April 1775. The dominant issues in the Stamp Act crisis took a different form.

The American colonists insisted that the only direct taxes they were legally bound to pay were those levied by their own provincial legislatures, not by a distant Parliament to which they sent no members. On the other side of this dispute, the British government's proponents argued that because Parliament was the empire's supreme legislature, the colonists ultimately had to abide by its decisions. Parliament's claimed sovereignty was absolute and indivisible in its nature. Whatever claims the colonists made about the importance of representation had to yield to that fundamental principle.

There was a time, however, when scholars did not take this debate that seriously. The so-called progressive historians, who dominated scholarship in the early 20th century, treated these ideas and arguments simply as the rhetorical devices that political actors used to justify their real interests, which were usually their economic concerns and ambitions. Constitutional arguments were contrived to assert those interests; if one argument did not work, you simply trotted out another. When some colonial spokesmen seemed to fudge the American position, that was evidence of its insincerity.

The critical player was Benjamin Franklin, the most famous American of the age, who had been living in London since the late 1750s, acting as the Pennsylvania assembly's agent. When Franklin testified before the House of Commons, he suggested that the colonists were opposing only the direct taxes the Stamp Act imposed, not the "indirect" duties the colonists ostensibly paid on goods they imported from Britain. Franklin introduced this distinction to facilitate the Stamp Act's repeal, which occurred in March 1766.

A year later, Charles Townshend, the chancellor of the exchequer, revived this distinction as the basis for the new duties on imports that Parliament then approved. In response, John Dickinson, writing the enormously influential *Letters from a Farmer in Pennsylvania*, clarified the American position by arguing that what really mattered was the tax's purpose rather than its "direct" or "indirect" character. If the tax was designed to raise revenue rather than act as a protectionist duty, Dickinson argued, it violated the basic tenet that all taxes required the population's political consent.[3]

Franklin's testimony and Dickinson's clarification of the American argument could be read as evidence of the colonists' disingenuity. That, in an oversimplified sense, was the progressive historians' position.

The decisive refutation of this position came in a major book by Edmund S. and Helen M. Morgan, published in 1953. The Morgans argued that the colonists were largely consistent in their constitutional arguments but that their ideas evolved rapidly during this intense episode. On the one hand, their reliance on the flourishing condition of political representation in America proved quite potent in an era when elections to the House of Commons rested on a minuscule electorate and the manipulation of "rotten" and "pocket" boroughs. On the other hand, British counterclaims that Americans were ultimately subordinate to Parliament, the British Empire's supreme legislature, proved far more challenging. But in both cases, the Morgans demonstrated, these constitutional quarrels were earnest, thoughtful, and intellectually compelling. Equally importantly, colonists laid a foundation on which

the creative phase of American constitutionalism would be erected a decade later.[4]

That did not mean, however, that the Stamp Act crisis marked a first step in that direction. It occurred in the immediate wake of the Seven Years' War, at a moment when imperial patriotism dominated American political culture. Nevertheless, it had a dual legacy for the constitutional issues that Americans were considering as they prepared to declare independence in 1775–76.

First, the advantageous contrast between the norms and practices of political representation in the colonies and Britain gave Americans reasons to take pride in their condition. British North America had no rotten or pocket boroughs, and while the limitations on the suffrage offend modern sensibilities, by 18th-century standards they were quite liberal.

The idea that the new American states could ground their constitutions on republican foundations required no leap of the political imagination. The British claim that Americans were "virtually" represented in a House of Commons, where no colonial members sat, seemed nonsensical. As James Otis put it so well in his 1765 pamphlet, *Considerations on Behalf of the Colonists*, "To what purpose is it to ring everlasting changes to the colonists on the cases of Manchester, Birmingham and Sheffield, who return no members? If those now so considerable places are not represented, they ought to be."[5] This idea implied that representation was something more than a mechanism for selecting a skilled group of legislators from a social elite. It was also a device for replicating the people's will.

Precisely because these arguments were so potent, spokesmen for the British position had to escalate the debate to a higher level of abstraction: the principle of parliamentary sovereignty. Here was the second legacy of the Stamp Act debate. The colonists' argument that the autonomy of their legislative assemblies must be respected—that they were provincial equivalents of Parliament—raised, at least implicitly, questions about federalism in the context of an empire.

Yet no one then understood the imperial controversy in those terms. Only occasionally does one encounter a passing thought that perhaps

the colonies' residual authority could be formally codified. Franklin's 1754 plan for an intercolonial union was inconsequential politically. In the mid-1760s, the claim that unitary absolute sovereignty could be disaggregated—parceled out among institutions governing distinct jurisdictions—remained inconceivable.

Both positions were well-grounded in the Anglo-American tradition. Each could muster powerful arguments on its side, and neither could convincingly vanquish the other. There was no written imperial constitution to which they could appeal, nor any institution capable of resolving the controversy. But there was a deeper irony that exposed an asymmetry between Britain and America. Had Britain actually projected its sovereignty across its provinces, this argument would never have had to be made. But Britain had never governed its colonies in depth. The rhetorical appeal to parliamentary sovereignty was a confession of imperial weakness, not an assertion of effective power.

The same might be said of the Declaratory Act of 1766, the measure that the short-lived ministry of the Marquess of Rockingham introduced to ease the Stamp Act's repeal through a restless, and even resentful, Parliament. Its famous statement affirming that the colonists were subject to Parliament "in all cases whatsoever" was only theoretical.[6] It did not directly threaten the colonists, nor did it promise future legislation. Its implications were nonetheless ominous, and they became even more evident in 1774, when Lord North's ministry initiated a chain of parliamentary acts to punish Massachusetts for the Boston Tea Party and teach all the other colonies a lesson about the dangerous costs of defying the empire.

Becoming Constitution Makers

The Morgans' study of the Stamp Act crisis profoundly altered how historians wrote about the American Revolution's origins. But the true breaking point in the study of the invention of revolutionary constitutionalism

came in the mid-1960s with the appearance of three works by Oscar and Mary Handlin, Bernard Bailyn, and Gordon S. Wood.

Oscar Handlin was Bailyn's mentor, and Bailyn was Wood's, in turn, but Oscar Handlin and Wood were only 18 years apart in age. The Handlins' project was archival and editorial, but their hefty volume, *The Popular Sources of Political Authority*, comprehensively reprinted all the documents relating to the five years of deliberation that produced the Massachusetts Constitution of 1780. The most important of these texts were the "town returns," the opinionated and often lengthy responses that Massachusetts towns gave to the various constitutions they reviewed. These texts recorded thoroughly democratic discussions of major and minor concerns, notably including the critical question of how to distinguish the fundamental law of a constitution from ordinary legislation.[7]

Bailyn's contribution also began with an editorial project: to produce a documentary edition of the *Pamphlets of the American Revolution*. It seemed a modest task at first, but as Bailyn pursued it, he began rethinking his views of the Revolution's origins. His close reading of the pamphlets, Bailyn confessed, "confirmed my rather old-fashioned view that the American Revolution was above all else an ideological, constitutional, political struggle and not primarily a controversy between social groups undertaken to force changes in the organization of the society or the economy," as the progressive historians had argued.[8]

Bailyn originally planned to publish four volumes of scrupulously annotated pamphlets. In the end, only one appeared, but its introduction, "The Transforming Radicalism of the American Revolution," had a transforming impact when it was republished two years later as *The Ideological Origins of the American Revolution*, a Pulitzer Prize–winning book that effectively created a new and dominant school of interpretation. The difference between these two titles illustrated that Bailyn was concerned with not only explaining why the Revolution occurred but also measuring its transformative impact on how Americans thereafter perceived their society.[9]

Wood was finishing his dissertation exactly as Bailyn was completing the *Pamphlets*' introduction. Wood's 1969 book, *The Creation of the American Republic, 1776–1787*, began with the writing of the first state constitutions during the crisis of independence. But its real subject was to explain how this development and its aftermath profoundly reshaped the contours of American political and constitutional thinking.

Wood wrote primarily as a historian of ideas, not decisions, and one could read the whole book without noting that a war was being fought at the same time colonists were drafting state constitutions. But his book, though strikingly complex in its structure, deftly and concisely illustrated how a whole array of complex ideas was dramatically transformed in the decade after independence. Although Wood's book might seem derivative of Bailyn's, that opinion badly misjudges its originality. *The Creation of the American Republic* took a subject that had once been treated with a dry institutional formality and gave it a verve that captured the energetic excitement with which the revolutionaries pursued their republican project.

Whereas Bailyn devoted the first half of his book to explaining why the break with Britain occurred, the Handlins and Wood effectively started with the collapse of royal government in nearly every colony in 1774. Legal government at the provincial level became virtually impossible, because the legislatures were all committed to supporting resistance. In most colonies, effective power flowed to an apparatus of provincial conventions and local committees; in a few colonies, the conventions and legislatures coexisted. Royal governors understood that they were effectively powerless.

By 1776, as a decision for independence appeared increasingly likely, colonial leaders and their constituents grew ever more anxious to restore legal government. With the new states needing to mobilize their resources for war, it was essential to restore legal government, fully empowered to enact statutes, while in local communities, it was also important to get judicial courts operating again.

One other factor was critical to the new constitutional enterprise. Excepting the two corporate colonies of Connecticut and Rhode Island,

the colonies' executive branches were instruments of royal or proprietary power (like the power of the Penn family in Pennsylvania and Delaware and the Calverts' in Maryland). These could not simply be replaced; they had to be reconstituted on new principles.

There was no other way to complete this process than by writing new constitutions of government. This had never been the American objective before 1775. That calculus shifted in the spring and summer of 1775, after war erupted in Massachusetts. After the Second Continental Congress met in May 1775, the delegates had a frank, even heated debate over whether to revise the negotiating positions the First Continental Congress had adopted in October 1774. They even discussed sending a diplomatic mission to London, and one delegate, Dickinson, drafted a model bill he hoped to submit to Parliament as a framework for accommodation.

But in the end, the Second Continental Congress decided to simply restate its existing terms by sending another "olive branch" petition to the Crown. Nor did Lord North's ministry rethink its strategy. Having failed to isolate Massachusetts from the other colonies, the ministry still believed it could prevail by force of arms, even after the skirmishes at Lexington and Concord and the bloody assault on Bunker Hill proved the Americans could not be cowed into submission.

Neither side ever modified these positions. By the autumn of 1775, many American leaders understood that the coming months would require them to take further steps, including seeking foreign allies (above all, the French monarchy of Louis XVI), forming a confederation of the 13 colonies, and writing new constitutions for the emerging states and commonwealths. In this sense, these first written constitutions became an incidental but also necessary consequence of this larger revolutionary process.

Yet that judgment hardly captures the excitement that the drafting of these documents entailed. Some of that excitement was sparked by *Common Sense*, the iconoclastic attack on monarchy that resoundingly jolted public opinion. But John Adams also vividly captured it in his pamphlet *Thoughts on Government*, published in April 1776.

Adams had already earned a reputation as a learned and insightful political thinker. The basis for *Thoughts on Government* was a letter Adams had sent to a North Carolina colleague in Congress, discussing what kind of constitution the states should write. Though less striking than *Common Sense*, Adams's *Thoughts* proved to be the more important political writing in its impact on American constitutional thinking. "You and I, my dear Friend, have been sent into life, at a time when the greatest lawgivers of antiquity would have wished to have lived," Adams boasted. "When! Before the present epocha, had three millions of people full power and a fair opportunity to form and establish the wisest and happiest government that human wisdom can contrive?"[10]

Thomas Jefferson, newly returned to the Continental Congress, struck the same note a month later. "In truth," he wrote one Virginian friend, this task had become "the whole object of the present controversy; for should a bad government be instituted for us in future it had been as well to have accepted at first the bad one offered to us from beyond the water without the risk and expence of contest."[11]

Beyond this sense of enthusiasm and historical novelty, one other commitment also mattered: *Thoughts on Government* was an avowedly republican tract. The new American states were destined to become republics, not least because there was no monarchy or aristocracy to incorporate in their new governments. But republics were regarded as by nature fragile and unstable governments, best suited for geographically small and homogeneous societies, like the ancient Greek city-states.

Equally importantly, in all the constitutions adopted in 1776, the dominant institutions in state governments were the legislatures, typically staffed with political novices who usually served an annual term or two and then went home. Executive power was reduced to just that: an administrative agent of the legislative will.[12] Only after New York belatedly adopted its state constitution in 1777 did reformers begin to think about reviving the executive branch's authority.

This legislative predominance in state governance became the crucial factor shaping American constitutional thinking after 1776. The state

legislatures formed under the first constitutions differed from their colonial antecedents in two important respects. First, although the right of representation had customarily been extended to communities as they were settled and organized, support for the Revolution's common cause made the new governments more directly representative of their populations than had been the case previously. Second, and more importantly, because a war was raging and resources had to be mobilized, the legislatures had to make law to a broad extent unknown to the colonial assemblies. They faced urgent challenges and a public scrutiny that their colonial predecessors had rarely encountered.

Much of that scrutiny was directed against the policies the legislatures were compelled to adopt to keep the war effort going. But over time, that criticism generated constitutional concerns as well. After all, there was much to be said for having an energetic executive in wartime. Moreover, because they were faithful readers of Montesquieu's great work *The Spirit of the Laws*, with its formative contribution to the concept of the separation of powers, Americans had a new respect for the importance of judicial power, and with it the primitive notion of the judicial review of problematic legislation.

Popular Constitutionalism

Lessons from this experience of revolutionary governance could emerge only over time. After 1776, the republican enthusiasm generated by the crisis of independence gave way to a new realism about political conduct. But the conclusions from this experience were not immediately obvious. This was especially true in the realm of state constitutions. When those documents were written in 1776, the immediate incentive was to replace the apparatus of extralegal conventions and committees of safety with lawful government. How to revise these constitutions was a problem the drafters barely considered.

These provincial conventions were not limited to constitutional deliberations. They were surrogate legislatures, charged with pursuing all the governance tasks the situation required. But a surrogate was not equivalent to the real thing. The very use of the word "convention" implied some inferior legal status.

To note one important historical example, the Convention Parliament that summoned William of Orange and his wife, Mary, to the throne in 1688 was not technically a legal parliament because it had not been called by the deposed king, James II. Hence, when a legally convened Parliament gathered in 1689, it readopted the original Declaration of Rights, which the new monarchs had accepted as a condition of their accession, as the Bill of Rights.

This might initially appear to be a distinction without a difference. If a constitution was deemed legitimate and used to set up a working frame of government, that would be sufficient in itself. But substantive problems arose about a written constitution's nature and authority as Americans considered exactly what kind of institution the provincial conventions of 1776 had been. If they were surrogate legislatures, every action they took would be classified as legislative in nature. And a standing legal maxim held that one legislature could not bind its successors' decisions. In that case, a constitution would be only statutory in nature and not binding on later generations—or even the legislature's next session.

Amid the strain of the Revolutionary War, with all its other demands, there was no need to resolve this question—except in one state, Massachusetts. In 1775, when its governor was General Thomas Gage, a British general commanding a small army occupying its capital, Massachusetts became the first colony that urgently needed to restore legal government. To do that, however, it had to get the Continental Congress's assent, and Congress did not want to counteract imperial authority too flagrantly. It accordingly permitted Massachusetts to resume legal government under its second royal charter (1692)—which had been radically altered when Parliament adopted the Massachusetts Government Act in 1774. The main change was to allow the colonial council to act collectively as the executive, thereby displacing General Gage.[13]

This was only a stopgap measure, however. Like other states, Massachusetts wanted to write a new constitution, but it took almost four years to figure out how to do so. In the fall of 1776, the Massachusetts General Court asked towns for permission to draft a new constitution. Some of the town returns suggested this should not be the legislature's job; a special convention should be called to perform that task. When in 1778 the legislature instead proceeded to draft a constitution, the towns overwhelmingly rejected it.

The next year, the General Court took its cue and summoned a convention to pursue this task. Its 300 members were far too many to do the work. They appointed a drafting committee of 30, who in turn named a subcommittee of three, who then gave Adams, newly returned from diplomatic service abroad, the real work. This was a duty Adams relished; at last he could act like the great lawgivers of antiquity (even though Congress sent him back to Europe before the project was finished).

The convention completed the constitution in early March 1780, and citizens reviewed it in their town meetings. They compiled their returns in May and June, but those returns had their ambiguities. The convention had not provided a simple checkbox asking whether the towns finally approved or rejected the constitution as a whole. The returns instead presented a broad array of comments—some quite concise, other more elaborate—on different articles. But in the end, the constitution was declared to have been ratified.[14]

With that decision, a new doctrine of American constitutionalism had emerged in ideal form. It held that a constitution should be drafted by a convention summoned for that purpose alone and then ratified through some direct expression of popular sovereignty. Whereas conventions were once regarded as inferior versions of a legally embodied representative authority, Americans now viewed them as a superior expression of popular sovereignty. Nor was this idea a mere legal fiction, because its application provided a way to distinguish a constitution's supreme law from ordinary legislation.

This distinction proved fundamental to the divergence of American constitutionalism from its English antecedent. In the latter tradition, after 1688, what was legal—that is, what Parliament enacted and ordained—determined what was constitutional.[15] In the American variant, a written constitution would function as a test for the legality of specific government actions, undertaken by either political department.

Nor was this concept merely an abstract notion that appealed only to well-educated minds. True, Jefferson wrote an eloquent passage on this point in his *Notes on the State of Virginia*. "Constitution" was an equivocal word, Jefferson observed, susceptible to a variety of definitions.[16] But as the Massachusetts town returns demonstrate, the citizenry who gathered in their town meetings understood this crucial point just as well. Here was proof that the revolutionary era was itself a sustained episode in popular constitutionalism.[17]

Strategies of Constitution Making

Yet this account still points to an important question: Why did this transformation in the concept of a constitution occur?

In the long sweep of Anglo-American political history, constitutionalism's grand purpose had been to impose checks on arbitrary executive power. Before 1765, colonists had fully shared that commitment. Then, their concern shifted to Parliament, but only in part, because the leaders of colonial resistance believed the House of Commons no longer enjoyed the independence secured by the Glorious Revolution. The state constitution makers of 1776, as Madison recalled in 1785, had been preoccupied with the need to check executive power. "The want of *fidelity* in the administration of power having been the grievance felt under most Governments, and by the American States themselves under the British Government" was what led these constitution makers to pay too little attention to the potential dangers and deficiencies of legislative power.[18] (Emphasis in original.)

The Revolution's course quickly reversed that omission. Two parallel processes made regulating legislative behavior a dominant concern in American thinking. The need to treat a constitution as supreme law was driven no longer by the familiar desire to constrain the executive but rather by the need to regulate the legislature, the dominant branch in all the state governments. The initial force behind this lay in the unprecedented surge in legislative activity that the war effort required. Whereas colonial legislatures had rarely enacted general-purpose laws for the whole society, laws in the service of wartime mobilization were far more extensive and intrusive.

Second, this *political* development was accompanied by a shift in how Americans thought about the adequacy of political representation. Before 1776, colonists had distinguished their practices of actual representation from the decayed state of affairs in Georgian Britain. But in a process that Wood referred to as "the disintegration of representation," popular grievances were now directed against the legislatures themselves. Broadly representative as they still were, they could not escape the criticisms that the costs of an extended war generated.[19]

As these examples indicate, the crucial innovations in American constitutional and political thought after 1776 took place at the state level. That was the key discovery that gave Wood's account in *The Creation of the American Republic* its animating power. The genius of his book lies in the intricacy of his explanation of how these discrete ideas emerged and evolved within the states.

By contrast, the discussion of the confederation's nature was far less intense, nuanced, or sophisticated.[20] The Continental Congress was an isolated and secretive institution—typically numbering between two dozen and 30 delegates at any given time—that received little attention in the American press. Conversely, the state legislatures repeatedly enacted laws that affected the daily lives of every American. Their members were elected annually, represented small communities, and were well-known to their constituents.

Yet this disparity in the attention that Americans paid to their state and national governments worked to the advantage of the constitutional

reformers of the 1780s, the group that became the Federalist supporters of the Constitution. As the Continental Congress's authority and influence waned in the mid-1780s, the need for national constitutional reform became evident. But pursuing any reform scheme still appeared implausible. Amending the Articles of Confederation required all 13 state legislatures' approval. The amendments that Congress proposed in 1781, 1783, and 1784 all failed to pass.

By the autumn of 1786, the most committed advocates of national constitutional reform understood that the confederation's rules, and indeed its underlying principles, had to be abandoned. The federal union had to be reconstructed as a normal government, capable of enacting, executing, and adjudicating its own laws. Such a government would also have to be republican. But what republicanism meant by 1787 was no longer identical with what it had meant a decade earlier. When the framers of the Constitution asked how republicanism could be reformed and improved, the lessons they drew on most—and the sources of their creativity—came from the states.

In the great constitutional moment of the late 1780s, Americans collectively gained an opportunity to assess the initial phase of constitution making in 1776. A decade had passed, lessons had been learned, received principles and assumptions were subject to challenge, and an occasion had been created for a sustained debate on what form of national constitution the nation now needed.

That debate took place within the sealed chambers of Independence Hall in Philadelphia—where the framers drafted the Constitution that was first published on September 19, 1787—and in the polity as a whole, in a rich and extremely well-documented public colloquy. Because the published and digital record of these debates and other relevant events and developments in the revolutionary era is, in a word, humongous, scholars and other writers have a wide field of interpretation open to their analysis.

Many of the questions scholars ask focus on basic issues of constitutional theory. How did the framers, Federalists, and Anti-Federalists analyze the nature of American federalism or the separation of powers?

What form of judicial review did the framers envision, and how did this potent idea emerge? Other questions arise from current legal and political controversies that require examining how and why individual clauses were inserted in the Constitution or initially applied. Many of these controversies generate questions that historians would ordinarily deem not worth pursuing, yet they still deserve historically informed answers. The Second Amendment is the best example of this phenomenon, but it is hardly the only instance.

However, one major question has not received the attention it merits. That question relates to the process of constitutional formation itself, which, in turn, devolves into two major problems. The first concerns the role of strategically placed individual actors who determined how the process of adopting the Constitution would unfold. The second involves examining how the polity as a whole participated in this process.

Michael Klarman's recent interpretation described the process as "the framers' coup," precisely because the framers and their supporters precluded the people from actively affecting the debate.[21] But one can reach that judgment only after examining the political options that were available in the three-year period that began with the Annapolis Convention in September 1786 and ended when the First Congress sent its list of 12 constitutional amendments to the 11 state legislatures that had already ratified the Constitution (North Carolina and Rhode Island being the two exceptions).

Most efforts to survey these developments emphasize the role of Madison, who is routinely called the father of the Constitution. Other contenders have recently entered this titular competition: George Washington, James Wilson, and Gouverneur Morris. But the paternal title itself is more of an honorific tribute than a useful analytical device for explaining how the Constitution took shape. A document drafted over four months of debate, with several committees playing essential roles, by definition has multiple authors. Indeed, two of Madison's most intriguing contributions to the *The Federalist*, the 37th and 38th essays, not only stress the collective nature of the convention's deliberations but also contrast them with

the heroic efforts of the ancient solo "lawgivers," who fascinated Madison much as they had Adams.

One fact becomes evident when we track Madison's career in the 1780s. Putting the claims of paternity aside, he emerges as the leading *strategist* of national constitutional reform. He was actively involved in every phase of this process, first guiding the drawn-out ratification of the Articles of Confederation in 1781, next framing the revenue-related compromise amendments to the Articles that Congress sent to the states in April 1783, and then weighing the changing political landscape in the mid-1780s, after Congress sank into a state of political "imbecility."[22]

Until 1786, the agenda for reform was quite modest. Amending the Articles was no less daunting a task than their original ratification, which Maryland had delayed a good three years. Rhode Island played a similar obstructive role in the mid-1780s. The most reformers could hope for was that adopting carefully tailored amendments would set useful precedents that would abate states' reigning disdain for Congress. But they still needed to take that first step forward.

Other alternatives to amending the Articles of Confederation were conceivable. Madison had come to know Alexander Hamilton when they both served in the Continental Congress in 1782 and 1783. Although they agreed on many points, they were not full political allies. They took distinctly different paths when Congress was preoccupied with revising the revenue program that Superintendent of Finance Robert Morris had presented in July 1782. After Congress reached an impasse on Morris's proposals, Hamilton launched a risky maneuver to enlist the Continental Army's officer corps and even its commander, Washington, to support the Morris program. By late February 1783, Madison instead concluded that the only feasible option was to modify the program to make it more palatable to state legislatures. He then became the major architect of the three amendments to the Articles of Confederation that Congress submitted to the states on April 18.[23]

Hamilton rejected that compromise. He continued to dwell on an idea he had first discussed in 1780. Rather than deal with the Articles

of Confederation's obvious defects even before they were ratified, he believed the time had come to have a national convention to propose a fresh framework of federal union. He clung to that idea in 1782 and 1783, even drafting resolutions calling for a constitutional convention as the debate over the Morris program was ending. But ultimately, his proposal was never introduced. It had to be "abandoned," Hamilton noted, "for want of support."[24]

Eager to launch his legal practice, Hamilton left Congress in July 1783. By then, Madison had served more than three uninterrupted years as a Virginia delegate. In October 1783—with some irony—he was term limited out of Congress, finally returning to Montpelier, the family plantation outside Orange, Virginia. Quickly gaining election to the House of Delegates, he became its dominant member over the next three years, though he sometimes exasperated colleagues who were far less disciplined legislators.

Madison had become a professional politician when most lawmakers were avocational public servants. But from his service in Congress and the Virginia legislature, Madison had an extensive body of memories to draw on and a creative intellect that placed him in the top rank of American constitutional thinkers. Moreover, Madison had become a reflective student of collective deliberation, becoming one of the first to realize that positive lawmaking, in the broad sense of the term, would henceforth define the working agenda of American legislatures.

Throughout this period, Madison repeatedly applied and thought about the basic structure and problems of American federalism. He played a major role in negotiating the congressional acceptance of Virginia's claims to what became the Northwest Territory, which had ostensibly been why the neighboring state of Maryland had delayed ratifying the Articles of Confederation. Once that was accomplished, he chaired a small committee charged with asking how Congress could implement the powers that the Articles of Confederation formally vested in it.

The Articles' underlying premise was that the states would reliably implement Congress's resolutions. But as evidence mounted of states'

inability or failure to do so, Madison began wondering whether Congress should possess the power to coerce them to do their federal duty—say, by stationing a naval frigate or two outside their main harbors. This coercive tactic was more a confession of desperation than a constitutionally viable solution, but Madison continued to ponder the problem it identified. On January 28, 1783, amid the debate over the Morris program, he gave a thoughtful speech emphasizing the fatal naivete of believing states would uniformly comply with congressional recommendations and why their mutual suspicions of each other's good faith would cripple the whole federal system. This continuing concern became one of the main foundations of his approach to federalism issues in 1787.[25]

Once back in Virginia, Madison considered these questions from a different angle. He had two main objectives during his three years in the House of Delegates. One was to enact the revised code of laws that Jefferson and his fellow committeemen, George Mason and George Wythe, had drafted in the late 1770s. The revision was itself a latently constitutional act, because it sought to consolidate the commonwealth's statutory law on suitably republican grounds. The greatest achievement in this process was the Statute of Religious Freedom, which legally codified the principle of the free exercise of religion that Madison had managed to incorporate in Virginia's 1776 Declaration of Rights.

But legal codification was not fully equivalent to constitutional incorporation, as the concluding passage in the statute made clear. Conceding that any future legislature could alter the statute as it wished, Jefferson and his ally Madison declared nonetheless that "if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right."[26]

Madison's second concern in the mid-1780s was to align Virginia with the confederation's reform, primarily by convincing the assembly to endorse the two sets of amendments to the Articles of Confederation that Congress had proposed in 1783 and 1784. On this matter, Madison and his allies followed a cautious path. There was only one way to amend the Articles: Congress had to propose amendments, and all 13 legislatures had to

ratify them. To step outside these set procedures risked undermining the confederation itself. The revenue and commercial amendments proposed in 1783 and 1784 were not radical steps. Both proposals were carefully drawn, and it was not unrealistic to imagine that, with some patience, they could finally be ratified.

Only in the winter of 1785–86 did this calculus begin to shift. The Virginia assembly took the initiative. During its winter session, Madison had urged the assembly to adopt a resolution vesting permanent regulatory powers over commerce in Congress. But when his colleagues diluted his proposal, Madison wrote Washington that he thought "it better to trust to further experience and even distress, for an adequate remedy, than to try a temporary measure which may stand in the way of a permanent one" and which would confirm the British belief that they could exploit the states' distrust of Congress.[27]

On the session's last day, however, the assembly adopted a measure calling for an interstate conference to consider the need for uniform commercial regulations and propose a resolution vesting that power in Congress. Although Madison initially had mixed feelings about this idea, his thinking soon shifted. "Something it is agreed is necessary to be done, towards the commerce at least of the U.S.," he wrote his friend James Monroe, who had replaced him in the Virginia delegation, "and if anything can be done, it seem[s] as likely to result from the proposed Convention, and more likely to result f[rom] the present crisis, than from any other mode or time."[28]

Monroe disagreed. If a genuine convention were to be held, he replied, its agenda should be broader than the one planned for Annapolis in September. Madison apparently changed Monroe's mind, however. In Madison's view, Congress had exhausted its political credit; nothing it proposed was likely to be approved. Trying a convention, especially one with a limited agenda, could set a useful precedent that could be repeated later. The situation was further complicated by deliberations in Congress, where ideas of calling a national convention or proposing further amendments to the Articles were discussed inconclusively during the spring and summer of 1786.

In the end, the Annapolis Convention became the preferred option, less because anyone was confident of the result than because no alternative seemed attractive. Several considerations drove this conclusion. One was the effective discrediting of Congress, another the insuperable barrier that the Articles of Confederation's unanimity rule raised against any amendment, no matter how reasonable or limited.

A different and more urgent challenge came from an issue that was badly dividing Congress: the stark sectional division that arose when John Jay, the secretary of foreign affairs, asked permission to yield American claims to the free navigation of the Mississippi for 20 years to secure a commercial treaty with Spain. The eight northernmost states favored this proposal; the five southernmost states opposed it. Given that the Articles required nine states to approve a treaty, the negotiations seemed unlikely to succeed. But the real danger was not the impasse in Congress. It was that a sectionally divisive issue with an enfeebled Congress could lead the Union to devolve into two or three regional confederacies. In that case, the clock of constitutional change might run out. Instead of pursuing the gradualist strategy reformers had favored, the whole enterprise might collapse.

Envisioning the Convention

The mid-September meeting in Annapolis could have proved to be yet one more setback. Although eight states had agreed to send commissioners, only a dozen delegates from five states finally caucused at Mann's Tavern. This was too small a group to issue any substantive proposal for action. But it was still a politically talented group, including not only Madison and Hamilton but also Dickinson, the main author of the Articles of Confederation; Edmund Randolph; and Abraham Clark, a veteran New Jersey leader. Rather than adjourn empty-handed, the commissioners ventured a desperate gamble: to propose that the states send delegates to a general convention to assemble at Philadelphia in mid-May 1787.

In the aftermath of Annapolis, Madison became the premier strategist in the proto-Federalist movement and its most creative thinker. While spending a few more autumn weeks in Philadelphia, Madison wrote Monroe an intriguing letter reflecting on the Mississippi crisis. It raised a fundamental question of political theory he would continue to revolve in the months and years ahead. "There is no maxim in my opinion which is more liable to be misapplied," he wrote, "and which therefore more needs elucidation than the current one that the interest of the majority is the political standard of right and wrong."[29]

Perhaps the two of them discussed that subject further as they rode south together to Virginia, accompanied by Monroe's very pregnant bride. En route, they stopped at Mount Vernon, where they discussed the events at Annapolis and the plans for Philadelphia. From there, Madison went directly to Richmond, where the state legislature was meeting. He quickly introduced a bill that would have Virginia invite the other states to the Philadelphia convention and appoint its own delegation. Madison had *not* told Washington that he intended to place Washington's name atop the list, but he knew the former commander in chief was the most formidable asset he could wield, and he needed to keep that option open.

After the legislature adjourned, Madison spent a few days at home and then headed north to New York City, where he would rejoin Congress. En route, he spent one more night at Mount Vernon. Although he and Washington must have discussed the coming convention, that was not the only subject of public concern in the winter of 1787. The Mississippi question was still being disputed in Congress, and Shays's Rebellion in Massachusetts, which everyone regarded as a well-governed state, was unsettling. The New England states had not yet endorsed the convention, and many delegates to Congress were uncertain whether they should do so.

Finally, on February 21, after some procedural wrangling, Congress resolved that the convention should meet

> for the sole and express purpose of revising the *Articles of Confederation* and reporting to Congress and the state legislatures

> such alterations and provisions within *therein* as shall when agreed to in Congress and confirmed by the States render the federal Constitution adequate to the exigencies of *Government and the preservation of the Union*.[30] (Emphasis in original.)

Madison noted that many members "considered this resolution as a deadly blow to the existing confederation," yet "the reserve" of other delegates "made it difficult to decide their real wishes & expectations."[31]

Observations like these provide a useful reminder of the convention's persisting uncertainty. How would delegates shape its agenda? Would it simply identify additional powers to vest in the existing Congress, or would it decide that some new set of national governmental institutions should be formed? In early January, Secretary of Foreign Affairs Jay and Secretary of War Henry Knox sent Washington lengthy and detailed letters expressing their thoughts about the coming convention. Both agreed it should propose a tripartite government with a bicameral legislature and an independent executive (or "governor-general") and judiciary. But neither yet believed that public opinion was ready to approve whatever the convention proposed, nor did they think Washington should commit to attending.[32] Well into spring, Washington remained hesitant on that point, as did Madison.

Doubtless, there were many conversations among the national elite on these subjects, but few of these survive in the archives. Nor is there much evidence that the delegates, as they were appointed by their state legislatures, began drafting tentative government plans, with the exceptions of Charles Pinckney and Dickinson. Madison was the delegate who prepared most carefully for the convention and the one whose assessment of its potential agenda was the most comprehensive and thoughtful.

Based on his experience in Congress and the Virginia legislature, Madison had become a close student of collective deliberation, the political activity that is the defining characteristic of a republican government. His ideas were recorded principally in four documents written between March 19 and April 16: a memorandum—written really for himself—he

titled "Vices of the Political System of the United States" and letters to Jefferson, Randolph, and Washington. These four texts provide evidence of not only what Madison *thought* but also his mode of *thinking*, in the active sense of that word.

The "Vices" memorandum was primarily a study of the Articles of Confederation's constitutional failure. The fatal illness afflicting Congress was that its lack of legal and coercive authority proved it wanted "the great vital principles of a Political Cons[ti]tution," making it "in fact nothing more than a treaty of amity of commerce and of alliance, between so many independent and Sovereign States."[33] When Madison later presented this analogy at the convention, his fellow delegates were skeptical. But the analysis's real point was not the definition of the failed confederation but Madison's explanation of that failure's origins. His effort to explain the root causes of the federal system's debilities—its vices—became the foundation of his constitutional theory, and with it what we sometimes call, rightly or wrongly, our Madisonian constitution.

The first set of vices derived from the innate parochialism and inexperience of the state legislators, who inhabited the most powerful institutions in the American constitutional system. They simply lacked the knowledge, experience, and capacity to adequately assess their duties to national interests and other states' valid rights. This was the sour lesson Madison had learned from his three years of earnest service in the Virginia House of Delegates and, more generally, his congressional observations of states' incapacity to fulfill their federal obligations.

The second set of vices, brilliantly described in item seven, addressed the Articles of Confederation's inherent structural defects. Its sustaining premise was that Congress could rely on states to voluntarily implement its decisions. No legal or coercive authority was needed to attain that effect. That supposition, Madison recalled, faithfully reflected the fervent patriotism of the mid-1770s and (though less consistently) the pressure of the Revolutionary War.

But those exceptional conditions would not exist forever, Madison argued. In what is recognizably a brilliant game theory analysis, Madison

concluded that a federal governance structure relying on states' voluntary compliance would never work. Three factors would repeatedly come into play: essential interests diverging across states; politicians' opposition within individual states, including "Courtiers of popularity" like Virginia's great leader, Patrick Henry; and the way in which "a distrust of the voluntary compliance of each other may prevent the compliance of any, although it should be the latent disposition of all." Here, Madison grimly concluded, were "causes & pretexts which will never fail to render federal measures abortive."[34]

Two conclusions immediately followed from this deft analysis. First, the national government had to be reconstituted as a government fully capable of enacting, administering, and adjudicating its own laws. Second, the Articles of Confederation must be abandoned, not merely revised or amended. The formal resolutions of Congress and the state legislatures had said otherwise. But the convention, once assembled, would be free to set its own agenda.

This analysis of the confederation's central defect marked only the start of Madison's effort to set the convention's broader agenda. These further thoughts let us articulate a broader conception of his ideas that goes beyond the famous statements in *Federalist* 10 and 51, which are the locus classicus for the prevailing conception of our Madisonian constitution. Understanding the fashioning of Madison's agenda as a culminating stage in the invention of American constitutionalism requires identifying at least five further elements in his thinking and strategy.

Madison's Constitutionalism

The one strategic proposal to which Madison was most closely attached involved voting rules in the new legislature. In place of the equal state vote that had always been the rule in the Continental Congress, he argued that representation in the new bicameral Congress should be proportioned to population or property (or both). Without that adjustment, he feared,

the most populous states would oppose any major enhancement of the national government's authority. Madison believed this would appeal to the Northern states because of their existing superiority in population, to the Southern states because of their anticipated future growth, and to the small states, in the end, because they had nowhere else to go.

This proposal was inherently democratic not because it imagined a more participatory form of popular politics but because it argued that states' interests were ultimately reducible to the aggregated preferences of their electorates, the individual voters who embodied a sovereign people. This was in effect an equality principle, not for states as political communities exercising the same autonomy but for citizens as such. It would also implement the prevailing maxim, which held that a representative legislature should be a mirror or miniature of the larger polity that legislatively "re-presented" the distribution of interests within society. But Madison added one further element to that principle: The articulation of those interests would be improved or "refined" by legislators' collective discussions and the moderating impulses of an upper house, which he had long viewed as a critical institution.

The second objective to which Madison was most strongly committed was to vest the national government with a negative "in all cases whatsoever" on state laws. That fateful phrase knowingly echoed the Declaratory Act of 1766, and Madison regarded it as "the least possible encroachment on the State jurisdictions."[35] It could use this negative to attain two ends. The first would be preventing states from enacting laws that were inimical to national policies. But the second, and more important, would be intervening in states' internal governance. As the final three items of the "Vices" memorandum put it, the "multiplicity," "mutability," and, worst of all, "injustice" of state legislation called "into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights."[36]

Madison then asked a simple question: "To what causes is this evil to be ascribed?" His first answer, involving "the Representative Bodies," was

quite succinct. This was a matter he had long considered, and because he was writing for himself, he felt no need to elaborate. The second answer, concerning "the people themselves," was quite different. The ensuing passage marked the first draft of what became the most influential political analysis in American constitutional history, best known from *Federalist* 10. Against "the prevailing Theory" of 1776, which held that republics should be small and homogeneous, Madison argued "all civilized societies are divided into different interests and factions."[37]

Those last two key words contradicted the fundamental tenet that republican citizens had to be virtuous in nature, knowing how to subordinate private interest to public good. The central thesis Madison developed in this extended passage is that the best check on the insidious effects of faction lay not in seeking a uniformity that could never be attained but in recognizing that a diversity of interests within society provided the best political security against majority misrule.

One further conclusion can be derived from this analysis. The smaller the society, the easier it would be for the wrong kinds of majorities to form, at large and within the legislature. That meant state governments would prove far more dangerous than a national republic, and thus more likely to produce the unjust laws that threaten republican government's core premise.

The negative on state laws would solve this problem by protecting minorities and individuals against their own governments' unjust legislation. This formulation offered a vision of federal constitutional reform quite different from any that had existed previously. The task was not merely to rebalance the legal authority allocated between state and national governments. It was also to implement a new vision of the federal relationship in which states would retain autonomy over their "internal police" while the national government would acquire a residual but superior power to limit majoritarian rule's dangerous aspects.[38]

Madisonian majoritarianism is thus a nuanced subject. Majority rule *was* an essential element in his political thinking, but the deeper question was, How does one promote or establish the right kinds of majorities?

Madison's position on proportional representation in both houses of Congress was decidedly majoritarian, though the three-fifths compromise affecting apportionment in the House and the selection of presidential electors certainly complicated the subject. But his constructive emphasis on fostering congressional deliberation indicated that representation was not merely a device for translating popular preferences and interests into law. Each session of the House of Representatives—which he rightly predicted would be stocked largely with novice lawmakers—would be its own learning cycle. Thinking comparatively, he also thought there would be qualitative differences between more cosmopolitan national legislators and their backwater provincial counterparts. Even though he was strongly disappointed that the Senate retained the equal state vote, he continued to believe it was constitutionally essential.[39]

When Madison wrote about the Senate in *Federalist* 62 and 63, his final contributions to that project, he retrospectively described the equal state vote as a compromise between the more and less populous states. But that was merely a rhetorical claim. He knew it had been a defeat for his side and his theory, and he took pains to note, somewhat indirectly, "that the peculiar defence which it involves in favour of the smaller states would be more rational, if any interests common to them, and distinct from those of the other states, would otherwise be exposed to peculiar danger."[40] But Madison knew no such common interests existed; to his way of thinking, this whole pretense was irrational.

Yet the idea of compromise was highly relevant to one last facet of Madison's constitutional strategy: his approach to the problem of ratification and the potential amendment of the Constitution in response to the public debates of 1787 and 1788. Three major ideas shaped his strategy. One was deeply conceptual, one rested on a raw political calculation, and one combined a substantive problem with an assessment of the optimal strategy for concluding this entire course of constitutional deliberations via a consensus.

The conceptual problem pivoted on deciding how to distinguish a written constitution from ordinary legislation, the same issue that had

vexed constitution making in Massachusetts and had also troubled other thinkers, notably including Madison's close friend Jefferson. In the eighth item of the "Vices" memorandum, Madison noted that most states had approved the Articles of Confederation by legislative resolution, raising the question of whether a law "repugnant to an act of Congress" would prevail if it were adopted more recently than the Articles. Such legal questions would also have to be resolved by state judges.[41]

For the Constitution to attain legal supremacy and the "new system" to gain "its proper validity and energy," Madison wrote Washington, "a ratification must be obtained from the people, and not merely from the ordinary authority of the Legislatures."[42] The appropriate mechanism would be to have the people elect the ratification conventions. The only role state legislatures would play would be to oversee the election of delegates to these conventions. Here again, the decision of 1787 culminated a process that had begun in 1776.

The raw political calculation that shaped the decision of 1787–88 had a more urgent and contingent origin. At different points in the long-running efforts to ratify the Articles of Confederation and then its amendments, individual states had played particularly obstructive roles. After Delaware and New Jersey had relented on their opposition to the Articles, Maryland waged a lonely fight that kept them unratified until the winter of 1781. For the various amendments that were proposed thereafter, Rhode Island and New York became the main hurdles. In 1787, Rhode Island was the sole state that refused to send a delegation to the federal convention, while the three-member New York delegation was controlled by two members who left the proceedings early and later became open Anti-Federalists. The nationalist Hamilton still attended for a while, but as a lone delegate, he could not vote and eventually went back to New York City to pursue his quite successful legal practice.

Under these circumstances, it became pointless to adhere to the confederation's unanimity rule. Why spend months debating a radical transformation of the federal union when a lone (and tiny) state could nullify the entire endeavor? The framers of the Constitution instead

proposed that it could be ratified with the approval of nine states. Having rejected the Articles of Confederation in this way made it easier to vest the authority to ratify the Constitution in state conventions rather than their legislatures.

These preliminary changes in the rules for ratification, however, left other important matters still open. Under what framework would the ratification conventions act? Would they approve or reject the Constitution article by article or clause by clause? Could they make their approval contingent on the prior adoption of amendments, so that this convention (or another one) might be resummoned (or called anew) to debate these changes? If such a meeting were called, could state legislatures appoint new delegations of a different complexion or issue binding instructions to their delegates? Once such a cycle began, how would it ever reach a prompt and consensual decision?

Historians generally do not deal in counterfactual hypotheses like these. It is hard enough explaining what actually happened in the past without conjuring speculative possibilities. But when one needs to explain a decision, it is often helpful to know what other contingencies were available and under consideration.

Having worked so hard over the past seven years to ratify and amend the Articles of Confederation, Madison was deeply mindful of all the risks associated with the process and equally anxious to ease the path to ratification. Some of that concern rested on his self-conscious reflections on the inherent difficulty of constitution making, which drew in part on his own experience in 1776 at Virginia's Fifth Provincial Convention, in part on his historical reading, and mostly on his active role in the constitutional reform movement. Two of his essays in *The Federalist*, 37 and 38, addressed these difficulties directly, and a third, *Federalist* 49, instructed readers that "these tasks are of too ticklish a nature to be unnecessarily multiplied."[43] These were, again, the reflections of a working and thinking politician, rather than the "abstract" ideas "an ingenious theorist" might have "planned in his closet or in his imagination."[44]

Rights and Ratification

Three goals dominated Madison's thinking about the strategy for ratification. The first was that the Constitution had to be accepted or rejected in its entirety. The final voice of the sovereign people, as expressed through the ratification conventions, had to be loud and clear, but it could utter only one of two words: yes or no. Although there is no record in Madison's writings of his thoughts about the popular ratification of Massachusetts's constitution of 1780, it is plausible that he did know something about the ambiguity arising from the open-ended way in which the town meetings could vote on the text. The decision on the Constitution would have to be transparent and unequivocal.

This calculus changed somewhat, however, when the Massachusetts convention became the first to append a list of amendments to its resolution ratifying the Constitution. Amendments could come in two forms. We casually assume that adding a bill of rights or new clauses affirming particular rights was the preeminent Anti-Federalist demand. But that modern belief reflects the extraordinary importance that the first eight ratified amendments have acquired over the past century of constitutional jurisprudence.

Before the 1920s, the Bill of Rights was not important as a focal point for jurisprudence, save for in a few cases, like *Reynolds v. US*, involving the admission to the Union of Mormon-dominated Utah, that did set important precedents. But the Anti-Federalists proposed a second broad category of amendments that called for changes in the powers vested in Congress or the structure of the government. These changes would undo many provisions the convention had labored hard to attain. On this basis, Madison was adamant that such proposals could be treated only as recommendations for further action, presumably in the First United States Congress but manifestly not in a second convention. States could not make their approval of the Constitution contingent on the prior adoption of amendments.

In the fall of 1788, after 11 states had ratified the Constitution, Madison decided to take the lead in supporting the adoption of rights-protecting

amendments. Several considerations led to that decision: the narrow Federalist victory in the Virginia convention; the urgings of religious dissenters, primarily Baptists, whose rights Madison had long championed; and his competitive race against Monroe for election to the first House of Representatives. Madison had also engaged in a fascinating correspondence on the subject with Jefferson, who was still serving as minister to France. Those letters reveal Madison's substantive concerns on the subject, which reflected the new ways in which Americans were thinking about the very function a bill of rights could serve.

Madison had made his first contribution to American constitutionalism in 1776. As a young member of the Fifth Provincial Convention, he had one noteworthy achievement: leading an effort to alter the religion article in the Virginia Declaration of Rights from a statement of toleration to a broader recognition of the individual freedom of conscience. But the declarations of rights written in 1776 were not fully equivalent to the bills of rights that would later appear in American constitutions. Excepting Pennsylvania's (1776) and Massachusetts's (1780) bills of rights, these documents were not incorporated in states' constitutional texts. They functioned instead as rhetorical statements that justified the transition to republicanism. They operated not as legal commands binding the legislature but as principles lawmakers should follow, generally using the monitory "ought" rather than the imperative "shall."

A decade later, when the idea of a written constitution as supreme law had taken hold, legislators could view these declarations in a new light. When the Constitution's First Amendment opens by saying "Congress shall make no law," it is issuing a command, not simply endorsing a principle. Contemporary thinkers, notably including Madison, were coming to recognize that including a right within a constitutional text would enhance its legal authority.

But explicit inclusion carried with it two other risks. One was that elevating particular rights to this elite position risked relegating others not mentioned to an inferior status. That is why the protection of unenumerated rights in the Ninth Amendment mattered, at least conceptually,

even though the amendment has remained an empty category doctrinally. The second risk, which particularly alarmed Madison, was that reducing a right to a concise textual formula might weaken its scope. That might prove especially the case for the one right Madison valued most: the free exercise of religion.

His deepest insight, however, lay in identifying from where the greatest dangers to rights would emanate in a republic:

> In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *cheifly* [*sic*] to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.[45] (Emphasis in original.)

This was the same argument Madison had first made in the final passages of his "Vices" memorandum. Such majorities would be dominant through their influence on the legislature, making the people themselves the virtual sovereigns in a republic. In this situation, Madison concluded, a bill of rights' true value would not come from its legal application. It would develop instead from its impact on public opinion, "as [its declarations] become incorporated with the national sentiment." Religious dissent would be protected not through litigation, as we would expect, but because Americans would become morally attached to the free exercise of conscience as one of the "fundamental maxims of free Government."[46]

Securing the Constitution

These concerns and opinions again illustrate the dynamic shifts in American ideas about constitutional rights that had occurred since 1776. They also reveal the nuances in Madison's thinking on this subject. But precisely because modern commentators obsess about the original meaning

of these individuated rights, they overlook the major concern that compelled Madison to place the adoption of constitutional amendments atop his list of priorities, to the great annoyance of his congressional colleagues.

While Madison conceded that a well-crafted set of amendments would make a useful addition to the Constitution, he never thought the Constitution would be defective without them. He had a greater political project to complete: to bring the entire process of constitutional adoption to a happy conclusion by assuaging the well-meaning, if somewhat misguided, concerns of its moderate Anti-Federalist opponents.

Other members of Congress disparaged "the nauseous project of amendments" as a waste of time.[47] But Madison had a deeper ambition. Two years and a week separated the federal convention's adjournment from the dispatch of 12 proposed amendments to the states. Another 27 months passed before Virginia ratified the Bill of Rights. But once the amendments were dispatched to the states, their fate became politically irrelevant. Madison had achieved his great objective in August 1789. There was no longer any basis to challenge the Constitution's legitimacy or worry that its framers had committed some kind of coup against the body politic. Room aplenty existed, world without end, to dispute the meaning of its clauses. But Madison's reputation as a constitutional strategist was now secure.

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2

The Revolution and the Constitution: Five Grand Narratives

AKHIL REED AMAR

"What is the precise relationship," you ask, "between the American Revolution and the American Constitution?" And "please be both specific and brief," you hasten to add.

"A tall order," I reply. The American Revolution was and remains a vast and complex phenomenon, as wide and deep as, say, the Renaissance or the Reformation. And the American Constitution, though remarkably terse, is a rich text with myriad complexities of its own. Also, a complete answer should not ignore the culture and regime that ultimately emerged from and built on the document itself—America's unwritten Constitution adjoining and infusing America's written Constitution. Nor should a comprehensive answer overlook the transformative amendments to the original Constitution that arose some fourscore and several years after the Revolution of 1776 and that were inspired in no small part by one compelling—Lincolnian—interpretation of that Revolution.

In what follows, I shall do my best to answer the questions as posed within the parameters prescribed. First, I shall briefly sketch my own grand narrative of the Revolution and the Constitution.[1] After that, I shall contrast my grand narrative with four competing master sagas that have emerged over the past century and a half.

The Revolution

Essentially, the American Revolution pulled together and intertwined four strong strands: *independence*, *republicanism*, *constitutionalism*, and *union*.

The great mass of white colonists in the 13 contiguous colonies that broke away from Britain in 1776 wanted to govern themselves rather than being completely under the thumb of a faraway Parliament and king whom they could not vote out and who in turn did not seem to care very much what they thought. For most of the preceding century, colonists had enjoyed considerable practical freedom to rule themselves, with local juries and local assemblies deciding many domestic issues without tight regulation from London—a period some historians have labeled an era of imperial "salutary neglect." When Britain, after defeating the French in Canada, tried to tighten its leash in the colonies south of Quebec, free white Americans resisted.

In the immediate aftermath of the French and Indian War and its culminating 1763 Treaty of Paris, mainland British American Patriots—not yet revolutionaries—essentially sought to restore the status quo ante bellum. Britain, they allowed, should continue to manage imperial matters, while colonists in each colony should continue to handle most domestic affairs. If taxes had to be raised for imperial defense, each elected colonial legislature should do the taxing. Americans were not represented in Parliament; thus, Parliament should not tax Americans. Patriots saw taxation without representation as tyranny—a violation of the first principles of the unwritten British Constitution, an uncodified mélange of revered principles, established institutions, and time-honored practices.

In response, Parliament and George III refused to concede Britain's right to tax America as the empire saw fit and indeed upped the ante by insisting on Britain's sovereign right to pass all laws whatsoever governing its emphatically not-sovereign American dependencies. In 1774, British overlords bared their teeth and removed the velvet gloves covering their iron fists. Backed by George III, Parliament belched out a slew of intolerable measures threatening basic American freedoms, including their

bedrock freedom to preserve their established local governments, their ancient freedom from unnecessary and potentially murderous standing armies, and their traditional freedom to hold fair local jury trials when blood spilled on their soil.

In 1776, 13 mainland colonies jointly declared their independence from Britain. This strand of *independence* (autonomy from Britain and the British Empire) tightly intertwined with the strands of *republicanism* (essentially, government rooted in popular consent) and *constitutionalism* (which for most Americans quickly came to revolve around written legal instruments superseding ordinary statutes and case law). Independence would enable the (free, unenslaved) people of each colony to govern themselves, by and large.

The written state constitutions that emerged in 1776–87 were the sweetest fruits, the crown jewels, of independence. They epitomized what Americans were fighting for, first and foremost—freedom to govern themselves (republicanism) in each former colony. In his May 17, 1776, letter to his wife, Abigail, John Adams waxed poetic: "An whole Government of our own Choice, managed by Persons whom We love, revere, and can confide in, has charms in it for which Men will fight."[2]

But *independence*, *republicanism*, and *constitutionalism* could not be won without *union*, the fourth major strand of the American Revolution.

Thirteen distinct colonies, which did not closely identify or converse with each other before 1763, needed to come together to cast off the great British Empire. In addition to its more industrialized economy, its imperial opulence, its more sophisticated financial system, and its enormous military, Greater Britain (including its Irish dependencies) boasted a combined population more than six times the size of white America. In a phrase that Benjamin Franklin coined in the 1750s and that reawakened in the 1760s and 1770s, American colonists had to *join or die*.

Join they did, and win they did, but just barely over the course of a long and brutal war. In the Declaration, the former colonies declared themselves "Free and Independent States"—states with an *s*, states independent even of each other, save as each chose to work with the others. True,

the Articles of Confederation that emerged in the late 1770s and early 1780s proclaimed America to be a "perpetual Union."[3] But it was avowedly a union of emphatically *sovereign* states—a mere *league*, a multilateral *treaty*, a classic *confederation*.

Essentially, the United States circa 1783 was a forerunner of modern-day entities such as the EU and NATO. Each state had a sovereign right to leave—to Brexit, so to speak—to preserve its vital sovereign interests going forward or in response to the failure of other sovereign member states to "inviolably" abide by the multilateral treaty.[4]

The Founders' Constitution

By the mid-1780s, George Washington and his supporters understood that the Articles of Confederation were a flop. States didn't pay their dues, and there was no money to repay veterans and other creditors for the last war, much less finance the next war or crisis, whatever it might be, just over the horizon. Americans risked losing everything if Britain (or France) ever tried to reconquer lost ground. Solving the truly existential problems of the Articles' imbecility would require a slew of changes. In turn, several of these changes created their own problems, which then entailed still more changes.

Drafting the Constitution was thus like solving a giant sudoku puzzle.

Start with the war-finance imperative, which meant that Congress needed to tax citizens individually rather than rely on state dues. But if individuals were to be taxed, individuals needed to be authentically represented in a new House of Representatives. (No taxation without representation, after all.) And the old unicameral Congress under the Confederation had to transmogrify into a real bicameral legislature, just like a typical state legislature.

As a true legislature (unlike the essentially executive and diplomatic Congress under the Articles), the new Congress could be openly vested with power to legislate over Western lands and interstate and foreign trade

and intercourse. In turn, this stronger continental legislature would need to be counterbalanced by a stronger continental executive and a stronger continental judiciary, mirroring the best state governments under the best state constitutions.

The big losers in this schema would be small-minded state legislators, who would wield less clout in the new continental regime. So Washington and company needed to bypass state governments by securing a republican mandate directly from the American people, via a series of special elections of unprecedented sweep. (More on this in a moment.)

This, in turn, induced Philadelphia draftsmen to lace their proposal with democratic sweeteners—a regular census to limit malapportionment; salaries for lawmakers so that men without vast fortunes could serve in government; repudiation of property qualifications for House members, senators, and presidents; and more.

The biggest fact—the key republican fact—about the United States Constitution circa 1787 has lain in plain sight all along: *The Constitution was put to a vote.* That is the obvious meaning of the subject, object, and verbs of the document's dramatic opening sentence: "We the People of the United States . . . do ordain and establish this Constitution."[5]

And what a vote it was. The breadth and depth of inclusion were stunning—unprecedented and, in hindsight, world changing. The launching of the United States Constitution in 1787–88 was nothing less than the hinge of human history, the year that changed everything, the big bang that birthed a modern world in which democracy now prevails over much of the planet.

Before 1788, only a few democracies had existed in world history. For most of the planet most of the time, most humans were ruled by princes and priests. None of the democratic or quasi-democratic regimes that had preexisted the American Revolution—various ancient Greek republics, pre-imperial Rome, the post-feudal British and Swiss nations—had ever promulgated written constitutions that had been put to any sort of special popular vote. In 1776, America's Declaration of Independence did not undergo any special vote, nor did any of the revolutionary state

constitutions born that year. In 1781, the Articles of Confederation had likewise launched without any special popular vote.

By contrast, in 1787–88, ordinary folk across a vast continent weighed in on the proposed Constitution with both voices and votes. In eight of the 13 states, the usual property qualifications were lowered or eliminated for this special jubilee year vote; nowhere were they raised. In New York, all adult free male citizens could vote—no race tests, no religious tests, no literacy tests, no property qualifications. These were not the ordinary rules for ordinary New York elections, but all America understood the need for a special democratic mandate for the bold plan Washington and company proposed. Never before in world history had so many played so direct a role in deciding their collective fate.

Opponents of the document—so-called Anti-Federalists—were generally allowed to speak their piece. Even before the freedom of speech and the freedom of the press were *textualized* and *enacted* (that is, legislated) in the First Amendment in 1789–91, these freedoms were *embodied* and *enacted* (that is, practiced) in the very process of ordainment itself in 1787–88. Americans across the continent that fateful year conversed and contested but did not combat. Virtually no one died in political violence in that year of enormous energy and deep disagreement, which culminated in decisions by the Anti-Federalists across the land to acquiescence in votes that they had generally lost fair and square.

The document's ambition was stunningly continental—republicanism not just state by state but along the entire expanse of the United States. Once again, we need only read the preamble with care. Washington and company's central aim in 1787–88 was to create a "more perfect Union"—that is, an indivisible union on the model of the indivisible union of Scotland and England in 1707—to "provide for the common defence," which would in turn "secure the Blessings of Liberty."[6]

Indivisibility was the keystone of the great new arch. Never, in the entire ratification year, did any leading Federalist suggest that any given state could unilaterally exit the union (Brexit style) post-ordainment. After all, if any state were to opt out unilaterally after the Constitution

launched, that state could thereafter presumably choose to ally with any other nation as that newly independent American state saw fit. European monarchs might then use that seceding state as a launching pad for military invasions of bordering states.

If so, America would no longer be a kind of island nation akin to post-1707 Britain. A large standing army would need to defend the new nation at every conceivable secession point. But large standing armies would imperil liberty.

Navies were far less threatening to domestic liberty, as post–Act of Union Britain itself illustrated. Navies posed no direct and existential threat to peaceful self-governing republican folk in the hinterlands. At worst, a ship could pound a coastline and its key ports.

Large standing armies, by contrast, threatened liberty wherever soldiers stood and wherever they could march—killing, raping, and pillaging as they went. As maps of Europe made clear to American revolutionaries, countries with land borders, especially long land borders without any natural barrier to invasion, tended toward despotism. Land borders often required large standing armies to guard the frontier, and dictatorial military leaders could easily use these standing armies to kill and cow civilian subjects and threaten domestic liberty.

A crucial moment in the ratification process occurred when Alexander Hamilton read aloud to the New York ratifying convention in mid-July 1788 excerpts from a letter penned by James Madison—in an episode covered by newspapers across the continent, including in Madison's home state of Virginia and also, notably, in South Carolina. Ratification, Madison wrote and Hamilton repeated aloud, needed to be "in toto and forever." Madison went on to write, and Hamilton went on to repeat, that all other 10 states that had already said yes to the document had ratified it with this indivisibility in mind.[7]

Indivisibility, to repeat, was the key to the project: Americans had to join *indivisibly* or die.

But what about slavery—an issue on which Northern states and Deep Southern states did not see eye to eye? The Declaration's evocative

phrase "all men are created equal" was not, I insist, the product of Thomas Jefferson alone or Virginia alone. Franklin and Adams stood side by side with Jefferson in 1776, and under their watchful eyes their home states of Pennsylvania and Massachusetts soon adopted state constitutions with sweeping language announcing the creational, natal equality of all humans.

Thus, the 1776 Pennsylvania Constitution opened with its own Declaration, which ringingly proclaimed "that all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety."[8] For its part, Massachusetts in 1780 adopted an influential written constitution that said much the same thing: "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."[9]

In keeping with similar pronouncements in various other Northern state constitutions and companion texts, much of the North before the Philadelphia Convention of 1787 had already taken steps to not merely free slaves but abolish slavery itself, either immediately or gradually. Other Northern states would soon follow suit. But whites in the Deep South, especially in stiff-necked South Carolina, did not share this burgeoning abolitionist vision. These men read the Declaration's key language that "all men are created equal" quite differently.

On this crucial issue—even more crucial with the benefit of hindsight—America in 1787 was not an *it* but a *they*. Indeed, America in 1788 was essentially a shotgun wedding of convenience between North and South, who united lest they die soon at the hands of European monarchs who still held sway across much of the globe.

To woo the Deep South into a new legally indivisible union in 1787–88, the Constitution thus had to accommodate slavery—and did so, most

disastrously, via a three-fifths clause giving Southern states extra seats in both the House of Representatives and the Electoral College. This wasn't the central purpose of the new Constitution, many of whose framers and ratifiers dreamed of a day when slavery would end across the nation. Still, the document certainly did bolster an incipient slavocracy, which would ultimately imperil the very blessings of liberty the document aimed to secure.

This, in a nutshell, is the opening act of my proffered grand American narrative: America's Constitution was far more *republican* (or *democratic* if you prefer—the words were almost interchangeable, contra Madison's *Federalist* 10); far more geography minded and *geostrategic*; and far more *slavocratic* than conventionally understood.[10]

In these respects, I have argued that the Constitution was much more *Washingtonian* than *Madisonian* and that the document's democratic, geostrategic, and slavocratic structure would unsurprisingly lead to the age of *Jackson*.

A close reading of America's Constitution, its early amendments, and crucial *Federalist* essays confirms my grand narrative's emphasis on tightly interrelated ideas about land, water, armies, navies, liberty, England, and Scotland. Article I frowned on a standing army while smiling on a standing navy; only the former required a fresh congressional vote every two years. The Second Amendment's ode to the militia likewise reflected anxiety about professional armies but not professional navies.

In *Federalist* 8, Hamilton, writing as "Publius," stressed that Britain remained free because it was an island protected by a navy. America should emulate Britain, said Publius. And in *Federalist* 5, John Jay, also posing as Publius, reminded readers that Britain's island nation had in fact been made, politically, via a conscious legal process in the early 1700s that had created "an entire and perfect union" between England and Scotland.[11] This language set the stage for the Constitution's preamble, whose "more perfect Union" language aimed to do much the same thing, and for much the same reasons, in America.

The Constitution in Practice and Later Amendments

Later chapters of my proffered grand narrative carry the story forward to Gettysburg and beyond.

Apart from slavery (which, needless to say, is a gargantuan caveat), antebellum America was a smashing success. As the United States celebrated its 50th birthday, in July 1826, the 13 original colonies remained free and independent states. Free white Americans were now reaping substantial benefits from a tight juridical and geostrategic system—Washington's Constitution—that had brilliantly preserved and strengthened Americans' continental freedom and independence from Old World monarchs and militaries. The 1787–88 making of a "more perfect Union" had enabled a "common defence," which in turn had secured "the Blessings of Liberty" for a (free, non-tribal) "We the People" and their (free, unenslaved) "Posterity," precisely as the Constitution's preamble promised.[12]

Thuggish armies, military dictatorships, hereditary autocracies, wars, coups, imperial authoritarianism, terror, bloodshed, chaos, censorship, and religious absolutism plagued or would soon plague much of Mexico, the Caribbean, South America, Africa, Asia, and Europe. By contrast, America was generally peaceful, prosperous, free, and self-governing. It was a land of regular elections, broad political participation (including jury service), typically peaceful transfers of power, orderly courtrooms, unrivaled newspaper circulation, robust entrepreneurship, brisk technological innovation, burgeoning centers of learning, and considerable religious freedom. It had no large standing armies in peacetime. Relatively few Americans (other than Revolutionary War Loyalists) had fled their native country for greener pastures abroad. In the other direction, free folk from around the globe were starting to stream into the United States.

In its first half century, independent America's free (non-tribal) population more than quadrupled. Eleven new states joined the Union on an equal footing with the 13 originals. Many more future states girded the horizon, thanks especially to the 1781 Battle of Yorktown, 1783 Treaty

of Paris, 1794 Battle of Fallen Timbers, 1795 Jay Treaty, 1796 Pinckney's Treaty, 1803 Louisiana Purchase, 1813 Battle of the Thames, 1815 Battle of New Orleans, and 1819 Adams–Onís Treaty.

Slavery was the enormous and ultimately decisive exception to young America's otherwise strong performance. True, states north of the Mason–Dixon line had either ended slavery outright or put it on a guaranteed path to elimination. And these states had done so in harmony with Northern state constitutions that in general closely tracked the Declaration's soaring language of birth equality and inalienable rights. But states south of Pennsylvania had yet to follow this lead, and the Constitution had myopically failed to induce or oblige slavery's ultimate extinction.

At the federal level, a structurally proslavery (even if spiritually antislavery) Constitution had generated, thanks to the three-fifths clause, a generally proslavery presidency. Between 1789 and 1840, five of the eight men to serve as president were Southern slaveholders even while in office. The three who weren't—John Adams, his son John Quincy Adams, and Martin Van Buren—were the only three not to be reelected. Put another way, 10 of America's first 13 presidential elections had put Southern slaveholders in power. Southern slaveholders also made up a majority of the 14 men who served as House Speakers.

In the wake of the election of America's first emphatically antislavery president, Abraham Lincoln, 11 states in 1860–61 betrayed the Constitution's core meaning by attempting to secede unilaterally from the Union. Lincoln rightly resisted, and the ensuing war set in motion a chain of events that would ultimately redeem the best understanding of words at the heart of the American Revolution: "All men are created equal." Thanks to a series of constitutional amendments, the founders' structurally proslavery constitution became Lincoln's antislavery Constitution.

Thus, the four great themes of the American Revolution—*independence, republicanism*, *constitutionalism*, and *union*—ultimately intertwined and strengthened each other better than ever.

Alternative Narratives

It remains to contrast my grand constitutional narrative to the main alternatives of other storytellers.

Bancroft's Story. Consider first George Bancroft's influential account of America, a grand narrative embellished by John Fiske and others in the late 19th century.[13] Bancroft got part of the story essentially right: The Constitution aimed to solve problems of national defense and cure the imbecilities of a grossly inadequate Articles of Confederation. But even on this point, Bancroft failed to hammer home the key principle of indivisibility. (Had he done so, he would have risked offending many living ex-Confederates, who were, on my account, legally clueless traitors.)

Bancroft also failed to stress sufficiently the Constitution's astonishing democratic features—features both reflected in and driven by the unprecedented sweep of democratic inclusion in the 1787–88 ratification process. That process was from one angle the very *constitution* itself, if we view the constitution not merely as a written text but an actual deed—an ordainment, an establishment, a *constituting*.

Nor did Bancroft, who began his adult life as a Jacksonian Democrat, greatly stress the original Constitution's original sin—its proslavery structure, anchored in the three-fifths clause.

Beard's Account. Enter Charles Beard's enormously influential 1913 book, *An Economic Interpretation of the Constitution of the United States*. Like Bancroft, Beard scanted slavery's role at the founding. Unlike Bancroft, Beard depicted the Constitution as strongly antidemocratic. Beard knew, but withheld from his readers, the key ratification facts that in the great continental act of democratic ordainment of 1787–88, property qualifications were lowered or eliminated in eight of the 13 ratifying states, were essentially nonexistent in two other states, and were not raised in any of the remaining three states.[14]

If, as Beard claimed, the Constitution was essentially antidemocratic, then why did ordinary Americans vote for it? Why did they unanimously

elect and unanimously reelect its avatar, Washington, and sweep into power so many leading Federalists in the first set of elections under the new document? How did an essentially aristocratic Constitution (as he claimed it was) so quickly give rise to Jackson's America?

On my view, by contrast, Jackson embodied the Constitution's three main structural themes; like the document itself, Jackson was pro-democracy, pro-defense, and proslavery.

Wood's Synthesis. A half century after Beard, Gordon S. Wood, America's greatest living historian, began to put forth his own grand narrative.[15] Wood has rightly emphasized the fundamentally republican nature of the Revolution and, indeed, its radicalism in many respects. He has also rightly stressed the centrality of written state constitutions in the years between 1776 and 1787. But he has failed to underscore the centrality of national defense and the key issue of indivisibility. In line with his early attention to state constitutions, Wood has seen the federal Constitution as more focused on solving problems within individual states than on solving the problems of the union as a whole.

Throughout his writings, Wood has returned repeatedly to a passage in an October 24, 1787, letter from Madison to Jefferson as the key to the Constitution:

> The evils issuing from these sources [the "mutability" and internal injustice of state laws] contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects.[16]

But I submit that this private letter is not the key to the Constitution. Indeed, Madison's letter went on to lament that the Philadelphia plan *failed* to solve the state-level problem he saw as critical.

The real key to the Constitution may be found not in Madison's private musings but in Washington's most public pronouncement of all. Writing to Congress on behalf of the entire convention in a letter accompanying the proposed Constitution itself—a letter reprinted everywhere in 1787–88, often adjoining the text of the proposed Constitution—Washington explained to all Americans (not merely one overseas friend, as with Madison's letter to Jefferson) the essence of the plan, the true key:

> The Friends of our Country have long seen and desired, that *the Power of making War Peace and Treaties, that of levying Money & regulating Commerce and the correspondent executive and judicial Authorities should be fully and effectually vested in the general government of the Union*. But the Impropriety of delegating such extensive Trust to one Body of Men is evident—*Hence results the Necessity of a different Organization.*
>
> It is obviously impracticable in the fœderal Government Of these States to secure all Rights of independent Sovereignty to each and yet provide for the Interest and Safety of all. . . .
>
> In all our Deliberations on this Subject we kept steadily in our View that which appears to us the greatest Interest of every true american[:] *the Consolidation of our Union* in which is involved our Prosperity Felicity Safety *perhaps our national Existence*.[17] (Emphasis added.)

Building in part on Beard, Wood has helped us see the significance of Article I, Section 10, which limited each state government's ability to victimize its own citizens. But in the process Wood has slighted the message of the other 95 percent of the document. He has focused too much on Madison and too little on Washington and Hamilton.

In sharp contrast to Beard and Wood,[18] almost no one in the ratification process (or for the next century, for that matter) paid any attention whatsoever to Madison's *Federalist* 10. The eagle-eyed historian Douglass Adair first flagged this issue in the early 1950s.[19] The more recent and massive

29-volume series *The Documentary History of the Ratification of the Constitution* corroborates Adair, as does the careful empirical work of the political scientist William H. Riker.[20] Indeed, after painstaking investigation of the matter, law professor Larry D. Kramer has reported that Madison's distinctive ideas in *Federalist* 10 were "virtually absent from the contest to secure the Constitution's adoption."[21]

The true key to ratification was a *Federalist* 8 argument, a Washingtonian-Hamiltonian argument, an English-Scottish-Act-of-Union argument, a "Join or Die" argument. This argument addressed the Articles of Confederation's basic failures to achieve the central purpose of common defense and had almost nothing to say about Madison's aim of reforming state governments to effect a kinder, gentler, worthier, and more elitist republicanism state by state.

Fence-sitting ratifiers everywhere said yes for common-defense, collective-action reasons. For example, Edmund Randolph, Virginia's flip-floppy governor—a pivotal man in a pivotal state—changed his mind for common-defense, collective-action, English-Scottish-Act-of-Union, *Federalist* 8 reasons and said so openly and repeatedly.[22]

Federalist 10's argument did not become more compelling as the months passed in late 1787 and early 1788, but the Washingtonian and Hamiltonian *Federalist* 8 argument did become stronger—a classic bandwagon, gaining velocity over time—as more states said yes. Once most states were in, their bordering states had to join—or die. Momentum became self-fulfilling; new states had to say yes because other states had already done so.

This common-defense, collective-action, *Federalist* 8 argument was utterly inconsistent with a state's alleged right to unilaterally secede post-ordainment. As Washington stressed in his official letter to the Confederation Congress accompanying the Philadelphia Convention's proposed Constitution, the nation's *existence* required an indissoluble *consolidation* of states and the transcendence of individual state *sovereignty*. Washington later reiterated this point in his 1797 Farewell Address. Alas, scholars have often ignored this essential part of the address in their rush to analyze more peripheral aspects of this parting pronouncement.

Standing alone, Madison's *Federalist* 10 was rather agnostic on the crucial question of secession. If a state's chief reason to join was that the central government would stabilize it from above for its own *internal* benefit, well and good, but if that state later decided it did not really want or need that stabilization, thank you, why shouldn't it be allowed to leave?

To repeat: *Federalist* 10 is not the key to understanding what the Constitution was all about or what ratification was all about in the fateful year when America became *indivisibly* America. Indeed, if Madison's essay was convincing, why didn't the subsequent Bill of Rights limit state governments? After all, on Madison's view, each state government posed a greater threat to liberty than did the federal government. In late 1789, Madison in fact desperately wanted a "No state shall" amendment, but he lost on this issue in the First Congress because his *Federalist* 10–ish arguments did not persuade his contemporaries. The Bill of Rights that emerged was Washington's Bill of Rights even more than Madison's—and one of its main purposes was to woo North Carolina and Rhode Island back into the fold for *Federalist* 8 reasons.

Zinn's Distortions. If the American republic fails in our lifetime, Howard Zinn and some of his followers should bear part of the blame as corrupters of America's youth.[23] Zinn and his many acolytes have sold America's gullible high school students and high school teachers a profoundly misleading story of America, exaggerating many of America's lapses and ignoring much of American greatness.

Here, I shall mention only one tiny sliver of the Zinnian worldview, a sliver popularized by *The New York Times*'s influential 1619 Project. No, Lord Dunmore's November 1775 emancipatory proclamation was not the main *cause* of American rebellion; rather, it was a *consequence* of it. The Revolution was already underway in much of America when Virginia's royal governor, Dunmore, acted to free some slaves—slaves of only Patriots, we must note. Dunmore and the British never proposed the *abolition of slavery itself* in the late 1700s.[24]

By contrast, American Patriots in the last quarter of the 18th century took large steps to *abolish slavery altogether* in most Northern states. This enormously portentous first wave of abolition is utterly ignored by the Zinn school and popularizers of the 1619 Project.

My Bottom Line

Unlike the Brits, Americans north of the Mason–Dixon line did in fact abolish slavery in the wake of the American Revolution, and they did so in no small part because of the radical ideas of republican equality unloosed by the Revolution itself. Ultimately, these revolutionary ideas of human equality would inspire and impel Lincoln and millions of other Americans, who viewed the founding and the founders with pride even as they candidly acknowledged that America's "fathers" had been obliged to make compromises to secure union and thus independence. Lincoln and his allies also insisted, correctly, on the geostrategic indivisibility of the continental republic ordained and established by the founders' Constitution.

To repeat: Thanks to Lincoln and his followers, the four great strands of the American Revolution—*independence, republicanism*, *constitutionalism*, and *union*—ultimately came to intertwine and mutually reinforce better than ever. These powerful strands continue to shape our society even today, providing much for modern Americans to take pride in and build on.

Notes

1. This chapter borrows from, builds on, summarizes, and distills a lifetime of work. See especially Akhil Reed Amar, "Of Sovereignty and Federalism," *The Yale Law Journal* 96, no. 7 (1987): 1425–520, https://akhilamar.com/wp-content/uploads/2021/12/Of-Sovereignty-and-Federalism-2.pdf; Akhil Reed Amar, "Some New World Lessons for the Old World," *The University of Chicago Law Review* 58, no. 2 (1991): 483–510, https://www.jstor.org/stable/1599964; Akhil Reed Amar, *America's Constitution: A Biography*

(Random House Trade Paperbacks, 2005); Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (Basic Books, 2015); Akhil Reed Amar, *The Words That Made Us: America's Constitutional Conversation, 1760–1840* (Basic Books, 2021); Akhil Reed Amar, "The Year That Changed Everything," *The Atlantic*, May 4, 2021, https://www.theatlantic.com/ideas/archive/2021/05/what-made-the-constitution/618756/; and Akhil Reed Amar, *Born Equal: Remaking America's Constitution, 1840–1920* (Basic Books, 2025).

2. John Adams to Abigail Adams, May 17, 1776, in *Adams Family Correspondence*, ed. L. H. Butterfield (Belknap Press of Harvard University, 1963), 1:411.

3. Articles of Confederation of 1781, pmbl., conclusion.

4. Articles of Confederation of 1781, conclusion.

5. US Const. pmbl.

6. US Const. pmbl.

7. For more details and documentation, see Amar, *The Words That Made Us*, 259–65.

8. Pa. Const. of 1776, art. I.

9. Mass. Const. of 1780, pt. I, art. I.

10. See Amar, *America's Unwritten Constitution*, 471. For more details and documentation of my parenthetical claim that *d*-words and *r*-words were nearly interchangeable in the ratification era and the decades that followed, see Amar, *America's Unwritten Constitution*, 276–80.

11. *Federalist*, no. 8 (Alexander Hamilton); and *Federalist*, no. 5 (John Jay).

12. US Const. pmbl.

13. See generally George Bancroft, *History of the Formation of the Constitution of the United States of America*, 2 vols. (New York, 1882); and John Fiske, *The Critical Period of American History, 1783–1789* (Boston, 1888).

14. For details and documentation, see Amar, *America's Unwritten Constitution*, 5–7, 503–5nn1–2.

15. See Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (University of North Carolina Press, 1969). See also Gordon S. Wood, *The Making of the Constitution* (Baylor University Press, 1987); Gordon S. Wood, *The Radicalism of the American Revolution* (Vintage Books, 1991); and Gordon S. Wood, "A New Kind of Democracy," in *Democracy and the American Revolution*, ed. Yuval Levin et al. (AEI Press, 2024).

16. James Madison to Thomas Jefferson, October 24, 1787, Founders Online, https://founders.archives.gov/documents/Madison/01-10-02-0151.

17. George Washington to the President of Congress, September 17, 1787, Founders Online, https://founders.archives.gov/documents/Washington/04-05-02-0306.

18. On this point, I should also note the Madison-centered work of Wood's estimable ally Jack N. Rakove.

19. Douglass Adair, "The Tenth Federalist Revisited," in *Fame and the Founding Fathers: Essays by Douglass Adair*, ed. Trevor Colbourn (W. W. Norton, 1974), 75–76.

20. William H. Riker, *The Strategy of Rhetoric: Campaigning for the American Constitution* (Yale University Press, 1996).

21. Larry D. Kramer, "Madison's Audience," *Harvard Law Review* 112, no. 3 (1999): 664, https://www.jstor.org/stable/1342372.

22. For more details and documentation, see Amar, *The Words That Made Us*, 254–55.

23. See generally Howard Zinn, *A People's History of the United States* (Harper & Row, 1980); and Howard Zinn, *A Young People's History of the United States* (Seven Stories Press, 2007).

24. Pre-proclamation, more than 100 men died at Lexington and Concord in 1775, and more than 1,000 men died or suffered grievous injury in ferocious fighting on or near Bunker Hill. Long before Dunmore's proclamation, Washington had taken charge of a vast and self-described continental army, and George III had proclaimed all the mainland colonies to be in revolt. Also, in late October 1775—again, *before* Dunmore's proclamation—the monarch had formally told Parliament that "the rebellious war now levied is become more general, and is manifestly carried on for the purpose of establishing an independent empire." George III, "His Majesty's Most Gracious Speech to Both Houses of Parliament" (speech, Houses of Parliament, London, England, October 26, 1775), https://quod.lib.umich.edu/e/eccodemo/K124613.0001.001/1:1. The yearlong delay between Bunker Hill and formal independence had little to do with Dunmore's Virginia, which had already in effect joined forces with Massachusetts Patriots. Rather, formal independence was delayed mainly because of the sluggishness of the middle colonies, including Quaker-filled Pennsylvania, which had few slaves and took steps to end slavery soon after independence. For an incisive analysis of middle-colony moderates in 1774–76 that tellingly makes no mention of Dunmore, see Jack N. Rakove, "The Revolt of the Moderates," chap. 2 in *Revolutionaries: A New History of the Invention of America* (Houghton Mifflin Harcourt, 2010). Most of the key moderates highlighted by Rakove were notably antislavery: Pennsylvania and Delaware's John Dickinson, who freed all his slaves in 1777; Pennsylvania's James Wilson; and New York's John Jay and James Duane. Granted, New York was another important laggard colony, and slavery loomed larger there than in Pennsylvania. But the Zinn school and its 1619 Project affiliates offer no proof that Dunmore's proclamation in fact galvanized New York Patriots.

3

From Colonial Rule to Constitutional Administration

ADAM J. WHITE

"The American Constitution is the final and climactic expression of the ideology of the American Revolution," Bernard Bailyn observed in his landmark study of the founding.[1] One might add that the Constitution embodies not just the Declaration of Independence's principles but also the founding generation's hard-earned experience—and, indeed, that the founding generation's experience helped it better understand the Declaration's principles.[2] And among those principles, refined and clarified by experience, was "the rule of law."

At first glance, that principle seems clear. Writing in April 1776, John Adams contended that "the very definition of a Republic, is 'an Empire of Laws, and not of men.'"[3] Thomas Paine put it even more bluntly in *Common Sense*: "In America the *law* is king."[4] (Emphasis added.)

But surely Adams—and even Paine—knew that things were not so simple. Kings, after all, rule by law too. So, what would a republican rule of law actually entail? Paine offered an answer:

> For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other. But lest any ill use should afterwards arise, let the Crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is.[5]

That is, the people would be the sovereign, and they would rule themselves by law.

In hindsight, Paine merely foreshadowed one of the most vexing questions of the next 250 years: If the people are to rule themselves by law, then whom will they trust to apply the law to themselves and their elected representatives? Or, stated differently, how can the courts be made strong enough to protect the Constitution but not so strong that they subsume republican government altogether?

Abraham Lincoln would pose the same question 85 years later in his first inaugural address, warning after *Dred Scott v. Sandford* that

> the candid citizen must confess that if the policy of the Government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.[6]

This dilemma challenged the founding generation from the start. It appears throughout the Declaration of Independence itself, but in ways that were much subtler than the Declaration's more famous lines.

For the most significant controversies precipitating the American Revolution, King George III's and Parliament's abuses of power were straightforward. They wielded legislation like a weapon: the Stamp Act, the Townshend Acts, the Tea Act, and eventually, in 1774, the Intolerable Acts. These acts illuminated the problem of bad laws and bad lawmakers. That problem is best solved by vesting legislative power in lawmakers who genuinely represent the people—and by calling them to account often at the ballot box.

But the Revolution involved more than just these abuses of power. Other founding-era controversies about the republican rule of law were not simply about *too much* law or too many *bad* laws but rather about the problems that arise when laws are not actually treated *as law*.

In the Declaration, the founders denounced King George's efforts to undermine the rule of law in courts and the weight of law in day-to-day

administration. These parts of the Declaration have been largely forgotten, but they deserve our renewed attention—now more than ever.

Colonial Judicial Independence

The Declaration of Independence famously denounced King George III's abuses of power. "He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures," its writers complained, and he has "abdicated Government here, by declaring us out of his Protection and waging War against us . . . [and] plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people."

But these examples come late in the Declaration's indictment of King George. Before that crescendo, the Declaration's list of charges against the king begins with his attempts to prevent laws from being enacted, executed, or adjudicated in the colonies. And regarding the king's attacks on the courts, the Declaration is especially clear: "He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers," the Declaration argues, and he has "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

These lines described infamous controversies that erupted in the 1760s and only grew in intensity until the Revolution. The first charge refers to a prolonged standoff in North Carolina, between the assembly and the Crown, over the substantive powers local courts should have—a stark reminder that the very powers of a court are generally defined by legislation and thus subject to politics.[7]

The second and, for our purposes, more important charge went to the basic question of judicial independence—and the king's attempts to nullify it. In England, the life tenure of judges was long established, dating back at least to a 1701 act of Parliament. But in the colonies, judicial life tenure was much less common. And the reason for this, as Bailyn recounted, was not unreasonable: In the colonies, unlike at home,

"properly trained lawyers were scarce," and automatic life tenure "would prevent the replacement of ill-qualified judges by their betters, when they appeared." So the "status of the judiciary in the eighteenth century was therefore left open to political maneuvering in which, more often than not, the home government managed to carry its point and to make the tenure of judges as temporary as their salaries."[8]

But then, Bailyn wrote, "suddenly, in the early 1760's the whole issue exploded."[9] The Pennsylvania legislature declared in 1759 that the colony's judges would all have life tenure—a declaration King George II immediately nullified.

A public outcry erupted, exemplified by Joseph Galloway's 1760 "A Letter to the People of Pennsylvania," which argued that the indispensability of judicial life tenure "is rendered apparent by the slightest Consideration of human Frailty."[10]

Galloway was no foe of the Crown—after serving in the First Continental Congress, he would later oppose the Declaration of Independence, serve under General William Howe, govern Philadelphia after its capture in 1777, and eventually flee the colonies for England. But he understood that judicial independence was indispensable to the rule of law and impossible without judicial life tenure. Truly exceptional judges might serve honestly without life tenure, but

> to look for strict Impartiality and a pure Administration of Justice; to expect that Power should be confined within its legal Limits, and Right and Justice done to the Subject by Men who are dependent, is to ridicule all Laws against Bribery and Corruption, and to say that human Nature is insensible of the Love, or above the Lure of Honor, Interest, or Promotion.[11]

The issue boiled over elsewhere too. New York had secured judicial life tenure in 1750, but King George II's death in 1760 reopened the issue because the crowning of a new king required all crown commissions to be

reissued. And James De Lancey, the colony's acting governor, refused to recommission New York's judges with life tenure.

Amid the ensuing political uproar, the newly crowned King George III issued an order permanently forbidding commissions with any tenure but that of "the pleasure of the crown." New Jersey's governor violated the order and was promptly removed from office. North Carolina and others soon joined the fray, to varying degrees. "But everywhere," Bailyn wrote,

> there was bitterness at the [king's] decree and fear of its implications, for everywhere it was known that judicial tenure "at the will of the crown" was "dangerous to the liberty and property of the subject," and that if the bench were occupied by "men who depended upon the smiles of the crown for their daily bread," the possibility of having an independent judiciary as an effective check upon executive power would be wholly lost.[12]

And soon, the fight over judicial *tenure* would be further inflamed by a fight over judicial *salaries*. In Massachusetts, colonists denounced the king's rumored plan to have judges be paid by the king himself instead of the colonies. They saw clearly the implications: Regardless of life tenure, the Crown's control of judicial salaries would risk the perception, or even the reality, of the Crown's control of judicial decisions.[13] As the colonies intensified their opposition to the Stamp Act, the Intolerable Acts, and the king's further abuses of power, the Crown's control of judges became, itself, intolerable.

Confederation to Constitution

As with the aforementioned problems in administration, the Declaration solved one problem but spurred others. The newly independent states could finally control the structure of their judiciary. But the nascent union raised judicial questions of its own.

First, under the Articles of Confederation came the basic question of what matters would be entrusted to the proto-national judiciary. The Articles of Confederation did not establish a full national judiciary, of course. Most judicial questions would be decided in the states' own courts, and the Articles required the states to give "full faith and credit" to each other's judicial decisions, presaging the future Constitution's own requirement.[14] But the proto-national government would have at least some courts of its own. First and foremost, there would be admiralty courts.[15] (The Congress itself would also sit as a "court" of sorts, adjudicating disputes among the states themselves.[16]) And second, the eventual adoption of the Northwest Ordinance would necessitate territorial courts too.[17]

By creating a new judiciary, the Confederation raised a new question about the judiciary: namely, how to *appoint* judges to the courts. Given the nature of the Confederation's government, the answer was no surprise: Congress would collectively appoint the admiralty's and the Northwest Territory's judges.[18] In a government with no executive and in which states acted collectively through Congress, one could scarcely imagine another means for appointments.

Yet when the Confederation began to collapse and the states' delegates began to frame a new constitution in Philadelphia, the federal government's major innovations forced harder questions about the judiciary. The Constitution not only established three separate branches of federal government but also provided that the Constitution would be "the supreme Law of the Land."[19] This would require, in turn, a new federal judiciary, or at least one Supreme Court—and a more complicated conversation about how judges should be appointed.

At first, the prevailing convention in Congress was the Virginia Plan, which proposed that the national judiciary's members be appointed by the national legislature. This followed the Confederation's example, but it also reflected the basic nature of the Virginia Plan itself, that the predominant legislative branch would also appoint the executive. Committing judicial appointments to the legislature naturally followed.

But in the convention's deliberations on June 5, 1787, Pennsylvania's James Wilson called for the *executive*, not the legislature, to appoint judges and officers. According to James Madison's notes, Wilson argued that the responsibility for appointments could not be vested in such a numerous body without too great a risk of "intrigue, partiality, and concealment." He thought it better to vest the appointment power in "a single, responsible person."[20]

South Carolina's John Rutledge disagreed. He opposed granting "so great a power to any single person. The people will think we are leaning too much towards Monarchy."[21]

Madison was characteristically wary of giving such a power to either a single person or a great multitude; he preferred a middle course, empowering the relatively small Senate to appoint judges. The delegates initially tabled the issue, but on June 13, they approved Madison's motion for Senate appointments.

Then William Paterson introduced the New Jersey Plan, with a unicameral legislature appointing the president—and the president, in turn, appointing judges. Hamilton then replied with his own plan for a constitution, under which the much stronger president would appoint judges "subject to the approbation or rejection of the Senate."[22]

Neither displaced Madison's plan for the Senate to appoint judges, but an uneasy stalemate ensued until July 18, when Nathaniel Gorham proposed a compromise: The president would make appointments, subject to the Senate's "advice and consent."[23] This was the approach in Gorham's Massachusetts (with the Privy Council playing the Senate's advice-and-consent role). Gorham's proposal occasioned one more round of debate among Madison, Luther Martin, Edmund Randolph, and Roger Sherman, all of whom pressed the question of what mode of appointment would best secure judges with the right "character."[24]

Eventually, the convention approved Gorham's proposal. The delegates had not seriously questioned the importance of judicial *independence*. That was taken for granted, and they focused instead on judicial *appointment*.

But when the Constitution went out for ratification, attention turned to the more profound question of judicial *power*.

When students today read *Federalist* 78, Hamilton's essay gives no hint of the history that preceded it. The Revolution's defense of judicial independence goes unmentioned. As for judicial appointments, Hamilton noted simply that "the mode of appointing the judges . . . 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."[25] Rather, with the question of judicial *independence* settled beyond serious dispute and judicial *appointment*—the question that had stymied the convention for half the summer—reduced to a fairly marginal point of debate, the Constitution's judicial branch attracted an entirely new criticism focused on the sheer power given to the newly conceived Supreme Court.

This was the crux of the argument that "Brutus"—the pseudonym of a leading Anti-Federalist writer—made against the Constitution: that a judiciary vested with the independence of life tenure could not be entrusted with the power of judicial review. To be sure, Brutus observed, English judges had long enjoyed life tenure, "but then their determinations are subject to correction by the house of lords; and their power is by no means so extensive as that of the proposed supreme court of the union." Brutus contended that English judges had never asserted "the authority to set aside an act of parliament under the idea that it is inconsistent with their constitution."[26] Such authority, he argued, in the hands of independent judges, was a threat to republican government itself.

"I do not object to the judges holding their commissions during good behaviour," Brutus concluded, but the convention erred by making judges

> *independent*, in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power

> under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.[27] (Emphasis in original.)

Brutus accepted judicial tenure, but he could not accept giving life-tenured judges a power to strike down legislation as unconstitutional.

In effect, Brutus was harking back not to the pre-1776 debates about judicial tenure and pay but to the *premise* of those debates: that the people themselves needed to control their community's rule of law. In the 1760s, the threat came from the king himself. Under the new Constitution, Brutus saw the threat to a rule of law coming from the new federal judiciary itself.

Hamilton responded by conceding neither judicial independence nor judicial power, but rather by highlighting the constitutional features that would contain this judicial power. First, Hamilton argued, the Supreme Court would be constrained by the Constitution's structure, which would empower the Court to decide questions brought to it in justiciable cases or controversies only (that is, by "the nature of its functions," which gave the Court "neither Force nor Will, but merely judgment").[28]

Second, Hamilton asserted, the Court would indeed have the power to "pronounce legislative acts void, because [they were] contrary to the Constitution," but only because the justices would be agents of the people themselves—that is, as "an intermediate body between the people and the legislature"—should the legislature's work be called into constitutional question. Even Hamilton conceded, for the sake of argument, that if the Court betrayed the people's trust by striking down laws under a "pretense" of unconstitutionality, then it would call into doubt whether "there ought to be no judges distinct from" the legislature at all.[29]

And third, Hamilton believed that judicial life tenure was the very thing needed to attract the right kind of republican judge—namely, those who would be wise enough in their study of the law and sound enough in their character to "unite the requisite integrity with the requisite knowledge."[30]

"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," Hamilton wrote. Surely Hamilton, one of the greatest lawyers of his era, knew what this really entailed: Rules and precedents do not bind down a judge, so much as the judge himself *chooses* to be "bound down" by them.[31]

Hamilton had conceded that a judge's work—"merely judgment," as he downplayed it—would necessarily entail what today we'd label "judgment calls." That is, Hamilton recognized a judge would sometimes need to decide whether a "fair construction" of a statute would allow it to avoid a constitutional problem or whether the conflict between a statute and the Constitution would be truly "irreconcilable." And in that zone of discretion, there surely would be opportunities for judicial mischief.[32]

It is worth emphasizing what Hamilton emphasized: An independent judiciary vested with such enormous power could still be safe for republican government, so long as judges were interpreting and applying "strict rules and precedents" sufficient to "define and point out their duty in every particular case that comes before them."[33] In short, Hamilton's case for the judiciary was really a case for clearer, enforceable *laws*.

This, then, was the culmination of our founding era's debates about the judiciary's role: First, before the Revolution, Americans defended judicial *independence*. Then, in the Articles of Confederation and the Constitutional Convention, Americans grappled with judicial *appointment*. And finally, in Hamilton's decisive rebuttal to Brutus, Americans faced the difficulty of judicial *power*.

Each debate answered one problem but raised another, and each iteration of the debate delved deeper into the nature of republican constitutional government. At the bottom of it all, as Hamilton made clear, was not simply sound judges but sound *law*.

As it happens, that brings us to the Revolution's second lesson for the rule of law, because King George III had not only attacked the courts—he also attacked the colonies' capacity for making and enforcing good

laws. And this, too, gave rise to a founding experience that bears revisiting today.

On Monarchs and Mutability

Before it reached the king's worst abuses of power—and before its earlier, subtler, but still stirring lines about his attacks on the courts—the Declaration of Independence denounced the king's limits on law itself:

> 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.

These charges are not about the *abuse* of government power so much as the forced *absence* of government, the vacuums of power caused by the king's willful and harmful neglect.

This part of the Declaration might be its most opaque—not just today but from the start. As Pauline Maier noted in *American Scripture: Making the Declaration of Independence*, "Most Americans, including professional historians, would be hard put to identify exactly what prompted many of the accusations Jefferson hurled against the King, which is not surprising since even some well-informed persons of the eighteenth century were perplexed."[34]

But, Maier further explained, "Jefferson left important clues to the meaning of his opening charges against the King in a still earlier document . . . a set of draft instructions for Virginia's delegates to the First Continental Congress that he wrote in 1774."[35] And that document, *A Summary View of the Rights of British America*, describes the controversy surrounding King George III's efforts to render new laws dead letters.

As Jefferson wrote in his *Summary*, the king had abused his right to veto the colonies' laws "for the most trifling reasons, and sometimes for no conceivable reason at all, his majesty has rejected laws of the most salutary tendency," such as colonies' proposals to abolish slavery.[36]

But, Jefferson added, the king abused his power by not just vetoing laws but leaving new laws in limbo: "His majesty permitted our laws to lie neglected in England for years, neither confirming them by his assent, nor annulling them by his negative." Worse still, Jefferson continued, the king's indefinite suspension of a law held open the possibility that the law "called into existence at some future and distant period, when time, and change of circumstances, shall have rendered them destructive to his people here."[37] Finally, Jefferson wrote, the king placed

> governors under such restrictions that they can pass no law of any moment unless it have such suspending clause; so that, however immediate may be the call for legislative interposition, the law cannot be executed till it has twice crossed the Atlantic, by which time the evil may have spent its whole force.[38]

Each delay tactic reflected a perversion of the very point of legislation. Legislators make laws to solve real-world problems, which, in turn, requires that the laws be promptly enforced. Delaying a law's effectiveness defeats its original purpose; abruptly resurrecting a dormant law under completely different circumstances, for different purposes, weaponizes the people's laws against the people themselves. And placing elaborate and arbitrary procedures for a law's eventual enactment and administration makes a mockery of the entire thing. Jefferson's point was a practical one. When law is so easily delayed or suspended, it ceases to be law, regardless of whether it nominally remains on the books.

Needless to say, winning independence solved the colonies' immediate problem—or, more accurately, it solved that version of the problem. With sovereignty now resting not in the king but in the states, domestic laws would not languish due to transatlantic voyages or depend on the

vicissitudes of royal government. But the newly independent states found entirely homegrown ways to degrade day-to-day governance.

The new states, in constructing their administrations, drew a stark lesson from the colonial experience. Charles C. Thach Jr. described this in *The Creation of the Presidency, 1775–1789*. In the struggles leading to 1776, "the popular assemblies were the bulwark of popular liberties, the executive departments the instrumentalities of British control. This attitude of mind could not fail profoundly to affect the original American concept of republican executive power."[39]

In every state but New York, the executive was completely subordinated to the legislature.[40] By and large, executives were selected by the legislatures, limited to short terms, and prohibited from reelection. And in every state but Pennsylvania, the chief executive was controlled or constrained by an executive council chosen by the legislature.[41]

At the national level, of course, the Articles of Confederation created no executive per se, only the weak Congress and the quasi-executive entities that the Congress eventually created to administer the national government's limited, hamstrung powers. As Leonard D. White noted at the outset of his four-volume study of American administration, by 1789 "the government of the Confederation had steadily run down until its movements had almost ceased."[42]

Thach recounted the rise of congressional committees as the postwar confederation's de facto administration. There were some noncongressional offices: Thach pointed to the "purely ministerial" offices of the treasurer and postmaster general. "But the *committee*," Thach wrote, "was the real seed bed for administrative growth."[43] (Emphasis added.)

The problems with these arrangements, and still more problems at the state and national level, soon became all too evident in the run-up to the Constitutional Convention in Philadelphia. Madison cataloged them in his 1787 memorandum "Vices of the Political System of the United States." He began with the Articles of Confederation's most glaring flaws, regarding federal revenues, diplomacy, and interstate squabbling, but eventually he turned to the problems of domestic governance in the states.

First among the problems in the states was the "multiplicity of laws." But just as important, Madison emphasized, was "mutability of the laws of the States,"[44] and his description of this latter problem bears quoting at length:

> This evil is intimately connected with the former yet deserves a distinct notice as it emphatically denotes a vicious legislation. We daily see laws repealed or superseded, before any trial can have been made of their merits; and even before a knowledge of them can have reached the remoter districts within which they were to operate.[45]

Madison expanded on this, after the Philadelphia Convention, in the Federalist. In *Federalist* 37's introduction to the new Constitution's structure, Madison explained, writing as "Publius," the fundamental challenge of "combining the requisite stability and energy in government with the inviolable attention due to liberty, and to the republican form."[46] Specifically, he explained that "stability in government . . . is essential to national character, and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society."[47] And the enemy of stability, he added, is mutability:

> An irregular and mutable legislation is not more an evil in itself, than it is odious to the people; and it may be pronounced with assurance that the people of this country, enlightened as they are with regard to the nature, and interested, as the great body of them are, in the effects of good government will never be satisfied, till some remedy be applied to the vicissitudes and uncertainties, which characterize the state administrations.[48]

Mutable laws, Madison knew, are repugnant to republican people.

Later, in *Federalist* 62's defense of the Senate, he put the point bluntly: "Every new election in the states, is found to change one half of the

representatives. From this change of men must proceed a change of opinions; and from a change of opinions, a change of measures." And "to trace the mischievous effects of a mutable government would fill a volume."[49]

A nation of ever-changing laws, Madison wrote, would forfeit its esteem on the world stage. But the effects at home would be "still more calamitous":

> It poisons the blessings of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promul[gat]ed, or undergo such incessant changes that no man who knows what the law is to day can guess what it will be to morrow.[50]

A regime of such mutable, ever-changing laws would *demoralize* its people, in both senses of the word. First, it would exhaust us. And second, by leaving us without the security of legal clarity, it would leave us all to protect our interests by our own means—perhaps, eventually, by any means necessary.

Furthermore, such a government of mutable laws would benefit "the moneyed few" over all others, by presenting "a new harvest to those who watch the change, and can trace its consequences." It would benefit "the *few*, not . . . the *many*."[51] (Emphasis in original.)

And, Madison concluded, such a regime of mutable law would destroy Americans' very faith in government itself. "No government any more than an individual will long be respected, without being truly respectable; nor be truly respectable without possessing a certain portion of order and stability," he wrote in *Federalist* 62, with clear echoes of his more famous argument for legal stability, *Federalist* 49.[52]

But the problem of mutable government is not limited to the legislative branch. Indeed, Publius's fullest account of the problem of mutability comes later, in his account of the administration. In *Federalist* 70, Publius

(here, Hamilton) made the definitive argument for executive power in republican government, famous for its recognition that "energy in the executive is a leading character in the definition of good government." Less famous, among even those who readily quote that line, is the essay's further point that this energy is not good for its own sake but for the sake of particular functions of republican government, especially "the steady administration of the laws."[53] As Harvey C. Mansfield observed in *Taming the Prince*, "energy is not something good in itself," but "in the American Constitution energy leads to virtue."[54]

This is the point of Publius's full argument, in the less famous essays before and after *Federalist* 70, on the central importance of "steady administration" in republican government.[55] Hamilton saw the importance of what was at stake. Too much upheaval from one presidency to the next would produce "a disgraceful and ruinous mutability in the administration of the government," he wrote in *Federalist* 72.[56] Where Madison saw that the public would lose faith in its government should there be too much change in the Constitution or in the written laws, Hamilton brought readers to an even more pointed conclusion: Even if the Constitution and written laws remain unchanged, the public would lose faith in their government if these laws were *administered* unsteadily.

This was, of course, the point of the Declaration's indictments against King George. And it is the point of Hamilton's unflinching statement, in *Federalist* 68 and 76, that "the true test of a good government is its aptitude and tendency to produce a good administration."[57]

The Constitution, as Publius saw it, would produce good administration by constructing the presidency—a unitary office, independent from Congress, with a four-year term long enough to empower presidents to administer government with at least temporary insulation from the popular pressures of Congress and the public. And the possibility of reelection would allow a president to be more ambitious in the legislation they would bring to Congress and more experienced in administering both old and new laws.

Even the president's power to veto legislation, Publius argued in *Federalist* 73, was good for the sake of steady administration. Congress, left to its own devices, would make too many bad laws and thus have to repeal and replace them. The president's veto would prevent many bad laws from being made and thus would preserve stability in the laws more generally.

A decade earlier, the Declaration had indicted the king for abdicating his responsibilities, an abdication that ultimately destroyed the people's allegiance to him. Now the Constitution would connect the president's powers to the president's virtues, for the sake of the public's allegiance.

The founding generation knew bad government all too well. The colonies endured too many bad laws, but they also often endured the lack of good laws, which their own assemblies had tried to enact but which the king too easily muted through outright vetoes or passive-aggressive suspensions and delays. His prevention of good laws, no less than his imposition of bad ones, was the antithesis of good, steady administration.

Liquidated and Ascertained

I began this chapter with the founders' sense of the importance of judicial independence and the rule of law before turning to their sense of the underlying challenge of law itself: how law is made and then administered, even before the law's constitutionality might be tested in court. But the relationship among legislation, administration, and adjudication is more than merely chronological. Each step shapes the next, for better or worse. And that relationship, crucial to the colonial experience and what followed, went to the very heart of Publius's argument for constitutional government—namely, the argument of *Federalist* 37.

That essay's importance is easily overlooked today, even to those who read the Federalist Papers from cover to cover. But it was obvious when the Federalist Papers were initially published in two volumes: The first 36 essays (the first volume) documented the need for a new government,

and the rest (the second volume) defended the Constitution that had been drafted. That defense began with *Federalist* 37.

As noted above, in *Federalist* 37, Madison described the delicate balance of "stability and energy in government."[58] But he also grappled with the problem that Hamilton alluded to in *Federalist* 78: the need for republican legislatures to write rules sufficiently clear for judges to be "bound down."

As Madison made clear, this is a challenge inherent in any system of written laws: "All new laws"—not just some, but *all* of them—"though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal."[59]

The causes for this obscurity and equivocation, Madison explained, are inherent in legislation, and triply so. Legislation uses imprecise words to capture our imperfect perception of impalpable principles. Because all laws will have some vagueness, republican government needs a way to clarify and settle a law's ambiguities. Madison gave his own answer, in *Federalist* 37, at the end of a sentence I just quoted but cut short: "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, *until their meaning be liquidated and ascertained by a series of particular discussions and adjudications*."[60] (Emphasis added.)

It is a quick and subtle point, one easily glossed over, but on even just a further moment's reflection, its implications grow clear. For Madison, the way to settle constitutional questions is not the fast-track litigation of our own era but something slower and more deliberate. And when Madison's account of constitutional legislation is married to Hamilton's account of constitutional administration and adjudication—which, of course, is the entire point of the Federalist Papers—then we see how each part of government plays a distinct role in constitutional self-government.

It begins with legislation, first at the level of writing a constitution and then at the level of writing laws under that constitution. As Madison suggested in *Federalist* 37, the constitutional ideal is for a law to be "penned

with the greatest technical skill, and passed on the fullest and most mature deliberation."[61] And just as Madison counseled in *Federalist* 49 for restraint in the making and unmaking of constitutions, he counseled in *Federalist* 62 for at least proportionate restraint in the making and unmaking of legislation, as I quoted earlier, lest they "undergo such incessant changes that no man who knows what the law is to day can guess what it will be to morrow."[62]

But laws will, of course, be made and unmade, and imperfectly so, and at that point we turn to the question of administration. As Hamilton explained in the aforementioned essays on the executive, the constitutional ideal is not just energetic administration per se but energetic administration that steadily and successfully executes the laws.

As it happens, administration can be more energetic and steadier if the legislature has already done its job: Writing clearer laws with less room for discretionary judgment leaves less opportunity or need for the executive to deliberate on how to craft its own discretionary judgments in the first place. With less need to make those judgments—what today we would call administrative "policymaking"—the executive can focus more on administration's practical questions. That is, it can focus less on determining ends and more on choosing the means that best achieve Congress's ends.

And, finally, the better a government's legislation and administration prove to be, the more focused and constrained the judiciary itself will be. When a legislature writes clearer laws, judges need to answer fewer open-ended questions about what Congress actually meant or whether those intentions exceed the Constitution's limits—and, for that matter, whether the executive branch is faithfully and fairly administering those laws. And when the executive branch administers laws more steadily across multiple presidencies, judges will not need to review the executive branch's latest innovations as often.

The True Test

To describe republican self-government in those terms is to highlight the difference between the founders' ideal and today's reality. The most significant legislation governing us today was written too often in intentionally open-ended terms, not constraining the executive's ambitions so much as *inviting* them. Administration, in turn, is largely a product of enormous flip-flops from one administration to the next, each new presidency erasing its predecessor's work and creating it all anew, only to be erased and replaced in turn. And the judiciary, faced with constant administrative change under infinitely malleable legislation, is seen as single-handedly responsible for resolving every major policy issue of the day.

Taken together, our malleable legislation and bipolar administration embodies Hamilton's nightmare, in *Federalist* 72, of "a disgraceful and ruinous mutability in the administration of the government."[63] Instead of each part of government successively contributing to greater clarity and stability, we get the very opposite. Instead of clearer legislation for the sake of steadier administration and simpler adjudication, we get ambiguous legislation, bipolar administration, and explosive adjudication.

That last part, adjudication, is exacerbated by the bad legislation and bad administration of our era. Yet the adjudication itself—especially in the Supreme Court—draws at least as much criticism as the underlying legislation and administration.

And in a way, today's debates concerning the Supreme Court bring us full circle: These debates often focus on the institution's independence, the first thing the founders needed to defend against King George. In the media, the academy, and the government's political branches, justices face new calls to end judicial life tenure, the very threat our founders denounced in the strongest possible terms.[64] We might chuckle at our constitutional amnesia if the stakes were not so great.

So far, in this new era of attacks on the Court, we have managed to avoid the disaster of ending judicial life tenure, largely without reference to the Declaration of Independence. But our nation's 250th anniversary is

a welcome moment to return to that part of America's founding principles and founding experience.

By tracing the founders' debates over judicial independence and the rule of law, from the colonies to the Constitution, we see the rule of law is safe for democracy—and, in fact, indispensable for it—when we constrain judicial discretion, as much as reasonably possible, by good, clear laws. And by tracing the founders' debates over administration, from the colonies to the Constitution, we see that good, clear laws are the product of not just good legislatures but the kind of administration that allows good laws to be clarified and refined over time, with the benefit of experience gained from the steady, careful experience of those very same laws.

Outright abuses of legislative power are easily spotted, in the founders' day and in ours. Harder, but no less crucial, is the task of ascertaining good administration and good adjudication. That, too, is a timeless challenge for our country. One might even call it the "true test" of our own times.

Notes

1. Bernard Bailyn, *The Ideological Origins of the American Revolution* (Belknap Press of Harvard University Press, 2017), 321. Martin Diamond agreed: "It is to the Constitution that we must ultimately turn as the completion of the American Revolution." See Martin Diamond, "The Revolution of Sober Expectations," in *America's Continuing Revolution: An Act of Conservation* (AEI Press, 1975), 32.

2. Here, too, Diamond puts it best: "With the Constitution the Americans completed the half-revolution begun in 1776 and became the first modern people fully to confront the issue of democracy," he wrote in 1975. "But, again, the American Revolution precisely in its revolutionary thrust was simultaneously distinctively sober. . . . The sobriety lies in the Founding Fathers' coolheaded and cautious acceptance of democracy." From revolution to constitution, the question of American government "gradually became a debate over how to create a decent democratic regime." See Diamond, "The Revolution of Sober Expectations," 38–39.

3. John Adams, "Thoughts on Government," April 1776, Founders Online, https://founders.archives.gov/documents/Adams/06-04-02-0026-0004. Adams is quoting James Harrington's 1656 *Commonwealth of Oceana*.

4. Thomas Paine, *Common Sense* (Philadelphia, 1776), https://oll.libertyfund.org/pages/1776-paine-common-sense-pamphlet.

5. Paine, *Common Sense.*

6. Abraham Lincoln, "First Inaugural Address," speech, Washington, DC, March 4, 1861, https://www.abrahamlincolnonline.org/lincoln/speeches/1inaug.htm.

7. Maier describes this "extended controversy in North Carolina" in great detail. King George III refused to assent to a North Carolina law that would have empowered judges to liquidate nonresidents' property for defaulting on their debts, a power that "the Crown considered contrary to the substance and spirit of English law." The assembly refused to enact the judicial legislation without such a power, and the ensuing standoff caused the courts to eventually close. See Pauline Maier, *American Scripture: Making the Declaration of Independence* (Vintage, 1997), 110.

8. Bailyn, *The Ideological Origins of the American Revolution*, 105.

9. Bailyn, *The Ideological Origins of the American Revolution*, 105.

10. See Galloway, "A Letter to the People of Pennsylvania (Philadelphia, 1760)," in *Exploring the Bounds of Liberty: Political Writings of Colonial British America from the Glorious Revolution to the American Revolution*, ed. Jack P. Greene and Craig B. Yirush (Liberty Fund, 2018), 3:1662.

11. Galloway, "A Letter to the People of Pennsylvania (Philadelphia, 1760)," 3:1663–64.

12. Bailyn, *The Ideological Origins of the American Revolution*, 106–7.

13. Bailyn, *The Ideological Origins of the American Revolution*, 107–8.

14. Articles of Confederation of 1781, art. IV.

15. Articles of Confederation of 1781, art. IX.

16. Articles of Confederation of 1781, art. IX.

17. Northwest Ordinance of 1787, § 4. The Northwest Ordinance also contained a fascinating provision, empowering the territory's three-judge court as a legislature: "The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to Congress from time to time." Northwest Ordinance of 1787, § 5.

18. Articles of Confederation of 1781, art. IX; and Northwest Ordinance of 1787, § 4.

19. US Const. art. VI, cl. 2.

20. James Madison, "James Madison's Notes of the Constitutional Convention," *The Records of the Federal Convention of 1787*, ed. Max Farrand, vol. 1. (Yale University Press, 1911).

21. Madison, "James Madison's Notes of the Constitutional Convention."

22. Alexander Hamilton, "Constitutional Convention. Plan of Government," Founders Online, June 18, 1787, https://founders.archives.gov/documents/Hamilton/01-04-02-0099.

23. US Const. art. II, § 2, cl. 2.

24. For a much more detailed account of this part of the convention's deliberations, see Adam J. White, "Toward the Framers' Understanding of 'Advice and Consent': A

Historical and Textual Inquiry," *Harvard Journal of Law & Public Policy* 29, no. 1 (2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=813464.

25. *Federalist*, no. 78 (Alexander Hamilton), https://founders.archives.gov/documents/Hamilton/01-04-02-0241.

26. Brutus, "XV," in Herbert J. Storing, ed., *The Complete Anti-Federalist* (University of Chicago Press, 1981), 2:438.

27. Brutus, "XV," 2:186–89.

28. *Federalist*, no. 78 (Hamilton).

29. *Federalist*, no. 78 (Hamilton).

30. *Federalist*, no. 78 (Hamilton).

31. *Federalist*, no. 78 (Hamilton).

32. *Federalist*, no. 78 (Hamilton).

33. *Federalist*, no. 78 (Hamilton).

34. Maier, *American Scripture*, 106.

35. Maier, *American Scripture*, 112.

36. Thomas Jefferson, *A Summary View of the Rights of British America* (July 30, 1774), quoted in Maier, *American Scripture*, 113.

37. Jefferson, *A Summary View of the Rights of British America*, quoted in Maier, *American Scripture*, 113.

38. Jefferson, *A Summary View of the Rights of British America*, quoted in Maier, *American Scripture*, 113.

39. Charles C. Thach Jr., *The Creation of the Presidency, 1775–1789: A Study in Constitutional History* (Liberty Fund, 2007), 15.

40. Thach, *The Creation of the Presidency*, 15–16.

41. Thach, *The Creation of the Presidency*, 16.

42. Leonard D. White, *The Federalists: A Study in Administrative History* (Macmillan, 1948), 1.

43. Thach, *The Creation of the Presidency*, 48.

44. James Madison, "Vices of the Political System of the United States," Founders Online, April 1787, https://founders.archives.gov/documents/Madison/01-09-02-0187.

45. Madison, "Vices of the Political System of the United States."

46. *Federalist*, no. 37 (James Madison), https://founders.archives.gov/documents/Madison/01-10-02-0227.

47. *Federalist*, no. 37 (Madison).

48. *Federalist*, no. 37 (Madison).

49. *Federalist*, no. 62 (Alexander Hamilton), https://founders.archives.gov/documents/Hamilton/01-04-02-0212.

50. *Federalist*, no. 62 (Hamilton).

51. *Federalist*, no. 62 (Hamilton).

52. *Federalist*, no. 62 (Hamilton).

53. *Federalist*, no. 70 (Alexander Hamilton), https://founders.archives.gov/documents/Hamilton/01-04-02-0221.

54. Harvey C. Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (Free Press, 1989), 267.

55. *Federalist*, no. 70 (Hamilton).

56. *Federalist*, no. 72 (Alexander Hamilton), https://founders.archives.gov/documents/Hamilton/01-04-02-0223.

57. *Federalist*, no. 68 (Alexander Hamilton), https://founders.archives.gov/documents/Hamilton/01-04-02-0218.

58. *Federalist*, no. 37 (Madison).

59. *Federalist*, no. 37 (Madison).

60. *Federalist*, no. 37 (Madison).

61. *Federalist*, no. 37 (Madison).

62. *Federalist*, no. 62 (Madison).

63. *Federalist*, no. 72 (Hamilton).

64. For an example of summarizing arguments for court-packing and other changes to the federal judiciary, see Michelle Adams et al., *Presidential Commission on the Supreme Court of the United States: Final Report: December 2021*, American Presidency Project, December 8, 2021, https://www.presidency.ucsb.edu/documents/final-report-the-presidential-commission-the-supreme-court-the-united-states.

4

That Honorable Determination

COLLEEN A. SHEEHAN

In *Federalist* 39, James Madison asks whether the proposed Constitution is truly republican. "It is evident," he says, "that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government."[1] If the new government is not strictly republican, he argues, its friends will have to abandon it as indefensible. Madison's powerful and definitive claim on this point is the Federalist Papers' central statement of principle and purpose. It connects the Constitution to the Revolutionary Declaration of Independence in an unbroken script that tells the story of the American cause.

For over a century, the character of the American republic has been a matter of considerable dispute among scholars of the founding. Despite Madison's staunch assertion regarding the synergistic relationship between the principles of the Revolution and the form of the Constitution, several contemporary historians have contended otherwise. According to Richard Hofstadter, the American Revolution's radicalism was tempered by the conservative emphasis on order and control in the Constitution.[2] Historians Charles Beard and Howard Zinn have portrayed the relationship between the Declaration and Constitution as rather more like one of enemies than one of friends.[3]

More recently, Gordon S. Wood has argued that the Constitution represents a significant ideological departure from the Declaration of Independence and the spirit of 1776, though in Wood's work we find a

much more nuanced and richer account of the founders' thought than in that of Beard, Hofstadter, or Zinn. According to Wood, the American revolutionaries adopted a neoclassical form of republicanism, emphasizing virtue, common interests, and the common good over private desires. However, this classical ideal proved unsustainable in the vast, diverse, and burgeoning commercial society of late 18th-century America, which led them in more modern, liberal directions.

Wood highlights Madison as a pivotal figure in this ideological shift; his writings in the Federalist Papers underscore the change from classical republicanism to a more modern, liberal conception of politics and political association. In *Federalist* 10, for example, Madison argues that the seeds of faction are inherent in human nature and that government's role is not to eradicate factions but to mitigate their impacts through a large republic, diverse interests, and strategic institutional arrangements.[4] Though he was part of the Revolutionary generation, Madison's thoughts evolved with the practical realities of governing a new and expanding nation.

Wood sees Madison as partly practical, partly idealistic, the latter evident in his optimistic reliance on the wisdom and virtue of "liberally educated, rational men . . . 'whose enlightened views and virtuous sentiments render them superior to local prejudices, and to schemes of injustice.'" Essentially, these are Madison's "enlightened statesmen" (defined in *Federalist* 10), who are capable of neutralizing clashing interests and passions "to decide questions of the public good in a disinterested adjudicatory manner."[5] Hofstadter also claims Madison was a romantic who relied on gentleman representatives of wisdom and virtue, including the virtue of disinterestedness. This expectation, Hofstadter claims, fails to account for the force of personal and class interest in politics and may well be a false expectation, given the inevitable influence of economic and social interests in politics.

Political theorists such as Martin Diamond, Ralph Lerner, and Thomas Pangle have explored the character of the American founding and the question of the influence of classical versus modern political philosophy

on the American founders. Like Wood, these theorists see Madison as pivotal in establishing modern liberalism and its collateral acquisitive commercial spirit in the extended republic of the United States. For Diamond, Madison's republic is "solid but low"—a political scheme that deliberately capitalizes on "the selfish, the interested, the narrow, the vulgar, and the crassly economic." In recent years, Patrick Deneen has emphasized a similar critique of Madison and the founders, depicting America as a regime of soulless modernists and crass materialists.[6]

What these assessments have in common is the critical nature of their conclusions regarding the low-minded purpose of Madison's constitutional architecture. For them, and indeed for many academics still, Madison's theory of human nature, the extended republic with its multiplicity of interests, and constitutional politics is deeply troubling, if not contemptible.

1776 and 1787: Thomas Jefferson and James Madison

The aspirations and spirit of '76 and those of the constitution-making era are captured in the central work of two of America's Founding Fathers, Thomas Jefferson and Madison. For Jefferson, that work consisted of the major role he played in writing the Declaration of Independence. For Madison, it was his contributions to envisioning, drafting, and ratifying the Constitution, including his intensive scholarly preparations for the Philadelphia Convention, his authorship of several significant essays in the Federalist Papers, and his continued work on constitutional republicanism in the early 1790s.

This is not to say that Jefferson was the only author of the Declaration or that Madison was the only or even most important framer of the Constitution. They themselves said otherwise, acknowledging that the Declaration was an "expression of the american mind" and the Constitution the work of "many heads and many hands."[7] However, it is to say that their labors and ideas are woven into the fabric of these documents,

which would be very different without them. After all, Jefferson was the prime author of the Declaration and, as Lincoln reminded us, introduced into this "merely revolutionary document" the "abstract truth" that all men are created equal.[8] This proposition applies to all human beings at all times and places and is the central idea of the American republic. By situating the movement for independence within this larger picture of the cause of humanity, Jefferson conveyed that the American Revolution was about more than a single people at a moment in time; it was about a new order of the ages.

In respect to Madison's contribution to the constitutional order, it is certainly fair to say that, while the Constitution's provisions have many sources, Madison's Virginia Plan stands out among them. Just as we sometimes forget the genuinely radical and trailblazing message of the Declaration of Independence, something similar is true of the United States Constitution. It marked the first time in history that a people, on the basis of their sovereign authority, established government by constitutional compact. The commitment to the experiment in republican self-government, however, was hardly a first—it had been attempted numerous times throughout the ages, but it had never really succeeded. As "Publius" (Alexander Hamilton) remarked in *Federalist* 9,

> It is impossible to read the history of the petty republics of Greece and Italy, without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions, by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy.[9]

The American founders were determined to give the experiment another try. Although Madison did not achieve all he wanted in Philadelphia, in terms of the big picture of constitutional republicanism, more than any of the other founders, he confronted its challenges and thought through its purpose, design, and dynamics. His labors paid off: He

discovered how republican self-government could succeed and flourish in America.

Although fellow Virginians and good friends, Jefferson and Madison did not always see eye to eye on political and philosophical issues. In fact, in two of the Federalist Papers essays, Madison took issue with an idea Jefferson had proposed concerning constitutional conventions. In September 1789, while serving as minister to France, Jefferson wrote Madison a letter setting out the principle that informed his proposal regarding calling constitutional conventions—namely, that "the earth belongs always to the living generation."[10] Arguing that each generation has the right to make its own constitution and laws, he reiterated his idea to hold a constitutional convention every 19 or so years. Decades later, Jefferson was still mulling the idea over in his mind. "Some men look at Constitutions with sanctimonious reverence, & deem them, like the ark of the covenant, too sacred to be touched," he wrote to Samuel Kercheval.

> They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well: I belonged to it, and labored with it. it deserved well of it's country. . . . I am certainly not an advocate for frequent & untried changes in laws and constitutions. . . . but I know also that laws and institutions must go hand in hand with the progress of the human mind.[11]

For Jefferson, a country and citizens' views change and grow over time, much like a boy grows into a man. You might as well make the man wear the same coat he wore as a boy, Jefferson argued, as keep the society "under the regimen of their barbarous ancestors."[12]

Madison disagreed with Jefferson's proposal to call constitutional conventions, whether periodically or on an ad hoc basis.[13] The use of ad hoc conventions to correct governmental usurpations of power, Madison argued, would not answer the purpose intended. The problem could

be more effectively treated with a system of separation of powers and checks and balances that enabled the government to control itself. Periodical conventions would tend to destabilize the political order. Moreover, if the idea that the earth belongs to the living generation were carried to its logical extreme, there would be an endless constitutional convention (a kind of Jeffersonian Groundhog Day). And as much as he agreed with the basic premise of Jefferson's principle, Madison reminded him that the living also owe a certain debt to their progenitors, given the benefits they inherit from them.

Overall, Madison warned that we should understand what "ticklish" experiments constitutional conventions are, especially because delegates to them represent the people in their most fundamental and sovereign capacity, meaning they cannot be limited in the scope of their proposed changes to the current law.[14] Even if radical changes are not afoot or unlikely to succeed, holding such public conventions routinely or too often tends to send the message that the Constitution is defective, perhaps even dispensable.

The first order of business for any polity is stability. As Madison learned from David Hume (and also discovered in Aristotle), "all governments rest on opinion," and to attain the requisite stability, a certain level of respect for the laws and government is required, which is generally attained in societies by an appreciation for what is tried and true. The confidence and trust in government that flows from what we are habituated to—things we may have a salutary opinion about despite not having given a great deal of thought to—are powerful influences in civil society. And "when the examples which fortify opinion are ancient as well as numerous, they are known to have a double effect," Madison wrote in *Federalist* 49. In the context of the need for a stable and steadying opinion to ground the regime, Madison argued that it would be unwise to needlessly disturb "the public tranquility by interesting too strongly the public passions." And unfortunately, this is precisely what Jefferson's recommendation of "a frequent reference of constitutional questions to the decision of the whole society" would do.[15]

Ongoing Consent of the Governed

The purpose of Jefferson's periodical constitutional conventions was to empower the people's voice by providing for their active and continual consent, or, as we say today, by activating popular sovereignty in real time. *Federalist* 49 is part of the string of essays—which begins with 47 and culminates in 51—throughout which Jefferson's presence looms large. While these essays are addressed to the people of New York, in another sense, they are a conversation Madison is having with Jefferson, politely but firmly criticizing his friend's impracticable (and rather radical) stance to set the stage for an alternative proposal. In response to Jefferson's potentially disruptive plan to activate the people's opinion on an ongoing basis via frequent constitutional conventions, Madison proposed to make the will of the government dependent on the will of the society and to form and shape the will of the society into "the reason, of the public."[16] This is Madison's theory of the politics of public opinion. It is his answer to the question of how to rescue republican government from the mortal disease of faction while preserving its form and spirit.

The politics of public opinion is the layered, dynamic process of filtering out factious demands, collating the multiplicity of interests as much as possible, and refining public views. Madison directed his energies in the more theoretical Federalist Papers essays to a discussion of the means to accomplish these objectives, though his presentation in 1787–88 is less than "a full development."[17] In a letter to Jefferson on October 24, 1787, in which he set forth at considerable length his theory of republicanism, he again added the caveat that his argument was incomplete: "A full discussion of this question would, if I mistake not, unfold the true principles of Republican Government."[18] Madison continued to work out his theory of republicanism and the politics of public opinion in the pages of his 1791 "Notes on Government" and the 1791–92 party press essays.

The multifaceted process Madison envisioned to transform raw public views into a refined and reasonable public opinion entails a host of circumstances, institutions, and procedures. These factors include the

extent of the territory, separation of powers, bicameralism, federalism, checks and balances, a free press, and, in general, the free "commerce of ideas" that flows between representatives and their constituents and throughout "the entire body of the people."[19] The process also requires a certain degree of human judgment and integrity, generally in the form of a critical mass of political leaders competent to the moral and political task at hand, though what constitutes this critical mass depends on times and circumstances.

In the Federalist Papers, Madison expressed the aim of his labors: to build "a coalition of a majority of the whole society" whose opinion is based on "justice and the general good."[20] In the party press essays, he spoke of finding a "common cause" in spite of "circumstantial and artificial distinctions."[21]

Consistent with the form and genuine spirit of republican government—which he juxtaposed to the false claim of republicanism that some apply to the British government—Madison argued that, in the extended, representative republic of the United States, the will of the government derives its energy from the will of the society; "by the reason of its measures," it works on, shapes, and hones—negating some interests and views and modifying others—the "understanding and interest of the society." Triumphantly, Madison proclaimed America to be pursuing a new and more noble course—the one "for which philosophy has been searching, and humanity been sighing, from the most remote ages." This is the republican form, "which it is the glory of America to have invented, and her unrivalled happiness to possess."[22]

The Conditions of the Social Compact

Unlike Hobbesian social contract theory, Jefferson's conception of popular sovereignty was substantive as well as procedural. Grounding the authority of the people in traditional natural law doctrine, in his first inaugural address, Jefferson celebrated the "sacred principle" that

the "will of the majority is in all cases to prevail." At the same time, he reminded his fellow citizens that in order for their "will, to be rightful," it "must be reasonable."[23]

Jefferson's insistence on both majority rule and rightful rule reflects the fusion of rights and responsibilities. His inaugural message is a continuation of the teaching of the Declaration of Independence, reminding the people that their collective right to govern is legitimate only if it is grounded in reason and the recognition of their moral obligation to protect the equal rights of others. This is why it is not merely the right but the duty of the people to alter or abolish a government whose design is to reduce humanity under the power of despotism.

The Declaration thus contains two fundamental claims: that the people are sovereign *and* that the exercise of their sovereignty is conditional—it must accord with natural law. Violations of the rights of others are contrary to the natural rights of mankind embedded in "the Laws of Nature and of Nature's God." While human beings are by nature free and independent, they do not possess the license to "feel power and forget right."[24] Indeed, they are free and "inherently independant of all but moral law."[25] While power and right do not easily come together in the practical world of politics, natural law nonetheless fixes the standard by which to judge the extent and seriousness of acts of oppression so that prudence can assist statesmen and citizens in choosing the best possible way forward.

In general, the majority is the more powerful group in society. What it demands, however, is not always guided by the precepts of justice and respect for the rights of the minority. Nonetheless, republican theory postulates that power and right are synonymous. Madison highlighted the dissonance between republican theory and practice as the political problem to be solved. He showed that this problem was fatal to the small Greek polities of the ancient world, whose factious, oppressive majorities ran roughshod over the resident minority. The challenge, he claimed, was no less pressing in his time if popular government was ever to be vindicated and recommended as respectable.

Madison wrote in "Notes on Vices of the Political System of the United States" that "according to Republican Theory, Right and power being both vested in the majority, are held to be synonimous." He further noted that, in reality, a minority can sometimes overpower a majority, due to greater wealth or military strength. Or in the exclusion of some people from suffrage, because of factors such as property qualifications, the constitutional majority may be a minority of persons in society. Indeed, "where slavery exists," Madison wrote, "the republican Theory becomes still more fallacious."[26] These examples show that the majority does not always possess power and power does not always align with justice.

Republicanism's essential principle requires that the majority rule and that it rule justly. The fact that this principle often fails to be achieved leaves the regime susceptible to legitimate opposition based on its core principles. Such injustice is alarming—even "more alarming" than the lack of wisdom shown in the "multiplicity and mutability of laws" of the United States, Madison claimed, not merely because it is a greater evil in itself but "because it brings more into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights."[27]

Since the people are "the only earthly source of authority," republicanism demands that the majority rule.[28] But the ultimate earthly source of authority is not the ultimate authority, according to Madison. We know from "Vices" that the majority is accountable to a standard of right, and we know from the "Memorial and Remonstrance Against Religious Assessments" and *Federalist* 43 that this standard of right is transcendent and above all earthly authority.

In *Federalist* 51, we are presented with an illustration of the problem of power and right in which the more powerful group or faction in a society ignores the rules of justice and oppresses the weaker group. Comparing this situation to a state of nature, Madison wrote, "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."[29]

When might is the sole basis for right, republican government has lost its purpose and failed. "Justice is the end of government. It is the end of civil society," Madison asserted. "It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in its pursuit."[30] Power without right is tantamount to anarchy—that is, to the absence of any government or civil society.

Rule by majority faction, then, is destructive of the republican social compact. Whatever legal requirements are outlined in the agreement, there are a priori limits to what the majority can rightfully do, by the nature of the republican compact itself. Stated differently, the compact's source of authority is the people, who, because all are by nature their own ruler and in this sense equal, can be under the obligations of government only with their own consent. In the original contract, unanimity is required. (Those who do not leave the state are presumed to have given tacit consent.) The consent of the people is necessary to legitimate government, but it is not sufficient. "Consent of the governed" is not identical with mere will; it also involves the elements of understanding and responsibility.

This follows logically from the nature of humanity. Since all humans share the same nature and in this sense are equal, each possesses the natural rights of human beings, and each is concomitantly required to recognize and respect the possession of those same rights by other human beings. Informed consent entails a pledge to abide by the mutual moral responsibilities inherent in the social pact. Its principles result from the fact of human equality and the rights and concomitant obligations that flow from it. Legitimate compact is thus the pledge to govern oneself and protect the rights and liberties of one's fellow citizens. In the exercise of power, one is not at liberty to forget right.

In an article titled "Property" published in the *National Gazette* in 1792, Madison argued that at the core of the social compact is a "debt of protection" to which "the public faith is pledged."[31] We have rights of property,

he said, and we also have property in our rights. The most sacred of all property is conscience:

> To guard a man's house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man's conscience which is more sacred than his castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact.[32]

We recall the discussion in *Federalist* 10, in which Madison claimed that the government's primary purpose is the protection of the human faculties. From this, the rights of property originate. Because the human faculties are as diverse and distinct as people themselves—people simply do not think, feel, or want the same things—protecting their free exercise leads to different kinds and amounts of property, and from this, different interest groups tend to form in society.

Madison's argument in *Federalist* 10 is not that the government's main purpose is the protection of property, nor is it a paean to diversity per se (as Deneen seems to believe). Rather, Madison's chief concern is to safeguard what makes us human, the core of which is our ability to reason and choose for ourselves how to live our lives. In a word, at the core of humanity is the capacity for self-government, whose realization depends on the free exercise of the human faculties. As Montesquieu put it, every human being has a self-governing soul. Self-governing souls, however, are not unanswerable souls.[33]

Republican government is *the* government dedicated to the experiment in self-government. It aims to secure the inherent rights of humanity, including life, liberty, and property, but its foremost purpose is to protect the very essence of humanity, the freedom of the mind or soul. The human faculties can be divided into those of the mind and those of the body. The intellectual faculties include reason, perception, memory, imagination, will, and conscience. As sharing the same human nature is

the basis for natural equality and natural rights, the nature of humanity is the foundation for human obligation. It imposes certain conditions on the sovereign authority it creates. The social compact is thus both a legal and a moral agreement.

The formation of the new United States under this pact was based on a "pledge" of civic reciprocity, in which each individual promised to protect the rights of his fellow citizens, who were equally free and self-governing souls. This requirement of civic reciprocity is grounded in the "Laws of Nature and of Nature's God." In Madison's view of the American compact, the consent of the governed is the foundation of political legitimacy. This concept combines the procedural act of giving consent with a substantive, moral commitment to a way of life that aligns with human nature and natural law.

In Jefferson's "earth belongs to the living" letter to Madison, dated September 6, 1789, he argued that the living generation is "by *natural right*"[34] (emphasis in original) independent of the decrees of past generations; it is morally answerable only to "the Laws of Nature and of Nature's God." In response, Madison asked, "On what principle does the voice of the majority bind the minority?" He then answered his own question:

> It does not result I conceive from the law of nature, but from compact founded on conveniency. A greater proportion might be required by the fundamental constitution of a Society, if it were judged eligible. Prior then to the establishment of this principle, *unanimity* was necessary; and strict Theory at all times presupposes the assent of every member to the establishment of the rule itself.[35] (Emphasis in original.)

Madison thus reminded his friend that majority rule is not a natural right or principle of natural law but rather is derived "from compact founded on conveniency" or "utility."[36] The principle of human equality and the principle of majority rule are not the same thing, nor do they have the same standing in the court of nature.

In Madison's view, justice and legitimacy are associated with the will of the whole society, which ensures that decisions reflect the common good. However, since unanimous agreement is unrealistic in a diverse society, the will of the majority acts as a plenary substitute for unanimity. This can result in the majority imposing its will and disregarding minority interests or rights—or, in other words, the tyranny of the majority.

Thus, while the will of the majority prevails in republican government, its legitimacy is contingent on adherence to limits that ensure justice and safeguard the rights of all individuals. In "Vices" and *Federalist* 43, Madison's juxtaposition of power and right refers to this challenge of bringing the process of majority rule and the moral substance of justice and the common good together in republican decision-making. The majority's authority is derived from the social compact, which, in theory, is necessarily based on the consent of the entire body of the people.

In an essay titled "Sovereignty," Madison set forth the terms of the social compact, further explaining his disagreement with Jefferson's view that majority rule is a right of nature akin to original consent in the social compact. In forming republican government based on consent, he said, a "moral person" has been created and a pledge of protection issued. The "moral person" that constitutes republican society is as accountable to the laws of nature as each individual is. I quote from this essay at length:

> All power in just & free Govts. is derived from Compact, . . . where the parties to the Compact are competent to make it, and where the Compact creates a Govt, and arms it not only with a moral power but the physical means of executing it. . . .
>
> [One view on the subject supposes] that each individual, being previously independent of the others, the compact which is to make them one Society, must result from the free consent of *every* individual.
>
> But as the objects in view could not be attained, if every measure conducive to them, required the consent of every member of the Society, the theory further supposes, either that

> it was a part of the original compact, that the will of the majority was to be deemed the will of the whole; or that this was a law of nature, resulting from the nature of political society, itself the offspring of the natural wants of man.
>
> What ever be the hypothesis, of the origin of the lex majoris partis, it is evident that it operates as a plenary substitute of the will of the majority of the Society, for the will of the whole Society; and that the Sovereignty of the Society as vested in & exerciseable by the majority, may do any thing that could be *rightfully* done, by the unanimous concurrence of the members; the reserved rights of individuals (of Conscience for example), in becoming parties to the original compact, being beyond the legitimate reach of Sovereignty, wherever vested or however viewed.[37] (Emphasis in original.)

In Madison's republican theory, majority rule is an exercise of power that must be tempered by justice. The unanimous people or will of the whole society is sovereign, while the majority is a plenary substitute for that will. As such, the majority practically exercises sovereignty in the ongoing operations of the polity. However—and this is a huge "however"—the majority has the authority to do only those things that "could be *rightfully* done" by the whole society—that is, by the unanimous concurrence of its members. Some things are simply beyond the reach of any earthly power—beyond the scope of politics.

Apart from this, what the majority may legitimately do depends on the terms of the contract, presuming it is grounded in the consent of the people. Such is the case of the United States under the 1787 Constitution, Madison argued, whose constitutional compact was created by "an act of the *majority* of the people in each State in their highest sovereign capacity equipollent to a *unanimous* act of the people composing the State, in that capacity." In forming the social compact, the people created a "*moral being*," designating sovereignty to the compact of union for some purposes and retaining the sovereign power to the states for other objects. "Now

all Sovereigns are equal," Madison argued, "the Sovereignty of the State is equal to that of the Union; for the Sovereignty of each is but a *moral person*. That of the State and that of the Union are each a moral person; & in that respect precisely equal."[38] (Emphasis in original.)

Madison's Guarantee of Republican Government

What constitutes republican government has spawned lively discussion and debate for centuries. Madison offers his most succinct definition of republicanism in *Federalist* 39:

> A government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour. It is *essential* to such a government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is *sufficient* for such a government, that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified.[39] (Emphasis in original.)

It is well-known that the plan Edmund Randolph proposed on May 29 at the Philadelphia Convention of 1787 was chiefly the brainchild of fellow Virginian Madison. Known as the Randolph or Virginia Plan, the slate of resolutions included "Res[olve]d. that a Republican Government & the territory of each State, except in the instance of a voluntary junction of Government & territory, ought to be guarantied by the United States to each State."[40] The bulk of the consideration and discussion devoted to

this provision occurred on June 11 and July 18. On June 11, George Read of Delaware objected to guaranteeing states' territory (in fact, he wanted to abolish the states entirely!), claiming this was a major cause of jealousy and discord in the Union. Madison responded by removing the territorial guarantee so that the revised resolution read: "that a republican Constitution & its existing laws ought to be guaranteed to each State by the U. States."[41]

On July 18, debate on the provision resumed. When Gouverneur Morris objected to guaranteeing the existing laws of Rhode Island (later, William Houston would cite Georgia's constitutional system as especially noxious), James Wilson argued that the clause was simply a protection against foreign and domestic violence. Madison offered an amended version that stated "that the Constitutional authority of the States shall be guarantied to them respectively agst. domestic as well as foreign violence."[42]

In response to Wilson, Randolph, who had originally introduced the provision, spoke up to clarify that the clause had two purposes: to secure a republican form of government and to protect against domestic insurrections. Wilson heeded Randolph's interpretation, proposing wording that would make clear its dual purpose: "that a Republican form of Governmt. shall be guarantied to each State & that each State shall be protected agst. foreign & domestic violence."[43]

Madison withdrew his motion and supported Wilson's wording, which was unanimously agreed to. It was essentially this version that was submitted to the Committee of Detail on July 26. On August 6, the committee reported Resolution XVIII: "The United States shall guaranty to each State a Republican form of Government; and shall protect each State against foreign invasions, and, on the application of its Legislature, against domestic violence."[44] On September 12, the Committee of Style reported the final wording of the clause, which, with minor adjustments on September 15, became Article IV, Section 4 of the United States Constitution:

> 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.[45]

The purpose of the republican guarantee provision, as discussed during the Constitutional Convention, remains a topic of debate even today. Scholars such as Ryan C. Williams and Jonathan Toren argue that the clause has the limited purpose of guaranteeing national succor to quell violence within a state's borders, when that assistance is requested by the state. Williams's research into the 17th- and 18th-century understanding of the term "guarantee," especially through Emer de Vattel's work and the theory of the law of nations, suggests that the provision is probably a "quasi-diplomatic, treaty-like commitment on the part of the federal government to its quasi-sovereign component states." This interpretation supports the idea that the clause is nonjusticiable.[46]

Toren provides a broad overview of the clause's development during the founding era, concentrating on its author, Madison, and concluding that "the particular function of this provision is neither the protection of liberty itself nor the particular virtues of republicanism, but the protection of a republican union from violence, upheaval, and ultimately, tyranny."[47] In contrast, Akhil Reed Amar argues against the nonjusticiability of the republican government clause. For Amar, other clauses of the Constitution are also "big" and require a similar hermeneutical exercise but are nevertheless considered justiciable.[48]

Amar is particularly concerned with understanding and explicating the "republican government" aspect of this clause. To do this, he focuses on Madison and lays out that founder's conception of popular sovereignty, majority rule, and the right of the people to alter or abolish government. Amar then merges popular sovereignty, the act of ordaining and establishing the Constitution, with majority rule to form what he calls "majority rule popular sovereignty." From this convergence of majority rule with popular sovereignty, he traces many of the nation's trials and tribulations from the founding to the present, observing how

this principle has been plagued by the lack of inclusiveness, or what he dubs "the denominator problem."[49]

Amar is certainly correct that the rights of revolution, popular sovereignty, and majority rule are key to Madison's understanding of republican government and that Madison was committed to "the republican principle which refers the ultimate decision to the will of the majority."[50] In the final analysis, however, Amar parts ways with Madisonian republicanism. We recall that for Madison, majority rule is neither a principle of natural law nor equivalent to the social compact requirement of unanimous consent and that he criticized Jefferson for making these errors in his "earth belongs to the living" musings. Amar, however, takes Jefferson's position:

> In his First Inaugural Address, Thomas Jefferson described majority rule as "the vital principle of republics"—a point he later formulated as follows: "the first principle of Republicanism is, that the *lex majoris partis* is the fundamental law of every society of equal rights. *To consider the will of the society announced by the majority of a single vote as sacred as if unanimous is the first of all lessons of importance.*"[51] (Emphasis added.)

Like Jefferson in this instance (but not in Jefferson's inaugural address), Amar equates majority rule with the original act of consent required by republican social contract theory. For Amar, majority rule popular sovereignty and its sidekick, the denominator problem, is about who is included in the sovereign authority and has the right to vote, and this constitutes the central consideration of republican government. This is the procedural issue of republican theory. The substantive issue of republican theory concerns the ends that should be pursued by the sovereign authority, which is given scant attention and analysis in Amar's studies.[52]

In fact, Amar's fairly extensive treatment of Madison's thought does not include Madison's emphatic insistence that majority rule is not synonymous with the original act of popular sovereignty, nor does it treat in

any depth the challenge of republican government that Madison considered of prime importance, namely, the substantive aspect of the problem when power and right are discordant.

In a genuine republic, the people rule via a coalition of a majority of the whole society. This majority's voice is the outcome of the politics of public opinion and its multifaceted processes that filter, shape, and refine the public views to cancel out or temper demands contrary to the rights of others or to the permanent and aggregate interests of the society. Stated differently, the aim of the politics of public opinion is, via deliberative republicanism, to achieve legislative decisions in accordance with the claims of justice and the rights of individuals. In this manner, republican government founded in social compact is the continuous formation of the collective moral being.

At the time of the compact's establishment of government, and in the ongoing exercise of sovereignty through the constitutional majority, the challenge of making power and right coincide is ever present. In the founding era, the incongruity between the principles and practice of republican government was particularly evident in the despicable practice of slavery in the Southern states. How to remedy this grave contradiction continued to occupy Madison's thoughts throughout his life. When he put pen to paper to design an outline for a comprehensive treatise on republican government, he included a chapter about the influence of slavery on public opinion and government, emphasizing that the institution of slavery meant the Southern states of America were actually aristocracies rather than republics.[53]

The republican guarantee clause nonetheless makes clear that the states permitting the practice of slavery are to be considered legitimate members of the American Union. If the republican guarantee allows slavery, which is as anti-republican a policy as one can imagine, is the idea of republicanism in the Constitution simply an empty one? According to Madison, the authority of the clause does not extend beyond that of "a *guaranty* of a republican form of government," which leaves existing state constitutions as they are. (Emphasis in original.) The clause

> supposes a pre-existing government of the form which is to be guaranteed. As long therefore as the existing republican forms are continued by the states, they are guaranteed by the federal constitution. Whenever the states may chuse to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican constitutions; a restriction which it is presumed will hardly be considered as a grievance.[54]

In *Federalist* 43, Madison said that the clause is merely a "harmless superfluity"—though he qualified this by adding, "if the interposition of the general government should not be needed"—and he indicated that, in closely knit federations, members have a "right to insist that the forms of government under which the compact was entered into, should be *substantially* maintained."[55] (Emphasis in original.)

It is not an exaggeration to say that the republican guarantee clause embodies the toughest and thorniest challenge of American republican constitutionalism. Essentially, it declares that the Constitution is rooted in the principles of republicanism, and then it protects the existence of state constitutions and laws that violate those principles in the most egregious and inhumane way. The contradiction between law and justice—between legal right and natural right—in the circumstances present in pre–Civil War America could not be made starker than in the words and implications of this clause.

According to the classics, the synchronization of power and justice is *the* challenge of politics. In the proem to the first book of *The Republic*, Plato recounts an encounter between Polemarchus and Socrates that illustrates the juxtaposition of power and justice (based on reason and persuasion). Aristotle treats the challenge of natural right in the fifth book of the *Nicomachean Ethics*. Thomas Aquinas, John Locke, Samuel von Puffendorf, and Vattel address the issue in their investigations, in general arguing that in the application of the precepts of natural law, prudence is

required of the statesman. What is the right thing to do when current laws or circumstances essentially prohibit one from doing the right thing or when doing the right thing will make matters worse, not better?[56]

The traditional understanding of natural justice (whether natural right or natural law) is that politics should promote human flourishing, the aims of which are eternal and unchanging, but that the practical realities, laws, and customs of the day must also be considered. Out of this complex and nuanced consideration, a prudential decision fitting the specific circumstances must be made. This teaching is reflected in the passage of the Declaration regarding the dictates of prudence, which instruct "that Governments long established should not be changed for light and transient causes."

Because nothing could be done to immediately change the practice of slavery in the states where it existed in 1787, and because attempting to do so would have resulted only in those states refusing to join the Union, thereby not freeing a single slave, the framers accepted the existing laws of the states under the Constitution. Still, the presence of the republican guarantee clause also pronounces the overarching principles of the Union, revealing the moral contradiction in the document and casting a bright, harsh light on the compromises made to bring it about. By implication, the anti-republican inconsistencies in the Constitution are answerable to the higher standard of right that infuses the document's architectonic republican character.

The republican character of the United States Constitution is present with or without the republican guarantee clause, based on the nature of the original social compact. In an essay touching on this subject, Madison claimed that at the core of the social compact was a debt or moral obligation accompanied by a pledge (guarantee) of protection, of each citizen to every other, to respect the freedom of conscience at the core of our humanity. In "Property," he wrote,

> To guard a man's house as his castle . . . can give no title to invade a man's conscience which is more sacred than his

> castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact.[57]

By its very nature, Madison argued, the social compact creates conditions that must be met for it to constitute a legitimate agreement. It is legitimate when and only when the nature of humanity is recognized and respected, including especially the protection of the free exercise of conscience and the other faculties, which constitute the core of self-government.

The social contract or compact entails moral obligation, but it does not create obligation ex nihilo. It entails obligation because of natural law, because social compact doctrine itself is derivative from natural law and reasoning about human nature. Accordingly (and contrary to Thomas Hobbes's view), natural right exists whether or not there is a social contract or civil society or government; it exists everywhere and always. In *Federalist* 43, Madison asked what the relationship between the dissenting and assenting states would be if one or more of them chose not to enter into the compact. He answered,

> The moral relations will remain uncancelled. The claims of justice, both on one side and on the other, will be in force, and must be fulfilled; the rights of humanity must in all cases be duly and mutually respected.[58]

In this essay, which falls at the precise center of the Federalist Papers, Madison's discussion of the "claims of justice" and moral obligations that exist among independent political orders in the absence of any social compact reveals his embrace of classical natural right teaching.

For Madison, in the absence of conventional justice and the rule of law, natural justice remains in force and sets the standard for political societies and the individuals within them. These claims of natural justice are part of the rights and moral obligations inherent in our humanity.

The Blessings of Self-Government

Despite the many differences between Jefferson and Madison in character and outlook, they were best friends. They understood and trusted one another's principles and aspirations for their country. Toward the close of his life, in February 1826, Jefferson wrote Madison about the "harmony" of their views and purposes:

> The friendship which has subsisted between us, now half a century, and the harmony of our political principles and pursuits, have been sources of constant happiness to me thro' that long period. . . . It has also been a great solace to me to believe that you are engaged in vindicating to posterity the course we have pursued for preserving to them, *in all their purity*, the blessings of self-government.[59] (Emphasis in original.)

In response, Madison also recalled the many years of personal and political accord between them. "You cannot look back to the long period of our private friendship & political harmony, with more affecting recollections than I do," Madison wrote. "If they are a source of pleasure to you, what ought they not be to me? We can not be deprived of the happy consciousness of the pure devotion to the public good, with which we discharged the trusts committed to us."[60]

Monticello and Montpelier are two of the most frequently visited presidential and founders' homes in the country. The relatively short distance between the two residences means that many people who visit one, if they have time, visit the other as well. Of course, it took longer on horseback in the 18th century, but for the two Virginians, it was a road they traveled frequently, with cheerful anticipation of the time they would spend together. Today, for those of us touring the ribbon of roadway that connects the homes of Jefferson and Madison, the close bond between them that impelled their frequent visits becomes palpable.

And like them, the Declaration of Independence and the Constitution are also connected by this unbroken ribbon, with the miles between them hardly worth mentioning, for distance is nothing when it means the gathering of friends.

Notes

1. *Federalist*, no. 39 (James Madison).

2. Richard Hofstadter, *The American Political Tradition and the Men Who Made It* (Alfred A. Knopf, 1948).

3. In 1913, historian Charles Beard published *An Economic Interpretation of the Constitution of the United States*, in which he argues that the framers designed the Constitution to protect their own selfish economic interests, diverging from the democratic spirit of the Revolution and Declaration of Independence. In 1980, historian and activist Howard Zinn published *A People's History of the United States*, which, like Beard's interpretation, argued that the Constitution was the product of elites at the expense of the working class. To the economically underprivileged, Zinn added the categories of race, ethnicity, and sex or gender, claiming that the wealthy, white, Anglo-Protestant males who dominated politics in the founding era excluded such folk from the halls of power.

4. *Federalist*, no. 10 (James Madison).

5. Gordon S. Wood, *Revolutionary Characters: What Made the Founders Different* (Penguin Books, 2007), 164; and *Federalist*, no. 10 (Madison).

6. Martin Diamond, "Ethics and Politics: The American Way," in *The Moral Foundations of the American Republic*, ed. Robert H. Horwitz (University Press of Virginia, 1977), 59. See Patrick J. Deneen, *Why Liberalism Failed* (Yale University Press, 2019).

7. Thomas Jefferson to Henry Lee, May 8, 1825, Founders Online, https://founders.archives.gov/documents/Jefferson/98-01-02-5212; and James Madison to William Cogswell, March 10, 1834, Founders Online, https://founders.archives.gov/documents/Madison/99-02-02-2952.

8. Abraham Lincoln to Henry L. Pierce and Others, April 6, 1859, in *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler, vol. 3, *1858–1860* (Rutgers University Press, 1953), 376.

9. *Federalist*, no. 9 (Alexander Hamilton).

10. Thomas Jefferson to James Madison, September 6, 1789, Founders Online, https://founders.archives.gov/documents/Madison/01-12-02-0248.

11. Thomas Jefferson to Henry Tompkinson [Samuel Kercheval], July 12, 1816, Founders Online, https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002.

12. Jefferson to Tompkinson.

13. See *Federalist*, no. 49 (James Madison); *Federalist*, no. 50 (James Madison); and James Madison to Thomas Jefferson, February 4, 1790, Founders Online, https://founders.archives.gov/documents/Madison/01-13-02-0020.

14. See *Federalist*, no. 49 (Madison).

15. *Federalist*, no. 49 (Madison).

16. *Federalist*, no. 49 (Madison).

17. *Federalist*, no. 51 (James Madison).

18. James Madison to Thomas Jefferson, October 24, 1787, Founders Online, https://founders.archives.gov/documents/Jefferson/01-12-02-0274.

19. James Madison, "Public Opinion," in Colleen A. Sheehan, *The Mind of James Madison: The Legacy of Classical Republicanism* (Cambridge University Press, 2015), 245. See also Colleen A. Sheehan, *James Madison and the Spirit of Republican Self-Government* (Cambridge University Press, 2009). Compare Jack N. Rakove's excellent discussion of legislative deliberation in Jack N. Rakove, *A Politician Thinking: The Creative Mind of James Madison* (University of Oklahoma Press, 2017), 54–95. Here Rakove argues that Madison viewed legislative debate and deliberation as a crucial component of republican government. Allowing for the consideration of diverse opinions and interests, Madison saw deliberation as essential for achieving consensus and making informed decisions that reflect the will of the people.

20. *Federalist*, no. 51 (Madison).

21. James Madison, "A Candid State of Parties," in Sheehan, *The Mind of James Madison*, 268.

22. James Madison, "Spirit of Governments," in Sheehan, *The Mind of James Madison*, 257.

23. Thomas Jefferson, "First Inaugural Address," speech, US Capitol, Washington, DC, March 4, 1801, Founders Online, https://founders.archives.gov/documents/Jefferson/01-33-02-0116-0004.

24. Jefferson, "First Inaugural Address."

25. Thomas Jefferson to Spencer Roane, September 6, 1819, Founders Online, https://founders.archives.gov/documents/Jefferson/03-15-02-0014.

26. James Madison, "Notes on Vices of the Political System of the United States," in Sheehan, *The Mind of James Madison*, 198.

27. Madison, "Notes on Vices of the Political System of the United States," 201.

28. Madison, "Charters," in Sheehan, *The Mind of James Madison*, 247.

29. *Federalist*, no. 51 (Madison).

30. *Federalist*, no. 51 (Madison).

31. James Madison, "Property," in Sheehan, *The Mind of James Madison*, 263.

32. Madison, "Property," 263.

33. *Montesquieu's "The Spirit of the Laws": A Critical Edition*, trans. W. B. Allen (Anthem Press, 2024), bk. 11, chaps. 2–3.

34. Thomas Jefferson to James Madison, September 6, 1789, Founders Online, https://founders.archives.gov/documents/Madison/01-12-02-0248.

35. James Madison to Thomas Jefferson, February 4, 1790, Founders Online, https://founders.archives.gov/documents/Madison/01-13-02-0020.

36. Madison to Jefferson, February 4, 1790.

37. James Madison, "Essay on Sovereignty," December 1835, Founders Online, https://founders.archives.gov/documents/Madison/99-02-02-3188.

38. Madison, "Essay on Sovereignty."

39. *Federalist*, no. 39 (Madison). The claim that Madison further limits "republican" government to representative government and thus excludes democratic processes such as referendum and recall does not fit with his overall argument in the Federalist Papers. It mistakes Madison's solution to the problem of republican government for his definition of republican government. Madison uses "republic" to mean "popular" government. However, he argues that to rescue popular government from "the opprobrium under which it has so long labored" will require an extensive territory and representation. See *Federalist*, no. 10 (Madison).

40. *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (Ohio University Press, 1984), 32.

41. *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, 117.

42. *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, 321.

43. *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, 322.

44. *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, 395.

45. US Const. art. IV, § 4.

46. Williams claims that although the meaning of "guarantee" is critical to understanding the clause, it has been given scant attention. Moreover, the term is "something of a constitutional anomaly." It does not appear in the main documents before the drafting of the Constitution, the Constitution itself, or any of the earlier amendments. "In the absence of more definitive clues regarding the term's originally understood meaning," Williams writes, "most scholars" have either declared the term "hopelessly ambiguous" or ignored the problem of defining it. Ryan C. Williams, "The 'Guarantee' Clause," *Harvard Law Review* 132, no. 2 (2018): 608, https://harvardlawreview.org/print/vol-132/the-guarantee-clause/. It should be noted, however, the term is employed 25 times in the Pacificus–Helvedius debates, penned by Hamilton and Madison, respectively. The first *American Dictionary* by Noah Webster, though not published until 1828, defines the terms "guaranty" and "guarantee" using examples from the Pacificus–Helvedius exchange and the Franco-American Treaty of 1778 (which was at issue during the debate over Washington's Neutrality Proclamation). *An American Dictionary of the English Language* [. . .] (1828), under "guarantee," "guaranty."

47. Jonathan Toren, "Protecting Republican Government from Itself: The Guarantee Clause of Article IV, Section 4," *NYU Journal of Law & Liberty* 2 (2007): 385, https://www.law.nyu.edu/sites/default/files/ECM_PRO_060952.pdf. Madison also discusses the problems of unions in which some states are republican and others not in his 1792 *National Gazette* essay "Universal Peace," criticizing Rousseau on this point, specifically. "Among the various reforms which have been offered to the world, the projects

for universal peace have done the greatest honor to the hearts, though they seem to have done very little to the heads of their authors," Madison argued. "Rousseau, the most distinguished of these philanthropists, has recommended a confederation of sovereigns, under a council of deputies, for the double purpose of arbitrating external controversies among nations, and of guaranteeing their respective governments against internal revolutions. He was aware, neither of the impossibility of executing his pacific plan among governments which feel so many allurements to war, nor, what is more extraordinary, of the tendency of his plan to perpetuate arbitrary power wherever it existed; and, by extinguishing the hope of one day seeing an end of oppression, to cut off the only source of consolation remaining to the oppressed." James Madison, "For the *National Gazette*, 31 January 1792," Founders Online, January 31, 1792, https://founders.archives.gov/documents/Madison/01-14-02-0185.

48. According to Amar, "It is hard to see how other big clauses—from Section One of the Fourteenth Amendment, for example—are so different from the Republican Government Clause in their potential breadth, and their need for judicial mediating principles." Akhil Reed Amar, "The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem," *University of Colorado Law Review* 65, no. 4 (1994): 753, https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=2016&context=lawreview.

49. Amar, "The Central Meaning of Republican Government," 750–51.

50. Madison to Jefferson, October 24, 1787, quoted in Amar, "The Central Meaning of Republican Government," 763.

51. Amar, "The Central Meaning of Republican Government," 765 (cleaned up). Here Amar cites Thomas Jefferson to Baron F. H. Alexander Von Humboldt, June 13, 1817, https://founders.archives.gov/documents/Jefferson/03-11-02-0361. Compare Akhil Reed Amar, "Popular Sovereignty and Constitutional Amendment," in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, ed. Sanford Levinson (Princeton University Press, 1995), 89–90.

52. Amar does acknowledge that for Madison, "not everything a majority does is lawful." It must follow certain procedures and niceties, rather than operate by brute force, he argues. Amar, "The Central Meaning of Republican Government," 769. But this hardly answers the purpose, since majority factions can follow unjust procedures as well as just ones and still achieve their vicious ends. In another article on popular sovereignty, though, Amar cites Wilson's belief that a majority was "not entitled to do simply whatever it pleased," for they are beholden to "God and natural law." Akhil Reed Amar, "The Consent of the Governed: Constitutional Amendment Outside Article V," *Columbia Law Review* 94, no. 2 (1994): 501, https://scispace.com/pdf/the-consent-of-the-governed-constitutional-amendment-outside-a256qx8bqb.pdf. This leaves the full force of popular sovereignty intact, according to Amar, since the people remain the only source of earthly authority. The reference to Wilson's appeal to the higher-law standard by which to measure the people's authority begins to fill in Amar's popular sovereignty argument, but it would be fuller and stronger in terms

of Wilson's, Jefferson's, Madison's, and the founders' sense in general, if there were substantially more discussion of the conditions of the social compact, consent of the governed, and majority rule.

53. Madison, "Notes on Government," in Sheehan, *The Mind of James Madison*, 139–40.

54. *Federalist*, no. 43 (James Madison).

55. *Federalist*, no. 43 (Madison).

56. The classical response to this requires understanding that natural right is part of political right; legal right is part of political right as well. Natural right refers to principles of justice and moral order that are inherent in nature and can be discovered through reason. In contrast, legal right is constructed by human societies and can vary depending on the laws and conventions of a particular time and place. Political right is the point of coincidence.

57. Madison, "Property," 263.

58. *Federalist*, no. 43 (Madison).

59. Thomas Jefferson to James Madison, February 17, 1826, Founders Online, https://founders.archives.gov/documents/Jefferson/98-01-02-5912.

60. James Madison to Thomas Jefferson, February 24, 1826, Founders Online, https://founders.archives.gov/documents/Jefferson/98-01-02-5934.

5

Was the American Revolution a Change of Regime?

HARVEY C. MANSFIELD

On the 250th anniversary of the American Revolution, the language of politics and political science reveals some hesitation to call it a change of government, as does the Declaration of Independence. The phrase "change of regime," implying something more fundamental, has come into fashion; or rather, since "regime" translates a Greek word used in classical political science, it has returned to favor. In that political science, regime means a kind of rule, whereas modern, liberal political science makes a distinction between government and society that limits government, with the aim of preventing rule that combines government and society. The renewed sense of regime is aimed directly against liberalism and the liberal understanding of the American Revolution.

Which view is correct? The brief framing given above needs to be elaborated, because the classical idea of regime, long abandoned, is not well understood today, and liberal limited government, once intended as an alternative and replacement for the regime, has lost its original clarity as a distinction. Which type is "big government," for example—is it still properly limited or a regime? Working toward a clearer understanding of the difference between the classical conception of regime and the liberal ideal of government could help us better grasp the significance of the American Revolution—and the kind of constitutional government it ultimately brought into being.

The Classical Regime and the Common Good

The regime is at the heart of classical political science and was shown to be at the heart of politics itself by the two grand masters of that science, Plato and Aristotle. The Greek word *politeia* appears as "republic" in Plato's *Republic*, the dialogue in which Socrates discusses the nature of justice. And it appears as "regime" or "constitution" in Book 3 of Aristotle's *Politics*—the most important part of that essential work.

Aristotle says a human being is by nature a *political* animal, not merely a familial or social one. He also says a human being is a *rational* animal, one who gives reasons for his desires. These reasons are directed to other human beings to convince them to agree that they would have acted as the speaker acted. By giving a reason, one states the principle by which another would act; merely stating one's desire is not enough. The speaker's principle should rule the situation. Ruling takes its origin in speech or rational justification: What I did should be the rule for you, too, whether you are superior, inferior, or equal. Reasoning thus leads to ruling, and the sociability of communication implied by human rationality leads to politics. A political animal is a ruler. Even a person who says he decides for himself, not for others—a typical liberal today—wants that principle to rule society as well.[1]

The regime is the rule of the whole of society by a part of it, which, because it rules, gives a characteristic stamp and style to that society. Aristotle identifies three types of regimes, defined by their number of rulers—one, few, and many. Monarchy, oligarchy, and democracy define the rule of the whole by the part ruling it, so that, for example, the result of rule by the many is a democratic society, a certain way of life. There are different democracies depending on the character of the demos, but all are democracies by virtue of being ruled by the many. No society stays together without rule; it must be ruled by some part of itself. And in Aristotle's formulation, the part that rules does not represent the whole, as with modern representative government, but rather makes the other parts contribute to its rule.[2]

This rule shows itself in the most open and public ways, each a kind of display of who is in charge. The ruling part is the most powerful one and always the most publicly visible. There are parts kept private in every society, but the reason they are hidden is that they are less powerful than the part that doesn't have to hide. The ruler of any society is always its most respectable power, and, vice versa, the most respected is the most powerful. The Communist Party in the former Soviet Union, the mullahs in the Islamic Republic of Iran, and the American electorate are three diverse examples of rule by the most powerful and respected part. Thus, the most impressive fact of politics everywhere is who rules.

The Greek word for rule, *archē*, also means the beginning or principle of rule. An *archē* is both a beginning in accordance with a principle and a rule according to a beginning. This beginning is never from a state of nature with no rule or regime. The state of nature with no government invented by modern liberalism is not possible for Aristotle, since man is a political animal by nature, not by consent or contract. Ruling is participating, taking part, taking *one's* part in a whole. The ruling part is partisan on behalf of its principle, as every regime moves in a certain direction in accordance with its principle. This principle is reflected in its form or structure of government, one of the three types mentioned above or a mix of them.[3]

Though the regime is fundamentally partisan, there is a common good of the whole. But the difficulty is that there are two common goods that Aristotle offers in two formulations: the *common benefit* and the *benefit in common*.

The common benefit is common to all as individuals, especially to their bodies, to which each and all must give attention in private. This common good is public and constitutes a community, because it is *universally* private. Being universal, it is democratic, and its principal material is that of bodies. It describes the goods we all require by virtue of our humanity.

The benefit in common comes from superior human beings who benefit the community through their superiority, especially in intellect, character, or soul. These are the nondemocratic few who contribute to

the community more than others do and claim honor rather than bodily sustenance as compensation. In our democracy, such individuals are not oligarchs but rather celebrities honored with more money than most. They democratize oligarchy and infuse democracy with it, producing a kind of mixed regime. We need what they have to offer, but they do not offer something we all need to possess—only something we need to benefit from.

This fact suggests the possibility of a mixed regime that would secure a whole without a partisan ruling part. But Aristotle thinks this happy result very unlikely and declares that regimes typically are either democratic or oligarchic, aiming at either the common benefit or the benefit in common. Each of these types has a basis in human nature, one claiming that people are more or less equal in body and the other claiming that they are marvelously unequal in soul or intellect. Yet these two claims are only half-truths about human nature with contrary implications, and so they are very hard to put together without emphasizing one more than the other.

Democracy needs the few but accommodates their superiority to its own needs, and in reverse, the dependency of oligarchy on the many is made to serve the domination of the few. A perfect democracy would be universal, since there would be no reason to prefer the material of one body over that of another. Similarly, oligarchy would rule over all souls according to the principle of superiority it fancies and supports, ending in a monarchy of the one most superior individual. But in fact, democracy divides into multiple democracies, each nationalistic or patriotic for its own self-defined version of democracy and each thus partisan. Oligarchies base which is better on some superiority contest—in bygone Massachusetts, this occurred among those belonging to different ethnicities, such as the Yankees, the Irish, and the Italians—and they too fall into partisan divisions.

The rulers of a regime, then, have a certain awareness of their direction toward an end that they claim to be just. They are led to this awareness by the democratic or oligarchic form of their communities, each leading to a

conforming way of life. As partisans, the rulers do not have full awareness of the whole they aim at, yet with partial awareness, they take responsibility for the character of their regime. They blame and denounce their enemies, foreign and domestic, and they praise and extol their own regime, all the while insisting on its contrast with the other and the superiority of their own. Every regime has a self-definition that is partisan and that shows itself in a partisan change—or revolution.

According to Aristotle, there are three kinds of revolution. He presents the first two as a contrast between an uprising (*stasis*)—which is a change in personnel—and a change of regime, constitution, or form. The contrast shows that a regime depends not on certain named individuals but on a principle. (Napoleon was an individual who made a revolution of regime we can call Napoleonic because it applies to others besides himself.)[4]

A third definition of revolution, according to Aristotle, is its literal meaning—cycle (*kyklos*). Being partisan, regimes overlook or mismanage what they do not understand. In America, our principle is in the Declaration of Independence and its assertion that all men are created equal. We try to manage obvious inequalities in honor, talent, and wealth by claiming they benefit everybody—or at least those who are least advantaged. Sooner or later, though, the bias toward equality, with its partial truth, will catch up to our regime and bring it to an end. No regime is perfect; none rules in accordance with the complete truth of human nature. The likely result is a return to the beginning so we can make the same mistakes all over again. Nature permits us the freedom to choose among possible regimes but limits us to imperfect results. Mere survival cannot be the goal of politics, because no regime can survive forever. Most regimes, when speaking of survival, mean the survival of their regime, not of individual human beings. Regimes survive individuals, but neither regimes nor individuals survive forever.

Or is it possible for a very wise individual—say, a philosopher—to found a permanent regime by avoiding the bias of regimes and finding a true whole rather than a partisan one? Aristotle says the most virtuous

humans are the least likely to rebel. These are philosophers, but they are few. To effect a revolution, they have to find allies among the not so wise, whether those are few or many. With undependable allies like these, philosophers must live with bias rather than remove it. They may even make things worse, since error will now have their stamp of approval. It is true that Aristotle had a remedy for the partiality of the regime—the mixed regime. But this remedy was not a cure for partiality, because it depended on persuasion to make the mix, requiring its elements to be persuadable. Here we find the same difficulty that defeats the utopian regime of philosophy.

Nonetheless, despite the classical philosophers' profound doubts, the modern philosophers we now call liberals tried their best to find, and their followers to found, an impartial regime that would not be subject to partisan bias. For America, these philosophers were John Locke and Montesquieu, and the American founders (including those who wrote the Constitution) were their followers.

Liberalism Against Regimes

The American Revolution was part of the modern revolution—made by modern philosophy, led by modern philosophers, and begun by Niccolò Machiavelli. According to him and thinkers thereafter, the most virtuous are, contrary to Aristotle, the *most* likely to rebel. These modern thinkers envisage a permanent improvement in the status of humanity, a new regime that will actualize their philosophic thought. This improvement would not happen all at once but rather by stages pointing in a single direction, each more radical than the one before. Take, for instance, the British, the American, the French, the Russian, and the Chinese revolutions. The direction does not and cannot change, and Aristotle's revolutionary cycle of regimes is replaced by the modern notion of flattened-out linear progress that does not return to the beginning to start over. This means that the limits set by human nature no longer apply, for men are

more malleable than the classical thinkers supposed. There may not be a human nature, nor even nature itself.

The American Revolution is part of this modern revolution. It began with a "shot heard round the world"[5] and led to the American founding proclaimed on the first page of the Federalist Papers to be the work of "reflection and choice" and an experiment on behalf of mankind.[6] This political wonder appears to be not a change in regime but rather a change in the *notion* of regime to make it impartial. Liberalism, in the political science of Locke and Montesquieu, begins with hostility to a certain regime, the rule of the church. But hostility to this regime was enlarged to become hostility to the very notion of rule by regime.

Religious wars in the 17th century exposed rule as the rule of a faith that subjected worldly power to the next world, with the consequent harms of both cruel fanaticism when human necessities were denied and feeble pacifism toward the enforcement of human justice. Dissatisfied with ad hoc compromise between church and state, modern philosophers sought a permanent, theoretical remedy in politics to make human sovereignty as clear as possible. The assertion against the church on behalf of human necessities led to the rejection of Aristotle's regime, which, with its emphasis on rule, was the foundation of domination by the church.

The early modern rejection of Aristotle's notion of regime determined the basic form of liberalism still standing today, though it is now much qualified, as we shall see. Replacing the duties demanded by a regime that rules, liberalism placed individual rights before duties. Instead of man's being by nature political and rational, man is reduced to an original state of nature in which nobody rules and all war against all. To escape the conflict that nature imposes, government must be installed through contract by consent as a correction of nature's imposition of insecurity and penury. Men are neither naturally inclined to politics nor rational enough to think their way to peace. They must be governed by appeal to the bodily passions of fear and desire, not by the aspirations and visions of the soul. Your self needs to be preserved in its rights, rather than your soul saved

by obeying its duties, and the purpose of government becomes "to secure these rights."

To do this, government must be limited to protecting individual rights, leaving their exercise to individuals living freely in society. In this new function, government does not rule society; in Aristotelian terms, the regime does not form a certain way of life. Instead, government represents society. Representative government in this new sense is the invention of liberalism: Government does not rule but represents. It has a common good that benefits all individuals equally—in Aristotle's political science, the common benefit based on the body rather than the benefit in common that forms the soul. The gist of liberal political science is given in Locke's *A Letter Concerning Toleration*, where he says that the magistrate (the government) cares for bodies and not for souls.[7]

Liberalism is a formal doctrine. It does not tell you how to live. It tells you to pursue happiness but does not define it; that's for you to do. Instead, liberalism tells you how to arrange to get what you want, individually, for yourself. Government is limited in its scope and must respect the difference between what it can do and what society can contain. Government can hold elections but not tell you how to vote; it can protect your right of free speech but not tell you what to say.

Liberalism is vulnerable to attack from both right and left. The right declares that liberal self-preservation is paltry and cowardly, whereas the left declares that liberalism ignores the weak and the poor. Both complain that in abstracting the individual from an actual way of life, liberalism is too comfortable and complacent. But in the liberal framework, this abstraction saves individuals from the impositions of a regime they have not consented to, originally the church and now those who have unconsciously inherited the church's ambition. Going back to Aristotle for a change of regime would be submitting to a rule that liberals like to call authoritarian.

Liberalism wants a distinction between government and society so individuals can live a life of choice, not one imposed by a regime. In the best case, this would be choice together with reflection, as Alexander

Hamilton put it. But reflection on choice tells us that political life is often directed to "accident and force," the very conditions from which choice is distinguished by Hamilton.[8] According to Aristotle, choice does not control the ends that are given to us; we can choose only the means to those ends. For example, health is not an end we can ignore; that would be irresponsible. Choice has to be responsible, and you must take responsibility for keeping yourself healthy.

Politically, a country that wants to live by liberalism needs to be large and have a heterogeneous population and a spirit of interest and ambition favorable to liberty. These are the conditions of the American republic that help prevent it from falling into the partisan divisions that have ruined all previous republics. What the founders did was constitutionalize these necessities, bringing them into the republican system so political choices could be responsible. For example, the American Constitution contains provisions for largeness in its federalism, by which the states have a semi-independence allowing them to choose differently from one another. A republican *system* such as America's can be distinguished from a republican *regime* by its lack of rule over the whole. The parts do not fit under a sovereign ruling part, each determined by the whole, but combine freely to achieve one end together, without a single principle of rule.

Constitutionalized necessities are those conditions for liberty that we would like to wish away, such as size, division, and self-interest, but instead choose responsibly to accept. To be responsible is a coin of two sides: on one side to be accountable for one's own actions and on the other, more virtuously, to be willing to take charge when the problem is not your fault. The American Constitution has some parts that encourage stability, such as the Senate and the courts, and some that ask for energy, such as the executive. Stability and energy are necessary to all governments but are achieved in republics with well-chosen institutions calling separately for both. To choose means to choose well and, in the sense of the American republic, responsibly. Responsibility is a favorite American virtue not on Aristotle's list of moral virtues.

A Liberal Regime?

We now have a picture of the basic structure of liberalism that centers on a distinction between government and society, a system of choice that accounts for necessities. It admits that you can't have everything you wish but insists that everything can be addressed and, in a reduced sense, chosen responsibly. This structure leaves an empty center where Aristotle's regime places a principle of rule. Or, one could say, liberalism has a principle of liberty in a form empty of content, to be filled not by the government but by civil society. Its life is in a formality and needs to be kept formal against the critics from the left and right who want to take hold of that center. Liberals need to maintain free speech without defining it and elections without saying who should be elected.

The trouble with liberalism is that its empty center has a tendency to fill, arising from the very exercise of free speech that liberalism wants to respect. This fill-up comes from the way one choice leads to another—from the parties that develop under liberty, from the virtues necessary to liberty, from the religion that both sustains and endangers it, and from wars and other accidents.

Those who have rights have the freedom to exercise them, either as individuals or through government. But once one makes a choice, that choice limits future choices, such as with marriage. Often today, people want to avoid this result by "keeping their options open," as they say. But that, too, is a choice, because one has passed up making a choice that may not reappear. As with Aristotle's regime, every new regime or movement toward one must reckon with the leftovers from the previous regime. So, too, American liberalism after its victory in the Civil War had for a long time to deal with remnants of the Confederacy. Liberalism's freedom is obliged to deal with its history of choices made and paths taken. Liberalism is based on rights, which means on the independence of formality, but what starts as a formality in a liberal constitution becomes, through progress in the exercise of choice, a substantive limitation on choice. The empty center becomes what is called the private

sphere, a whole separate from the formal public sphere yet under it and regulated by it.

Between the public and private spheres are political parties that come from the private sphere but contend for the offices in the constitution. For Aristotle, partisanship, which is rule by a part—for example, the rule of the demos in democracy—characterizes the regime as a whole. But the few remain as both challenging the rule of the demos and contributing to it. Aristotle's regime is for the most part single-party domination, at times qualified and various according to the particular character of the few and the many. Liberal choice, however, opens the door to parties.

Thomas Jefferson's Democratic (or Democratic-Republican) Party claimed to be the sole truly republican party, but in time, perhaps in the administration of Martin Van Buren (from 1837 to 1841), the respectability of two opposed parties was recognized. The civil society of liberalism now normally contains a liberal and a conservative party or set of parties that alternate with one another according to the choice of the voters. This everyday fact has become a kind of formality under the constitution and is usually called a party system, meaning an organized choice. Although the original liberal philosophers Locke and Montesquieu did not speak of party systems, they were well acquainted with the facts of human partisanship and careful to accommodate them.

Our two parties today, liberal and conservative, stand for the formal principle of liberal diversity. This requires that each party make way for the other when it loses an election and refrain from annihilating the other when it wins. Liberal diversity requires that one subordinate one's own party to the maintenance of rivalry by means of the liberal virtue of toleration. Yet toleration cannot work if it is purely formal toleration of any person or principle that is merely different. There has to be something of value in diversity besides diversity itself. Consider the virtues of the two parties in America today.

Democrats stand for inclusiveness; they want to include everybody in a whole composed of individuals made equal by the demands of their bodies. They turn their attention to those who are excluded or marginalized

and therefore vulnerable in the whole by either design or neglect. Democrats like to say they care for them, using "care" to signify the virtue of compassion or empathy that they praise and claim for themselves.

Republicans, for their part, want a variegated whole in which some are held more valuable than others. They are more valuable because they contribute more: the wealthy through their investments and tax payments, the military through their service, and others by excelling in some useful or remarkable way. Republicans praise those who take risks and prefer looking up in admiration to looking down with compassion. They think of themselves as givers rather than takers but present themselves as normal folk who earn their living rather than living off the government and the taxpayers.

Each party prefers its own virtue but will have, when pressed, some appreciation for the other's—an understanding that results in toleration. That understanding has a basis in human nature, for men are both equal in having bodies and, thus, vulnerable and unequal in their souls, which range from the level of Aristotle's down to that of a moron's.

Liberalism works best in a sizable country not united by a single nationality or sect, and hence it does not work in one featuring a traditional or classical republican virtue such as Spartan self-sacrifice. Self-interest must come to the fore.

Liberal Virtue

But self-interest alone does not suffice, because it can be in your interest to be a free rider on others' exertions or to be content with an average performance. Liberalism in America has always wanted a certain greatness in the honor of being mankind's first successful republic. America's founders were great men who taught its people a respect for greatness and virtues that bring them in reduced form down from George Washington into civil society. I will mention two teachers of liberal virtue to the American republic: Benjamin Franklin and Publius, the fictive author of the Federalist Papers.

Franklin offers his fellow Americans a defense of bourgeois virtue, though without the pejorative sense that Max Weber and D. H. Lawrence attach to it.[9] Bourgeois virtue differs from naive, honest republican virtue by being based on self-interest, but Franklin shows that self-interest does not preclude public-spiritedness. Though he believed in liberty, he did not think that how it is exercised should be left to chance. Rather than the private education favored by Locke, Franklin wanted public education in public schools. In his autobiography, he shows a virtue that is sociable and conversational, never harsh or abrasive. He was for utility but, unlike later utilitarian philosophers, utility with style. Style consists mainly in never "presenting one's self as the Proposer of any useful Project," thus keeping oneself out of sight. Yet he soon presents himself pursuing "the bold and arduous Project of arriving at moral Perfection."[10]

Franklin offers a list of 12 or 13 virtues that, in comparison with Aristotle's list of 11 moral virtues, omits ambition and substitutes frugality for generosity. That substitution one could call the very soul of the bourgeois. Franklin was a generous man—but he did not want to present himself as such. "Sincerity" he describes as "us[ing] no hurtful Deceit."[11] In his autobiography, he records his success in rising from poverty and obscurity to greatness by doing good to his fellow citizens. That is how a great man can survive and be held up as great in a republic among the many who are not great. What a guy! Thus can liberal society borrow greatness without having to achieve it and gain a reputation for morality by relaxing it.

Publius, whose name masks Hamilton and James Madison (with a touch of John Jay) in agreement, also authored a book. And in him we again see a new republican virtue suitable for greatness—ambition, a virtue Franklin omitted (but Aristotle included). Ambition is the motive that runs the new Constitution; in the most famous of Publius's phrases, "Ambition must be made to counteract ambition."[12] Where ambition cannot be concealed, as Franklin has it, it must be put to use in opposing the ambition of others. Publius says a man's ambition must be connected to the interest of his office; for instance, the ambition of a senator is as

a member of the Senate. Ambition is thus regulated by being constitutionalized, hence serving the government and powering the republic. This ambition requires an expenditure of energy that distinguishes it from ordinary self-interest, to say nothing of free riding.

Sure enough, energy is a new word and an important factor in the Federalist Papers. Energy in office will get you seen, in the mode of Franklin, as more than excusable and positively praiseworthy. Energy includes responsibility, the other new word used by Publius. Responsibility is taking charge of an office or a situation and executing or fixing it for others with actions they could not have performed themselves.

With these virtues set forth by Franklin and Publius, America, so proud of its democracy, opens itself to greatness. Greatness does not figure in the basic structure of liberalism, which is seemingly designed to discourage the "extensive and arduous enterprises" that Publius claims to set in view for the advantage of the American republic.[13] A successful republic finds greatness, one could say, because it sets an example for mankind. Both Locke and Montesquieu had made England their model constitution to show that liberty could be set in order and kept instead of merely wished for. Republican greatness implies that a people can be great, but that seems to occur only or mainly when the people follow great leaders who enlist their cooperation in an enterprise, in peace or war, that can be considered great. The possibility of cooperative greatness between the few and the many in a republic alleviates the danger that the many may fear from the few. As we see in the two fundamental texts of American democracy, the Federalist Papers and Alexis de Tocqueville's *Democracy in America*, the American founding is based on the fundamental need to address the tyranny of the majority.[14]

In a democracy, the majority—understanding itself as composed of equals and calling itself the people—tends naturally to fear the few, who are outstanding in some way, usually in wealth but also in talent and virtue. The majority fails to appreciate the risk that they themselves will oppress the few by despoiling them or stifling their ambition. Disappointed ambition may turn one of the few to lead the majority against the rest of the

few—in the role known as demagogue. Here we encounter today's enemy known as elitism.

Elitism means that a certain few take the side of the elite against the rest. Those opposed to elitism alternate between denying the worth of any elite and alleging that the people suffer under an unjustified elite that is harmful. These anti-elitists have been for some time in charge of American education. They are themselves an elite, one united against elitism. They deny any danger from majority tyranny but pose it themselves. They politicize American education, leading it to transform civil society from nonpartisan independence into partisan conformity. Their accusation of elitism amounts to a would-be majority tyranny on their part. Liberals can agree with Machiavelli that the few are the ministers of the few. In seeking power for themselves, however, the few can also be ministers of the many in greatness or tyranny.

The American Constitution gives representation to the people, but it gives opportunity mainly to the few, so their ambition can counteract ambition. By itself, representative government would endorse majority tyranny, but when it takes account of the fact that the representatives are an elite few and that democracy has its own elitism, the avenue to greatness—and let's not forget common prosperity—is opened. Ambition has its peak in "the love of fame, the ruling passion of the noblest minds," a phrase that has itself gained fame as the expression of the highest passion in the noble mind of Hamilton.[15] But ambition can reach far down the ladder of meritocracy to activate the desire to get ahead among ordinary folk. "Getting ahead" means getting ahead of where you would be if not touched by ambition and ahead of others, as in a race.

Thus, the effectual truth of democracy is meritocracy. Human beings are divided into few and many by nature, so an egalitarian society in which all are equals can be achieved only by flattening the high to the level of the low. Yet merit is not intellectual only, and it is distributed among the many as well as concentrated in the few. Democratic freedom can release this multifarious merit from arbitrary inherited or traditional restrictions to yield a society teeming with satisfied ambitions that are respectable,

if not grand. A plumber brings relief to his customers and, in doing so, earns well-paid contentment for himself. His competence is qualified by its scarcity, value, and honor in comparison with other competences to make a stratified society.

A society defined by such an idea has a certain cast that is neither empty, as in the basic structure of liberalism, nor flat, as in egalitarian democracy. Each individual is in company with others, as in Tocqueville's American democracy of associations that are voluntary or involuntary and guided by the art or science of association. This is Tocqueville's modification of liberalism based on a single social contract that yields an empty society. His associations, amounting to a new kind of liberalism, "a new political science," are designed to forestall a mass of undifferentiated individuals who readily come together to constitute the tyranny of the majority.[16] A salutary meritocracy with stratified professions, occupations, jobs, and families—less rational than Hegel's civil society but moved by ambitions of all sizes and limits—brings liberalism out of its basic structure toward the way of life of Aristotle's regime. Liberalism's rule of law is no longer impartial to allow choice but rather partial toward the certain kind of society that its choices have developed—a sociable society rooted in a principle of merit. Such a society is liberal in its tendencies, but it is a regime in the classical sense.

Liberal Prudence, Liberal Truth

A principle of merit can help deepen the politics of a free society. But can such a society exist without a principle of religion? Aristotle suggested that such a principle is necessary, but that might not quite mean what we imagine.

According to Aristotle, the rule of law does two contrary things: It holds us down and keeps us up. It holds down our desire to be gods over other men and keeps up our pride in living by law rather than by bestial instinct. In the latter aspect, laws are chosen by human beings who are

rulers of the regime; laws come from and serve the regime that makes them. A democracy makes democratic laws. Does this rule of men over laws not endanger the impartiality of law?[17]

In the former aspect, however, it is possible that the men who make the laws will do so in a spirit of lawfulness. In that case, we have men over laws and lawfulness over men—an in-between situation that keeps both aspects alive and active.

Where does the lawfulness of men come from? Aristotle explains that to put lawfulness over men requires that we believe in the sacredness or sanctity of certain laws.[18] This is religion understood as custom, which means the priority of unwritten over written law. This sort of custom reflects the power of habit over the power of reason. Somehow, there are writers who approve of unwritten law and reasoners who approve of the power of habit. To say the regime makes the laws means that the regime, with its prudence, can decide to use discretion or follow the law. The status of discretion is raised and made equal with the rule of law, thus releasing human prudence.

But it appears that prudence needs a standard to guide it—a law—and law needs discretion to make necessary exceptions. Neither prudence nor law can do without the other. To sum up this brief argument from Aristotle, we may identify three features of the rule of law. First, law comes from above, from God or from the divinity in us; second, law is based on custom or habit; and third, it allows, more or less, for prudence.

The modern revolution against Aristotle denies these three features. First, it establishes the sovereignty of man in the world, so that law acquires its impartiality by being universal rather than by coming from above. The Declaration of Independence speaks of "the Laws of Nature and of Nature's God" as the source of the rights of man. Nature is a universal source, and nature's God works through it with a divinity not peculiar to America. These laws do permit America to seek a "separate and equal station" from other peoples, but not, in this reasoning, one chosen providentially by God. Second, laws are made, not found in custom. Custom

from the English common law has to be validated in America through legislation. And third, prudence tends to lose its status. It is divided into reason and will, and both are universalized. Reason is universal, and will is anyone's. Thus the modern rule of law is divided into legalism of reason and realism of will—a pale version of Aristotle's dualism of the best man versus the best laws. For Aristotle, there is no solution to the dualism; for the modern rule of law, there is only a never-ending dispute between two schools of interpretation.

America, however, puts Aristotle's dualism into its Constitution. Legalism is found in the legislature, whose premise is that law is enough, while realism is the doctrine of the executive, arguing that legislation is never enough. The judiciary is left to resolve the dispute without ever ending it. Aristotle's dualism makes sense of the checking-and-balancing function dear to liberalism by showing it to be inherent in politics rather than merely one arbitrary decision checked by another. Arbitrariness, meaning freedom from law, can be good when it is necessary to discretion; it can be bad when it is the compromised result of checking. Liberalism's separation of powers is open to an Aristotelian interpretation that makes it wiser than the freedom it would rather promote.

Religion in America lives with the distinction (albeit not quite the separation) between church and state that is characteristic of liberalism. Under this condition, religion is a private belief and activity of civil society whose free exercise, according to the First Amendment, is to be neither established nor prohibited by law. These limits prevent the foreclosing of religious choice by the rule of either religion or atheism. When set down at the time of the American Revolution, this distinction corrected America's Puritan founding of religion joined with democratic political theory (as Tocqueville put it). This was the ruling religion of a regime, set down in Nathaniel Hawthorne's *The Scarlet Letter*. But "Nature's God" in the Declaration worked through nature, not against it, and spoke in self-evident truths rather than divine revelation. Preachers of that era would have disagreed with Jefferson's deist formulation, but Jefferson's word rather than the Gospel was the official Declaration.

There was, then, nothing sacral about or behind the laws that would be made under the Constitution. Laws themselves would be so tenuous as to be subordinated to the power of making laws—the openly political legislative process of human beings, neither unwritten nor revealed from God.

Aristotle would want to know whether laws so readily changeable will be obeyed. In the Federalist Papers, Publius worried that laws made by that process would be mutable and proposed that the Senate would tend to lessen that evil. One could add the independence of the judiciary and the influence of lawyers educated in the law as elements that work for needed durability. In our day, however, "the law" is a mass of particles left after an explosion in which "Nature" as expressed in the Declaration is hardly recognizable among regulations, decrees, mandates, and statutes passed by Congress and state legislatures, not to mention "letters of guidance." Running through the legal profession like a virus is the theme of legal realism, the argument that something other than law is stronger than law.

Our statesmen disagree over whether one should obey an unjust law. Abraham Lincoln thought so, but Martin Luther King Jr. disagreed.[19] Somehow, the American people, unruly as they are, obey most of the time—and liberalism survives.

The American Regime

To say liberalism survives, however, requires that one apply the standard of success for a regime, for which one must resort to Aristotle's political science or some other that equals or surpasses it.

What is the content of law that fills the empty center of liberalism? That is the question liberalism cannot answer on its own without violating its basic structure. The liberal constitution can pronounce on only how we must decide—the correct process—not what we should decide. Machiavelli professed an effectual truth that reduced the formalities of morals and politics to their outcomes. This is the sort of thinking, hostile

to liberalism, found in legal realism. In this view, the empty center is an arena for princes and other power seekers.[20]

But what do they want to do with their power? Aristotle brings up the good life: virtue and the conditions of virtue. Liberalism is the regime of the anti-regime that must be judged according to the standard of the regime it opposes. Beginning as a denial of the good life, it must defend the goodness of the life it delivers instead. If America measures up to that standard, it has always lacked a theory of itself that consistently helps it demonstrate its greatness. The American Revolution did launch a regime, and a great one, yet one that has always struggled to articulate the character of its greatness.

Notes

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