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NATIONAL Forum

THE PHI KAPPA PHI
JOURNAL

FALL
1984

T TOWARD THE BICENTENNIAL OF THE CONSTITUTION

GUEST EDITED BY MARK W. CANNON ★ WITH WILLIAM J. BENNETT ★ WALTER BERNIS ★ ALBERT P. BLAUSTEIN ★ WARREN E. BURGER ★ ORRIN G. HATCH ★ RITA E. HAUSER ★ A. E. DICK HOWARD ★ TOM JOHNSON ★ DAVID MATHEWS ★ WADE H. McCREE, Jr. ★ RICHARD B. MORRIS ★ BETTY SOUTHARD MURPHY ★ THOMAS P. O'NEILL, Jr. ★ DON K. PRICE ★ RONALD W. REAGAN ★ GORDON S. WOOD ★ ★ ★ ★ ★ ★ ★ ★

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was founded in 1897 and became a national organization through the efforts of the presidents of three state universities. Its primary objective has been from the first the recognition and encouragement of superior scholarship in all fields of study. Good character is an essential supporting attribute for those elected to membership. Since Chapters elect from all curricula of their respective universities, both democracy and coordination in educational endeavors are fostered.

The motto of the society is *philosophia krateitō phōtōn*, which is freely translated as "Let the love of learning rule mankind."

Supplementing the work of its Chapters, the Society devotes income to the annual award of fellowships for graduate study, the erection of funds to endow the society's publications and fellowships, and the publication of this journal. Phi Kappa Phi is a founding member of the Association of College Honor Societies.

Dear Citizen:

The Honor Society of Phi Kappa Phi, the **Commission on Public Understanding About the Law** of the **American Bar Association**, and **Mead Data Central** invite you to peruse, discuss, and enjoy this special issue of *National Forum* on the Bicentennial of the Constitution. Assembled here are articles by seventeen knowledgeable authors of diverse backgrounds. Each author brings unique qualifications to the examination of different aspects of the Constitution—its history, its significance, and the contemporary issues surrounding it.

Why are you receiving this special issue? The Honor Society of Phi Kappa Phi, the American Bar Association, and Mead Data Central undertook this project to stimulate interest in the upcoming celebration of the Bicentennial of the United States Constitution. We seek to reach civic-minded citizens likely to influence the planning and implementing of Bicentennial programs and festivities by national and community organizations. We hope you will retain and share this issue of *National Forum* as a resource and guide for the Bicentennial projects ahead.

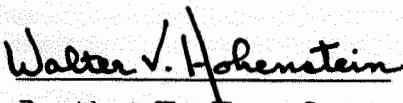
We would also like this issue to reach students across the country and abroad. Civic education is one of the most important charges we as a society must undertake. Familiarizing the youth of the country with our charter of government is vital, and this issue should advance the cause.

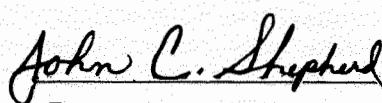
This issue of *National Forum* is being widely disseminated through the generous support of **The Brown Foundation, Inc.**, **The General Electric Foundation**, **The George Gund Foundation**, the **Kettering Foundation**, **The Mead Corporation Foundation**, and **The Pfizer Foundation**. **Mead Data Central** has made possible the printing and distribution of the journal to the membership of the American Bar Association. The contributions of these organizations exemplify the civic activity needed to make the Bicentennial celebration successful.

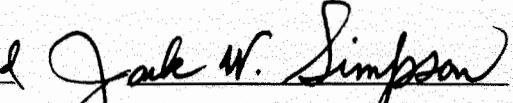
We hope that you will enjoy this issue and gain a greater appreciation of the historical and contemporary significance of our Constitution. We hope that these articles will stimulate you to become a scholar of the Constitution and to consider how its core of enduring principles relates to contemporary problems. For when we know more about the consensus and compromise that the Constitution embodies, more about the concerns that led to the Bill of Rights, and more about how power is used and is checked and balanced among the branches of government—we will strengthen our appreciation of how fragile participatory government and ordered liberty are in the absence of a written constitution supported by committed and often heroic citizens.

The approach of the 200th anniversary of our Constitution in 1987 provides an appropriate opportunity to examine fundamental questions about its creation and implications. What were the central ideas of the Constitution? How was it written and adopted? Why did it help unleash such creative energy in science, technology, education, entrepreneurship, religion, government, and the arts? What elements are of enduring importance? What changes, if any, might be considered?

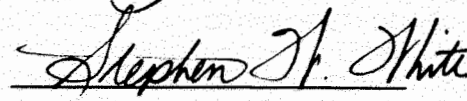
To supply thoughtful Americans with information and ideas as a point of departure for reflecting on our past and future as a nation, the Board of Directors of The Honor Society of Phi Kappa Phi, with great enthusiasm, decided in 1983 to support the production of a special issue of *National Forum*. The guest editor of this issue, Mark W. Cannon, secured commitments from a broad array of public leaders and scholars, many of whom possess what Woodrow Wilson called "the air of affairs" and understand the real workings of government. These people were encouraged to write broadly and to avoid professional jargon. Their views are solely their own and not necessarily those of *National Forum*, the American Bar Association, Mead Data Central, or the other contributing organizations. Although the list of authors includes some of the busiest persons in America, all were pleased and honored to join in this important project. Those who worked to produce this issue hope that it will generate wider celebration of the events surrounding the creation of our pioneering Constitution. We dedicate this issue to future generations.


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The Phi Kappa Phi Journal

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Why Celebrate the Constitution?

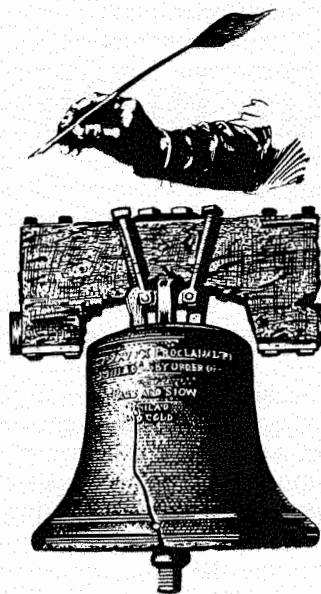
Mark W. Cannon

“Why celebrate the Constitution?” Why celebrate a yellowed, 200-year-old piece of parchment with faded print? Why bother? We should bother because we cannot afford to let the Constitution become confined to that category of “our hallowed past.” We should celebrate the Constitution not only for its role in American history, but for its significance to modern government, its pivotal place in the American psyche, and its role in the continuation of our personal freedom. Now is the time to realize the Constitution’s great impact upon our individual and collective lives.

Few things endure 200 years. No other constitution has lasted so long. A comparison of the longevity of the American Constitution with that of the constitutions of other countries provides some basis for our appreciation. Nearly two-thirds of the world’s 160 national constitutions have been adopted or revised since 1970, and only 14 predate World War II. It has been calculated that 53.5 percent of the independent states of the world have been under more than one constitution since the Second World War. The average nation has had two constitutions since 1945, and two states, Syria and Thailand, have each had nine constitutions over the past forty years! These figures dramatically illustrate the precarious existence of a constitution. By these standards, the Constitution of the United States has proven remarkably durable.

Perhaps one reason for its continuing importance in our lives is that the Constitution is a revolutionary work. Drawing upon the lessons of history and their understanding of human nature, the Founders crafted a bold, masterful document. Thomas Jefferson wrote: “We can no longer say there is nothing new under the sun. For this whole chapter of the history of man is new.” We often pay tribute to “firsts” in this country—to breakthroughs in science, in sports, in space technology and exploration, and in the arts. Our Bicentennial is an occasion for celebrating our Constitution as a breakthrough in creating an energetic government that would be restrained from using its powers to subjugate the citizens.

The new nation was understood by its architects as unique primarily because of its dedication to the universal principles of justice announced in the Declaration of Independence. To fulfill the lofty demands of those principles, the Founding Fathers enshrined republican self-government as the quintessentially American form of government, and they did so upon what they consid-



ered to be the only sound basis for such a government—a written constitution. Chief Justice John Marshall did not hesitate to speak for all Americans when, in *Marbury v. Madison*, he referred to a written constitution as “the greatest improvement on political institutions.” In more recent times, Max Lerner, author of *America As a Civilization*, has attributed much of the success of the document to “word-magic”—a reverence for things written. The Constitution is a tangible and visible symbol of the things that people hold dear. Moreover, the document reminds us that our government is one of law, not of men. By having a written document, the law seems less mutable, less vulnerable to the whims of individuals. The Constitution thus symbolizes the idea of the rule of law.

Having representatives of the people put words to parchment was a new concept in constitutional development; but having a written constitution does not in itself guarantee acceptance. Ratification by the people of the states gave the Constitution legitimacy—a major reason for its long life. It has cultivated what Justice Samuel Miller described as an “inborn and native regard for the law” among Americans. This respect for law stems from the awareness that the Constitution, and the government under law established by it, were created by the people to secure their safety and happiness. The

MARK W. CANNON has served as the administrative assistant to the chief justice of the United States for the past twelve years. Formerly the director of the Institute of Public Administration in New York and chairman of the department of political science at Brigham Young University, he has worked in the House of Representatives and the Senate. Mr. Cannon has published widely and has coauthored The Makers of Public Policy: American Power Groups and Their Ideologies and the upcoming Views from the Bench: The Judiciary and Constitutional Politics (Chatham House, 1984).

democratic ratification process of 1787–88 and the provision for popular amendment testify that the authority and legitimacy of our Constitutional order derive from “We the People.” American support for law also derives from what jurist Lon Fuller refers to as an “inner morality” in the law. By learning to observe rules for public life that are promulgated (not secret), that are prospective (not *ex post facto*), that are consistent, and that apply to everyone (not just a select group), Americans generally have come to expect that laws will conform to these safeguards.

Plato argued that a polity should have a myth surrounding its founding, an inheritance that could be passed to future generations to unite them behind a way of life. The virtually miraculous creation and adoption of the Constitution blend with legend to be part of the cultural inheritance and inspiration passed on to each new generation of Americans. Because of the legitimacy of the Constitution and the perpetuation of this legitimacy, disagreement has almost always occurred within the American political system, not about that system. In celebrating the Constitution, we celebrate our rich history and the ideals that have allowed us to flourish as a people.

The most tragic exception to the extraordinary moderation of American politics was the Civil War—a struggle for the soul of the American political order. It required the genius of Abraham Lincoln to convince friends of democracy of the irreconcilable contradiction between human slavery and American principles of self-government. The Framers of the Constitution would no doubt have regarded Lincoln’s leadership of the Union as a providential event in world history, for it rescued their work from the opprobrium of slavery by emphasizing the primacy of freedom for all.

What is particularly remarkable about our Constitution is that its words have meaning. As William G. Andrews writes in *Constitutions and Constitutionalism*: Many regimes in the world today have constitutions without constitutionalism. Tyrants, whether individual or collective, find that constitutions are convenient screens behind which they can dissimulate their despotism Provisions that seem to be restraints can be employed to rationalize the arbitrary use of power.

Some of the most repressive totalitarian regimes have had showcase constitutions that failed to protect the people.

In contrast to the preponderance of constitutions around the world, the American Constitution does have meaning and continues to govern the political life of our nation. The ultimate source of governing authority in the United States—the American people—remains attached to the Constitution as the “supreme Law of the Land,” and to the principles of equality before the law which inform the language of that Constitution. The Bicentennial celebration is not only a time to salute the designers of “the granddaddy of constitutions,” but also a time to appreciate that we and our forebears have remained faithful to our constitutional heritage through changing times, needs, and circumstances.

Why celebrate the Constitution? It was a remarkable success. On the occasion of the Centennial of the

Constitution, the Englishman William Gladstone wrote: “I have always regarded that Constitution as the most remarkable work known to me in modern times to have been produced by the human intellect, at a single stroke (so to speak), in its application to political affairs.” His words ring true 100 years later.

The Constitution is certainly worthy of praise and salute. Why *celebrate* it, though? Celebration is one way to get people enthusiastic about and in touch with our heritage. It unites the country, and it inspires interest and pride. In 1976, despite preoccupation with societal malaise, the celebration of the Bicentennial of the Declaration of Independence nevertheless stimulated over 5000 programs and festivities.

These projects did more than focus upon the Declaration of Independence; they celebrated American life. Indeed, very few projects in 1976 were intended primarily to “educate.” But the end result was, in varying degrees, education—not only of schoolchildren, but of all Americans. However successful the Declaration Bicentennial was, several things can and should be done differently from 1987 to 1989. The Constitution Bicentennial celebration should be more than tall ships and medallions. It should be a “cerebration” with greater emphasis on civic education.

R. Freeman Butts, the William F. Russell Professor Emeritus at Columbia University, is a prominent advocate of civic education in the Bicentennial era. He believes that “the fundamental ideas and values upon which our Constitutional order is built should be the core of sustained and explicit study . . . carried on throughout the school years from kindergarten through high school.” Butts is part of a great tradition of Americans concerned about education of the citizen. “If we think them not enlightened enough to exercise a wholesome discretion,” wrote Thomas Jefferson, “the remedy is not to take it from them, but to inform their discretion by education.”

Today, many Americans are appallingly ignorant of the workings of law and government. They are unfamiliar with the Constitution and the rights, duties, and powers it confers. To be sure, it is easy to lose interest in a 200-year-old document. Yet, “informing popular discretion” is as important now as ever. Mark H. Curtis, President of the Association of American Colleges, has made a most imaginative proposal:

Though we are only inheritors of the Constitution and not makers of it, the continuation of orderly government under the Constitution requires not only our tacit assent but also our active participation in accepting the duties as well as the rights which we derive from it. If it were possible, it could be more than symbolic to have all persons upon reaching voting age sign a document of ratification to signify that they understand the principles of the Constitution and accept the rights and responsibilities it bestows upon them.

Although this idea may not be completely feasible, it does conceptualize a solution. By making the Constitution more immediate in our lives, we can prevent it from becoming “ancient history.” This Bicentennial offers an opportunity to bring the Constitution into our contemporary understanding, which is perhaps the most

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T Gordon S. Wood

The Intellectual Origins of the American Constitution

The Constitution was created at a stroke in the summer of 1787, but its intellectual origins and sources, like those of all great events, reached back deep into the past. The Constitution has been described as the climax of the Enlightenment—that great eighteenth-century attempt to apply the results of Western science and learning to human affairs. As the product of Western “enlightened” thinking, the Constitution could scarcely have sprung simply from a summer’s meeting. Its sources have often seemed to be the whole of previous history. No thinker, no idea, has been too remote, too obscure, to have been involved somehow in the making of the Constitution. Thus historians and political theorists have rummaged through the past looking for the particular philosopher or book that might have especially influenced the Framers of the Constitution. Some have seized on the Englishman John Locke; others, the Frenchman Montesquieu; still others, the Scot David Hume or the Swiss Burlamaqui; and some have even made a case for the ancient Greek Polybius. But not one of these was the sole source of the thinking of the Founding Fathers.

Thus searching for one key person in order to explain the Constitution is doomed to futility. Influence on something as monumental and as collectively created as the Constitution does not work in such a simple and direct way. The writings of Locke, Montesquieu, Hume, Burlamaqui, and even Polybius were all important to the creation of the mental world of Americans in the 1780s. But so too were the works of countless other thinkers. All formed virtually inseparable aspects of the Americans’ political culture. To be sure, the Founders often referred to this book or that philosopher in their speeches and writings; indeed, they cited and quoted from every conceivable source available to an educated man in the eighteenth century—from Plutarch to Pufendorf, from Cicero to Blackstone, from Plato to Rousseau. But so many sources were cited so promiscuously, it is difficult to perceive the dominant influence of any one.

This does not mean, however, that there were no intellectual influences affecting the thinking and actions of the Framers of the Constitution. Although isolating the influence of any one thinker on the Founding Fathers may be impossible, describing the currents of the political culture in which they were immersed in 1787 is not. The Founders were experienced, pragmatic political leaders, but they were not such practical, down-to-earth men that they could not be bothered by

questions of political philosophy and theory. On the contrary, they were men intensely interested in ideas and especially concerned with making theoretical sense of what they were doing. They were participants in a rich, dynamic political culture that helped determine the nature of the Constitution they created. Understanding the Constitution requires an understanding of that political culture.

The most pervasive characteristic of that political culture was republicanism, a body of ideas and values so deeply rooted that it formed the presuppositions of American thinking. This body of thought not only determined the elective political system the Founders believed in; it also determined their moral and social goals. To become republican was what the American Revolution had been about.

It is difficult for us today to appreciate the revolutionary character of this civic culture. We live in a world in which almost all states purport to be republican; even those few states such as Britain or Sweden that remain monarchies are more republican in fact than some others that claim to be in theory. But in the monarchy-dominated world of the eighteenth century, republicanism was not so widespread or acceptable. It was then a radical ideology; indeed, this body of civic thought was to the eighteenth century what Marxism was to be for the nineteenth century. For the eighteenth century republicanism was a countercultural ideology of protest, an intellectual means by which dissatisfied people could criticize the luxury, selfishness, and corruption of monarchical culture.

It is not surprising, therefore, when eighteenth-century Americans and Frenchmen alike decided upon revolution that they should have repudiated royal authority and erected republics in its place. Republicanism was the ideology of the democratic revolutions of the late eighteenth century; it was the ideology of the people against monarchs and hereditary aristocracies. Even the English who held on to their king and their House of

*GORDON S. WOOD is chairman of the department of history at Brown University. He is the author of *The Creation of the American Republic, 1776–1787*, for which he won the Bancroft Prize in 1969, and *The Confederation and the Constitution: The Critical Issues*. He also edited the volume *The Rising Glory of America, 1760–1820*.*

Lords through the upheavals of this period nevertheless felt compelled to claim that, because of the power of the House of Commons, their constitution was already greatly republicanized. By the last quarter of the eighteenth century, being enlightened in the Western world, it seemed, was nearly equivalent to believing in republican values.

The deepest origins of these civic and moral values went all the way back to ancient Rome and the great era of the Roman Republic. The modern world found most of what it wanted to know about the Roman Republic from the writings of the period that Peter Gay has called the Roman Enlightenment—the golden age of Latin literature between the breakdown of the republic in the middle of the first century B.C. to the establishment of the empire in the middle of the second century A.D. The celebrated Latin writers of this time—Cicero, Sallust, Tacitus, and Plutarch among others—lived when the greatest days of the republic were fading or already passed; and thus they contrasted the growing stratification, corruption, and disorder they saw around them with an imagined earlier world of rustic simplicity and pastoral virtue. Roman farmers had once been hardy soldiers devoted to their country. But they had become selfish, corrupted by luxury, torn by struggles between rich and poor, and had lost their capacity to serve the public good. So went these Latin writers' pessimistic explanation of the republic's decline. They left a collection of writings embodying beliefs and values—about the good life, about citizenship, about political health, about social morality—that have had an enduring effect on Western culture. Their work is Rome's greatest legacy to us.

This great body of classical literature was revived and updated by the Renaissance, especially in the writings of the Italian philosopher Machiavelli. All was blended into a tradition of what has been called "civic humanism." This tradition stressed the moral character of the independent citizen as the prerequisite to good politics and disinterested service to the country. To be good citizens, men had to be independent, property-holding farmers free of control by other men, and free of the influence of selfish interests. The importance of this classical conception of political morality can scarcely be exaggerated. Among educated people it rivaled Christianity for dominance.

This tradition of civic humanism passed into the culture of northern Europe. In English culture it inspired the writings of the great seventeenth-century republicans, Milton, Harrington, and Sidney. And it was carried into the eighteenth century by scores of popularizers and translators. It was not so much the treatises of philosophers like John Locke as it was the essays of coffee-house journalists like John Trenchard and Thomas Gordon that spread republican values throughout the eighteenth-century, English-speaking world. Gordon, for example, in addition to writing about the importance of free speech and religious liberty, also translated editions of Sallust and Tacitus. But these classical republican values were confined neither to the radical fringes of British thought nor to the British world. They permeated the thinking of educated people

throughout the West—so much so that even eighteenth-century French aristocrats could acclaim Jacques Louis David's painting "The Oath of the Horatii" and celebrate the valor and selflessness of the republican citizens of antiquity without fully comprehending the dangerous antimonarchical and antiaristocratic implications of what they were doing.

What precisely did this body of ideas mean? It meant most obviously the elimination of a king and the institution of an electoral system of government. But these were just incidental means to a larger end. Republicanism really meant creating a political system concerned with the *res publica*, public things, the welfare of the people. Liberal critics of eighteenth-century monarchism believed that kings had become too wrapped up in their own selfish dynastic purposes and were ignoring the good of their people. By eliminating hereditary kings and instituting governments in which the people themselves would elect their political leaders, liberal reformers hoped that governments at last would promote only the public's welfare.

This civic culture, however, had more than political significance; it had social and moral significance as well. Republics required a particular sort of egalitarian and virtuous people: independent, property-holding citizens without artificial hereditary distinctions who were willing to sacrifice many of their private, selfish interests for the good of the whole community. This dependence on a relatively equal and virtuous populace was what made republics such fragile and often short-lived polities. Monarchies were long-lasting; they could maintain order from the top down over large, diverse, and stratified populations through their use of hereditary privilege, executive power, standing armies, and religious establishments. But republics had to be held together from below, from the consent and sacrifice of the people themselves; and therefore, as Montesquieu and other theorists had warned, republics necessarily had to be small in territory and homogeneous and moral in character. The only republics left in the eighteenth century—the Netherlands and the city-states of Italy and Switzerland—were small and compact. Large, class-ridden states that had tried to establish republics—as England had in the seventeenth century—were bound to end up in some sort of military dictatorship, such as that of Oliver Cromwell. It was little wonder that Americans in 1776 embarked on their experiment in republicanism in a spirit of great risk and high adventure. There had been nothing to resemble their confederation of republics since the fall of Rome. By 1787, however, Americans had become increasingly anxious about what they were attempting.

Americans of 1787 were not the republican enthusiasts they had been in 1776. In a decade's time many of them had had their earlier dreams and illusions about republicanism considerably dampened. Experience with popular government, especially in the state legislatures, had cast doubt on the American people's capacity for virtue and disinterestedness. By 1787 many leaders, therefore, were ready for what James Madison called a "systematic change" of government, a change that resulted in the creation of the federal Constitution. But



John Locke (1632–1704).

dissatisfied as many American leaders were with the Confederation and with the state legislatures, none of them—not even Alexander Hamilton who was the most monarchically minded among them—was prepared to give up on republican government. They knew, as Madison said, 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.” Hence in the new Constitution, the Framers provided for periodically elected officers of the executive and legislative branches, and they made the federal government guarantee a republican form of government for each state (Article IV, Section 4), and forbade the United States from granting any titles of nobility (Article I, Section 9).

Still, the new federal government was sufficiently different from the Confederation and the governments of the states to arouse fears among many people that it was not “strictly republican.” Did it not have a strong king-like executive and a powerful Senate with an aristocratic bearing? Unlike the Confederation, did it not operate directly on diverse peoples over half a continent despite the warnings of theorists and experience that such a large republic could not last? Fears and questions like these are what led Hamilton, Madison, and John Jay to spend so much time in *The Federalist* trying to prove that the Constitution was really “conformable to the true principles of republican government.” In the process they helped to develop and shape further American ideas of republicanism.

In 1787, classical republicanism was the basic premise of American thinking—the central presupposition behind all other ideas. However, it alone was not responsible for the peculiar structure of the revolu-

tionary governments, including that of the federal government created by the Constitution. There was another set of ideas encapsulated in the theory of balanced or mixed government. It came likewise out of antiquity and was closely if not inextricably entwined with the tradition of classical republicanism. The classical theory of balanced government provided much more than the foundational ideas for the structures of the several state governments. The classical theory also included the notion of an independent president, the aristocratic Senate, and the popular House of Representatives.

Since at least the time of Aristotle, theorists had categorized forms of government into three ideal types—monarchy, aristocracy, and democracy. These types were derived from the number of rulers in each: for monarchy, one person; for aristocracy, a few nobles; for democracy, all the people. Aristotle and others believed that each of these rulers when alone entrusted with political power tended to run amok and to become perverted. By itself monarchy became tyranny; aristocracy became oligarchy; and democracy became anarchy. Only by mixing each of these types together in the same constitution, only by balancing the tendencies of each of them, could order be maintained and the perfections of each type of simple government be achieved. The result would be a governmental system in equilibrium—the very kind of static model that the eighteenth-century Enlightenment admired.

For most enlightened thinkers of the eighteenth century, including those of the American colonies, there already existed at least in theory such a perfectly balanced government—the English constitution. The English constitution with its balance between king, the House of Lords, and the House of Commons corresponded marvelously with the classical categories of monarchy, aristocracy, and democracy; and it, therefore, seemed to intellectuals everywhere, not just to Englishmen but to continentals like Voltaire and Montesquieu, to be what William Hooper of North Carolina in 1776 called “a system that approached as near to perfection as any could within the compass of human abilities.”

When Americans in 1776 revolted from this perfect English constitution, most of them had no intention of repudiating the classical ideal behind it. Nor did they believe that this ideal of balanced government was incompatible with republicanism. They thought they could have single governors and senates of wise men, even within an elective system. Their quarrel with the English constitution was not, therefore, with its theory but with its recent practice and its current workings. They and other English critics, speaking out of the civic humanist tradition of republicanism, thought that in the course of the eighteenth century the ideal English constitution had degenerated and become corrupted. The king was using his power to appoint men to crown offices in order to bribe and influence members of the House of Lords and House of Commons. The monarchical or executive part of the constitution was, in other words, unsettling the balance among the three supposedly independent, ruling forces, and it was subtly absorbing all power to itself. The so-called balanced

constitution of England had become a hollow shell disguising an insidious monarchical tyranny. When in 1776 Americans declared their independence from the British crown, they were determined to prevent anything like this tyranny from reappearing in their own, new, balanced state constitutions.

Most of America's revolutionary state governments created in 1776-77 were meant to be miniature republican copies of the ideal English constitution. Although elected, the governors, senates, and houses of represen-

“Liberty was an English obsession before it was an American one.”

tatives of the several states were intended to resemble the king, House of Lords, and House of Commons of the English constitution; indeed, they still do. But in order to prevent their balanced governments from degenerating in the way the English constitution had, most of the states in 1776 severely limited the appointing powers of the governors or chief executives; and, more important for American constitutional development, all of them forbade members of both houses of the legislature and the judiciary from simultaneously holding office in the executive branch. In justifying this prohibition, some of the states in 1776 invoked a doctrine made famous by Montesquieu of separating the executive, legislative, and judicial powers from each other. This triad of functioning powers was really not the same as the classical triad of ruling elements—governors, senates, and houses of representatives—but the goal of the two triads—the prevention of corruption—was the same.

There is no exaggerating the importance of this American exclusion of the legislators from simultaneous executive or ministerial office. This fundamentally divided America's constitutional tradition from that of the former mother country. By this prohibition alone, Americans prevented the development of an English or European-style parliamentary cabinet form of government. Members of America's executive branch, unlike those of most of the democracies in the world, cannot at the same time hold seats in the legislatures. The separation of the legislature from what was thought to be the perverse, corrupting influence of the executive was written into the revolutionary state constitutions of 1776-77. This division was instituted for the sake of maintaining the independence of the ruling parts and the balance that an ideal government ought to have. Since separation of powers was often used to justify the maintenance of this independence and balance, there was the likelihood that separating powers and balancing parts of the government would blend in people's minds.

By the time Americans came to form the federal Constitution in 1787-88, the two sets of ideas had become thoroughly confused. Undoubtedly most of the Framers at Philadelphia thought they were creating a balanced government much in the form of the several state governments—only with a stronger chief execu-

tive and Senate than in most of the states. Although the ultimate source of this structure was the ideal English constitution, by 1787 few American political leaders felt comfortable any longer saying so in public. (John Adams was a conspicuous exception.) Referring to the chief executive as the monarchical element and the Senate as the aristocracy in a balanced government was politically impossible in the popular atmosphere of the 1780s. Thus the Framers had to find justifications for their two-house legislature and their strong, independent president in some place other than the English constitution and the classical ideal of mixed government.

What they did was blend the notion of separating the functional powers of government—executive, legislative, and judicial—with the older theory of balanced government; and they used both indiscriminately to describe the now incredibly fragmented and countervailing character of America's political system. “The constant aim,” wrote Madison in *The Federalist* No. 51, which summed up the Founders' thinking on their parcelling of power, “is to divide and arrange the several offices in such a manner as that each may be a check on the other.” Bicameralism, the presidential veto power, the independent judiciary, even federalism itself—the apportioning of authority between the national and state governments—all became various means of dividing, checking, and balancing a mistrusted political power.

Republicanism, the theory of balanced government, and the doctrine of separation of powers—these were the assumptions that determined much of what went on in 1787-88. But actually they are not the most palpable and immediate sources of American constitutionalism. They may not even be the most important sources. Although the classical traditions of republicanism and mixed government formed the presuppositions of American thinking, they were presuppositions shared by the whole Western world. Other nations, such as eighteenth-century France, were influenced by republicanism; indeed, most countries in the world now have republican governments. Other states also have attempted balanced governments, two-house legislatures, independent executives, and separated powers. But few of them have our particular concern for personal and political liberty: for the rule of law, for private personal and property rights, for constitutional and judicial limitations on the use of governmental power. If the origins of these concerns are to be found in sources other than America's own experience, then they must be found neither in the ideas of classical antiquity nor in those of Renaissance civic humanism but in the peculiarities of the English legal tradition.

Nothing was more important for the development of American constitutionalism in 1787 and in the years following than the fact that most of the Founders had been reared as Englishmen and had thus shared in the English preoccupation with liberty and in the unique protections of the English common law. England was, as Montesquieu said in 1731, “the freest country that exists in the world,” and eighteenth-century English-

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Richard B. Morris

Creating and Ratifying the Constitution

The Constitution is the supreme collective feat of political leadership in American history. Its survival is a tribute to the prescience, innovative capacity, and drafting skills of the fifty-five delegates who convened at Philadelphia in the late spring and summer of 1787. The rapidity of its adoption—in less than four months—attests to the fact that the national government that emerged represented a consensus of those attending the Constitutional Convention. Thus, more attention needs to be paid to the degree of consensus than to the compromises that the Constitution embodied. Important as these compromises were, they were agreed upon by the leadership to secure the major goal of the delegates at this historic session—the achievement of a durable union.

The federal Constitution is really our second Constitution. The first, the Articles of Confederation, proposed in 1777 but not ratified until 1781, failed to provide national solvency and denied Congress taxing power and control over commerce. The Nation possessed neither the military strength nor the prestige to force the British army to evacuate frontier posts on American soil in accordance with the Treaty of Paris of 1783. The new nation was not able to make a treaty with Spain providing Americans the right to free navigation of the Mississippi or to prevent Barbary pirates from seizing American mariners as hostages. The government lacked the power to enact retaliatory tariffs which might have induced the British to relax the trade and shipping restrictions imposed upon the United States since the peace or to end a severe depression, the rumblings of which were heard in western Massachusetts in the form of Shays' Rebellion on the eve of the Convention.

The solution of the nationalists, of men such as James Madison, Alexander Hamilton, and John Jay, was to scrap the Articles and substitute a more centralized system of government. The first step in that direction was taken at a rump convention at Annapolis in 1786, where it was resolved to call a convention to meet at Philadelphia the following May to take actions necessary "to render the constitution of the Federal Government adequate to the exigencies of the union." The Continental Congress took a more cautious stance. It recommended a convention as "expedient" but "for the sole and express purpose of revising the Articles of Confederation." Five impatient states answered the Annapolis call, and three others instructed their delegates to operate under the Annapolis formula, while the remaining four confined their delegates merely to revising the Articles as authorized by Congress. The thir-



George Washington presides at Constitutional Convention.

teenth state, Rhode Island, was mired in paper money experiments and refused to name a delegation.

Thomas Jefferson later referred to the Convention as "an assembly of demigods," for with a few notable exceptions virtually all of America's most respected figures were on the roster of delegates. Indubitably, the Convention's greatest asset was its presiding officer, George Washington, the unanimous choice to chair its sessions. Washington could count on advice from a prestigious delegation from his own state, which included the scholarly nationalist James Madison, who kept a careful record of the proceedings. Pennsylvania's delegation claimed Benjamin Franklin, its senior man at eighty-one years old, who brought to the assemblage his wit, his common sense, and his unrivaled experience in the service of empire, colonies, state, and nation. Franklin also enjoyed international renown as a diplomat, scientist, and humanitarian. The Convention benefited from other top-flight legal minds like James Wilson of Pennsylvania, John Dickinson of Delaware, Alexander Hamilton of New York, John Rutledge of South Carolina, William Livingston, learned and witty governor of New Jersey, and William Samuel Johnson and Oliver Ellsworth from Connecticut.

At its opening session on May 25, the Convention adopted a set of rules, gave each state delegation an equal vote, and passed a rule of secrecy. Action really began on May 29 when the Virginians advanced their

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bold nationalist plan, attributed to James Madison. For strategic reasons, the plan was offered to the Convention by Governor Edmund Randolph. A cautious and even indecisive man, Randolph prefaced his propositions with the recommendation that the Articles be "corrected and enlarged," whereas in fact the fourteen following resolutions entirely demolished the old Articles. The Virginia Plan set up a bicameral legislature, with the lower house chosen by popular election and the upper house picked by the lower from candidates named by the state legislatures. Representation in each house was to be proportional to population. This Congress would have authority to make laws "in all cases in which the separate states are incompetent" and to nullify any state laws contrary to the federal Constitution. There was to be a national executive with all the executive powers granted Congress under the Articles, along with a veto power over acts of Congress which would be shared with a number of federal judges. The Virginia Plan did not specify whether the executive would be unitary or plural. Only after debate did the Convention adopt the former. The plan did determine, however, that the executive be chosen by Congress and would serve for a term of seven years. The plan also proposed a system of federal courts.

A succession of events seemed propitious for the Virginia Plan, as the Convention immediately formed a committee of the whole, and on motion of Gouverneur Morris, voted six to one "that a *national* government ought to be established consisting of a *supreme* Legislative, Executive, and Judiciary." The vote on the Morris resolution was perhaps the most significant action taken by the Convention, as it amounted to a commitment to establish a supreme central government.

Other parts of the Randolph Plan were sharply contested, however, and some were either modified or resolved by compromises. The proposition that "the first branch of the legislature should be elected by the people" raised two issues: How much democracy did the Founding Fathers really want? How much power were the states prepared to yield to the people?

Patriots with long-established radical credentials such as Roger Sherman of Connecticut and Elbridge Gerry of Massachusetts stunned their colleagues with antidemocratic outpourings. But nationalists, who looked to the people rather than the states for support, could not let these attacks go unchallenged. George Mason, more democrat than nationalist, stoutly favored election of the House of Representatives by the people, while James Wilson wanted to raise "the federal pyramid to a considerable altitude" and give it as broad a base as possible, a view which Madison seconded. The Committee of the Whole was persuaded to entrust the lower house to election by the people, but as to the second branch—the Senate—Randolph and John Dickinson crossed swords with Wilson, as they favored choice by the state legislatures, the latter by the people again. This time Wilson lost and the Committee of the Whole chose the state legislatures to elect senators. After some further wrangling, it was finally agreed that senators serve for six-year terms, one-third to face reelection biennially.

Having settled the question of House representation by voting that it should be proportional, the Committee of the Whole faced the sticky question: On what basis should representation be allotted? Rutledge proposed that representation be made proportionate "to the whole number of white and other free citizens and inhabitants of every age, sex, and condition, including those bound to servitude for a term of years, and three-fifths of all other persons, 'except Indians not paying taxes.'" Despite the proposal's discriminatory features, the Committee of the Whole voted nine to two that representation should be proportionate "to the total number of free *men* plus three-fifths of all slaves." Note that in the proposal, sex was not mentioned in counting slaves while the number of white persons to be counted was restricted to males.

The long-brewing confrontation between the large and small states began on June 14. Regardless of whether a final settlement would apportion seats in the national legislature according to taxes paid or according to the number of free male inhabitants plus three-fifths of the slaves, the small states saw themselves completely outvoted in a national legislature by a few large states.

New Jersey's spokesman, their former attorney general William Paterson, now split the Convention by proposing the *Small-State* or *New Jersey Plan* in the form of nine resolutions, including a one-house legislature elected by states regardless of population. Save for granting Congress the right to tax and regulate commerce, the New Jersey Plan would have continued almost intact the old Articles of Confederation. The plan was rejected by the state delegations seven to three after sharp criticisms by Hamilton, whose remarks carried a high, almost monarchical tone, and James Madison, who tore the plan to shreds.

The first great compromise of the Convention followed. Proposed and persuasively argued by the Connecticut delegation, the Connecticut Compromise provided for equality of the states in the Senate. The nationalists put up fierce opposition, and the issue was assigned for resolution to a special committee made up of one member from each state, an arrangement favorable to the small-states group. Their report favored the compromise, and a week later the Convention agreed that representation in the lower house should be based on the total of its white population (sex unspecified) plus three-fifths of its slave population; eleven days later the compromise was completed with the Convention's acceptance of the principle of equal representation in the Senate.

The three-fifths clause left the impression that the delegates were prepared to give a constitutional sanction to slavery and the slave trade. That issue arose early in August and precipitated a fierce debate on the proposal to grant Congress the power to regulate commerce with foreign nations, among the several states, and, on Madison's motion, "with the Indian tribes." Southern delegates felt this clause would work purely to the advantage of the North, particularly New England, because it might prevent competition among shipowners of all nations and raise freight rates, in effect giving

New Englanders a monopoly of the southern carrying trade in staples. To prevent such a monopoly, the South sought to require that commercial legislation secure a two-thirds vote of each house rather than pass by a simple majority. Madison, standing apart from most other Southerners, prevailed and won acceptance of a majority vote. That decision begot a second compromise.

The great slavery issue, which had hitherto been swept under the rug, now came to the fore when the delegates turned to the question of import and export duties. The South proposed that Congress be forbidden from levying a tax on the slave trade and from prohibiting importation altogether. Virginia's elder statesman, George Mason, shocked the delegates from the Lower South with a tirade not restricted to the slave trade but embracing the institution of slavery itself. "I hold it essential to every point of view that the General Government should have power to prevent the increase of slavery." Speakers for the Lower South warned they would never agree to a plan of union unless the right to import slaves remained untouched.

With the northern delegates divided between those who preferred not to meddle in the slave trade and others who placed the issue on high moral ground, the Convention sought "some middle ground." That ground was almost reached by Governor William Livingston, who recommended there be no prohibition on slave importations before the year 1800. Mollified by this spirit of concession, Charles Cotesworth Pinckney of South Carolina substituted "the year 1808" for Livingston's 1800, and thus the second major compromise was adopted by the Convention with a vote of eight to four. The South was further propitiated by a promise forbidding the federal government to levy duties on exports. In turn, the Lower South waived its objection to taxes on imports.

While these two major compromises were being debated and adopted, other important propositions were adopted. The nationalists pushed through agreements on the supremacy of the laws of Congress and national treaties and gave Congress necessary and proper powers.

Now it was a question of organizing the resolutions into some acceptable form, a task that was assigned to the Committee of Detail. Edmund Randolph wrote a preliminary draft, and James Wilson authored the revised draft which formed the final report. Amplifying the resolutions and providing innovations of its own, the Committee took the very brief resolution on the "National Judiciary" and itemized in some detail the jurisdiction of the "Supreme Court" more or less in the form that it appears in the final Constitution. Again, it transformed vague powers conferred on the national legislature into specific powers, including the crucial "necessary and proper" clause which permitted the broad (or Hamiltonian) construction of the Constitution that was to govern the Supreme Court for years to come.

The Committee of Detail's report formed the basis of the Convention's debates for more than a month. A major question discussed was the mode of electing the president. The alternative to popular election settled

upon was to choose electors in each state "in such manner" as its legislature might "direct." Perhaps conceived to placate the states, this plan proved a victory for both nationalism and democracy, for very shortly after 1789 nearly all the state legislatures provided for the election of their states' presidential electors by popular vote.

The Convention proved understandably cautious on the vexing issue of where to locate the power to declare state laws unconstitutional. In the end it was a bitter states' rights man, Luther Martin, who inserted a clause making the Constitution and the laws and treaties of the United States "the supreme Law of the Land," binding upon the judiciary of each state. The "supremacy clause" became the cornerstone of national sovereignty. The Convention prudently abstained from spelling out just what body would have the authority to declare acts of Congress unconstitutional, but from the sense of the debates it was implied that the federal judiciary would exercise the power.

What stands out in the debates of the Convention are the points of similarity among the various proposals rather than their differences. Both the Virginia and the New Jersey plans had granted Congress the power to levy and collect taxes; and every plan presented at the Convention gave Congress the right to regulate foreign and interstate commerce. The Convention was unanimous in vesting in Congress the power to pay the debts and provide for the common defense and general welfare of the United States. There was also widespread agreement about incorporating into the Constitution a prohibition on the issuance by the states of paper money.

With the basic charter of government hammered out, the Constitution was entrusted to the skillful hands of the Committee of Style, to which some of the most talented penmen were named. William Samuel Johnson was the committee's chairman, with Gouverneur Morris, Madison, Hamilton, and Rufus King serving under him. Morris, however, was largely responsible for the final phraseology of the Constitution, producing in a mere two days a document distinguished for its precision of language and clarity of style. Morris's most noteworthy contribution was in changing the wording of

"Of all Madison's achievements, the Bill of Rights remains his noblest heritage to the Nation."

the Preamble—designating the people of the United States as the source of authority, and thereby elevating the sights of government and couching its purposes in eloquent language. The final draft report of the Committee of Style was approved in two days, and on September 17 the Convention adjourned.

The publication of the Constitution precipitated one of the great political and ideological debates in American history. Anti-Federalists soon mounted a formidable campaign against the Constitu-

tion—using all the available newspapers, pamphlets, and mass meetings. Under the pseudonym of “Agrippa,” James Winthrop of Massachusetts attacked on two fronts. The Constitution gave too much power to the central government and left too little to the states; it also would create a permanent aristocracy. From Virginia, Richard Henry Lee, in his widely read “Letters of the Federal Farmer to the Republican,” charged that “the change now proposed is a transfer of power from the many to the few.” In New York, Melancton Smith warned that the Constitution would create an “aristocratic tyranny” that must soon terminate in “despotism.”

The Anti-Federalists challenged the practicality of the notion that a federal republic could govern so vast an extent of territory, found fault with the kind of dual sovereignty the Constitution envisioned, and condemned its omission of a bill of rights. More extreme critics charged that the Constitution had been framed by a “dark conclave” of “monarchy-men,” bold conspirators who sought not only an elective king and a standing army, but “an aristocratical Congress of the *well-born*.”

More specific points of substance and mechanics were to be scored by their side in the state ratifying conventions that lay ahead. In essence, the Anti-Federalists revealed themselves to be parochial men (generally living isolated from the arteries of trade) and debtors of varying degrees and backgrounds. The Anti-Federalists were concerned about individual liberty, which they believed rested on republican virtue and the primacy of the states. They presumed that they alone spoke for the common man. However, despite certain well-founded objections they raised to the Constitution, they had no alternative plan.

Contrariwise, the Federalists had not only constructed a plan but commanded prestige and experience in politics on a high level, points which would score heavily in a society still deferential to elitist governance. Still, they took nothing for granted but defended their plan with vigor, notably in a series of letters to the New York newspapers published between 27 October, 1787 and 28 May, 1788 and then brought out in book form in June of 1788 to influence the ratification of the Constitution in New York. Writing under the pseudonym of “Publius,” the contributors were: Alexander Hamilton, author of fifty-one letters; James Madison, credited with twenty-nine; and John Jay who wrote five, along with his persuasive “Address to the People of the State of New York.” The principal task of *The Federalist* was to demonstrate that rejection of the Constitution would create a vacuum of power, a return to the irresolute and impotent Confederation. Its authors felt obliged to demonstrate that a republican federalism would provide energetic government while preserving personal liberties and taking into account the separate and different interests of the thirteen various states. Such devices as checks and balances, courts composed of judges holding office during good behavior, and representation of the people in the national legislatures by deputies of their own selection would “tend to the amelioration of popular systems of civil government.”

“Publius” assured his readers that the government they were debating was *federal* rather than national,

although an office such as the presidency combined both federal and national features as was true of the amending process. Madison sought to reassure the country that the federal principle would guarantee to the people of a widespread republic that “a coalition of interests, parties, and sects which it embraces, a coalition of a majority of the whole society, could seldom take place on any other principle than those of justice and the general good,” while safeguarding minority rights.

The federal Convention had submitted the Constitution directly to the people through ratifying conventions. Under Article VII of the proposed Constitution it would go into effect once nine states had ratified it. The Drafters of the Constitution, seeking speedy ratification, preferred the single-chambered, specially elected state ratifying conventions to the state legislatures, which would in most cases have required the agreement of two houses. The deeper significance of the choice for ratification by means of popularly elected conventions, however, lay in its harmony with the Founders’ desire to ground the Constitution on the authority of the people.

“The final draft report of the Committee of Style was approved in two days, and on September 17 the Convention adjourned.”

The nationalist strategy worked smoothly at the start. The small states, once reassured by the crucial Connecticut Compromise, which gave them an advantage beyond their numbers or wealth, fell quickly into line. The battles, it grew evident, would be waged in the large states.

The great drama of ratification reached its climax in twenty-three sweltering June days in Richmond, Virginia’s New Academy on Shockoe Hill and in some five weeks of June and July at the old courthouse in Poughkeepsie, New York. The Virginia convention opened with the forces evenly divided. In New York, the Anti-Federalists outnumbered the proponents of the Constitution by more than two to one. Both conventions witnessed great debates. Richmond pitted Patrick Henry and George Mason for the Anti-Federalists against James Madison and his allies for the ratification forces. Henry’s opposition came as no surprise, as he had originally refused to go to Philadelphia because, as he put it, he “smelt a rat.” Madison, however, defended the new government brilliantly; and by a vote of eighty-nine to seventy-nine, the Virginia convention ratified the Constitution unconditionally, with amendments recommended for the consideration of Congress.

Although New Hampshire, the ninth state, ratified the Constitution four days ahead of Virginia, thereby putting the charter into effect, a great battle remained for the admission of New York. Without that key state the nation would have lacked geographical unity, and

the significance of New York City, both as the nation's temporary capital and a major commercial center, was not lost on either side. In this case, the victory of the Federalists was a tribute to leadership and the art of persuasion in overcoming great odds. That informed leadership was provided by Alexander Hamilton and John Jay.

After the ratification of the Constitution, the Federalists set out to address some of the concerns of the Anti-Federalists. At the very first session of Congress, Madison turned his attention to drafting a bill of rights and quickly enough to avoid the necessity of a second convention. Madison used the alternative amendment procedure provided by the Constitution, which required a two-thirds vote in both the House and the Senate and ratification by three-quarters of the states. This cumbersome but prudent procedure worked. More than 200 amendments had been proposed in the state ratifying conventions, but the Senate and House in conference reduced that number drastically. In 1791, Madison was gratified to learn that the first ten amendments to the Constitution had been ratified. In the main, these amendments guaranteed personal liberties, but the

Ninth and Tenth reaffirmed the reservation of rights to the states and the people—in effect a guarantee of federalism. Of all Madison's achievements, the Bill of Rights remains his noblest heritage to the Nation.

The Bill of Rights is also a tribute to the conscience of the Anti-Federalists, to their concern lest a leviathan state be created that would crush personal liberties and negate the authority of the separate states. The Civil War, which settled for all time the supremacy of the Union, by no means eliminated Anti-Federalist criticism. Many of the arguments that had been raised in the struggle over ratification contributed to moving the Nation in a more democratic and egalitarian direction than may have been contemplated by the Founding Fathers at Philadelphia. An integral part of American constitutional thought is the Anti-Federalist concern for that delicate balance which the Constitution maintains between the preservation of individual freedom and equal rights on the one side and the maintenance on the other of a durable federal republic, capable of providing security, imbued with energy, and controlled under a unique system of checks and balances and separation of powers. **NF**

CANNON—continued from page 4

important reason we should celebrate the Constitution.

This special issue illuminates the Constitution and the 200-year history of "the Great Experiment." The authors gathered in this volume are among the most respected men and women in their fields. Hailing from government, private enterprise, and academia, they offer not merely histories, but fresh perspectives and diverse insights on their respective topics.

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to sacrifice immediate personal gain for greater long-term personal and societal benefit; for commitment to our constitutional system of ordered liberty which must at times assume heroic proportions; for the ingenuity to solve complicated new problems, as we have done so many times in the past. These qualities will sustain the cornucopia of benefits engendered by the personal creativity and vitality encouraged by our constitutional system.

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men on both sides of the Atlantic prided themselves on that reputation. The colonists began the Revolution in defense of their English liberties. Liberty was an English obsession before it was an American one.

As much as Americans developed and expanded their individual rights and freedoms in the late eighteenth century and after, they always began from the elevated base of English constitutionalism—a more liberal base than any in the world. Thus if America seemed to have a hundred religious sects and consequently moved to separate church from state, England had at least thirty of them and a degree of religious toleration that stunned continental observers like Voltaire. If Americans admitted truth as a defense in questions of a free press, England, unlike France, at least had no prior censorship of what was published. If Americans broadened the suffrage and political representation to an unprecedented extent, the English had a representative Parliament that went back more than half a millennium. If American judges in the late eighteenth century drew distinctions between statute law and the fundamental law of

the Constitution, had not Chief Justice Edward Coke in the seventeenth century construed and set aside portions of acts of Parliament in order to do justice? Whatever Americans did to extend liberty and protect individual rights from the encroachments of governmental power, the English had done it first: trial by jury, writs of *habeas corpus*, concern for property rights, fear of standing armies, bills of rights—all were English before they were American. Without the influence of the English constitutional and legal tradition, it is inconceivable that Americans in 1787 or later would have believed and acted as they did.

Yet ultimately, of course, the American political and legal system is not the English system, and this difference should make us aware that looking for intellectual origins and tracing intellectual influences are only part of the explanation of how we have come to be what we are. More important perhaps is what Americans have done with these inherited ideas, how they have used, expanded, and reshaped their intellectual legacies to fit the dynamics of their changing experience. **NF**

Albert P. Blaustein

The United States Constitution

A Model in Nation Building

The United States Constitution is this nation's most important export. It was meant to be, has been since even before its promulgation, and continues to be. It *could* not help but be . . . and it *cannot* help but be. As Venezuelan Ambassador Enrique Tejera Paris remarked, "In a dogmatic world, [the U.S. Constitution] is still regarded as the greatest of dogmas."

The British statesman William Gladstone characterized the Constitution as "the most wonderful work ever struck off at a given time by the brain and purpose of man," and it has been so regarded abroad. Prime Minister Gladstone was not engaged in Victorian hyperbole; he was expressing the majority view of constitutionalists everywhere, save possibly those within the United States itself.

Argentine scholar Nicolas A. Calvo concurred. In his Spanish version of Joseph Story's *Commentaries*, he stated that his compatriots,

. . . might become aware of the value of the Argentine federal constitution, which has been *copied* from the United States Constitution; and which has no defects except precisely in those points in which it ceases to be a copy. [*Emphasis added.*]

L. S. Rowe reports that during the 1860 sessions when the drafters were considering amendments to Argentina's 1853 constitution, it was said:

The democratic government of the United States represents the last word of human logic, for the Constitution of the United States is the only one that has been made for and by the people . . . it would therefore be both presumptuous and a proof of ignorance were we to attempt any innovations in constitutional organization, thus ignoring the lessons of experience and the manifest truths accepted by human conscience.

What made the United States Constitution so great, so admired, and so imitated? The establishment of a supreme law of the land was no innovation. Plato teaches in *The Laws* that "some body of law should exist on a permanent basis, on a superior plane—neither subject to individual tyranny nor to raw majority democracy." Likewise, historian K. C. Wheare notes that:

. . . from the earliest times . . . people had thought it proper or necessary to write down in a document the fundamental principles upon which their government for the future should be established and conducted. The Act of Union of the United

Provinces of the Netherlands of 1579 is a good example of modern European history.

It was not the concept of limited government that fascinated foreign statesmen. Even the notions of establishing a republic, having a president, or the radical concept of popular sovereignty were already commonplace. The *philosophes* of the Enlightenment and their philosophical forebears all had written on the subject and were familiar with each other's works. The works

"The genius of America's Founding Fathers consisted in creating the machinery to translate constitutional philosophy into constitutional reality."

of Kant, Goethe, Sonnefels, Hume, Locke, Hobbes, Condorcet, Rousseau, Voltaire, Diderot, Abbé Mably, Turgot, and Montesquieu were not and have not been strangers to constitution makers.

The genius of America's Founding Fathers consisted in creating the machinery to translate constitutional philosophy into constitutional reality. Their device was the constitutional convention or constituent assembly. This has been the most significant and most followed precedent in constitutional development, for in this way a nation is formed and gets its constitution (save in those instances where the former colonial power grants independence and bestows a constitution for independence). The constituent assembly institutionalized democracy. It legalized and legitimized revolution, enabling men to do what they had not yet been able to do peacefully and legally—to alter or abolish government

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and institute new governments deriving their authority from the consent of the governed.

Starting with the concept that the people are sovereign, the Founding Fathers reasoned that they ("We the People . . .") could formulate and promulgate ("ordain and establish") a constitution. This was truly revolutionary. "European thinkers," explains historian R. R. Palmer,

. . . in all their discussion of a political or social contract, of government by consent and of sovereignty of the people, had not clearly imagined the people as actually contriving a constitution and creating the organs of government. They lacked the idea of the people as a constituent power. Even in the [subsequent] French Revolution the idea developed slowly; members of the French National Assembly, long after the Tennis Court oath, continued to feel that the constitution which they were writing, to be valid, had to be accepted by the King as a kind of equal with whom the nation had to negotiate.

By following the United States model, all of the constitution writers after 1787 could legitimize their revolutions, their independence, their nationhood. In his study of Latin American political institutions, Jacques Lambert writes:

Here . . . was the worthy model of a constitution that repudiated monarchy and clearly proclaimed the principle of political freedom The Constitution of the United States lent authority the cloak of democratic respectability. A few countries very shortly adopted constitutions directly inspired by it—Venezuela in 1811, Mexico in 1824, the Central American Federation in 1825, and Argentina in 1826.

While the constituent-assembly concept was the most important American contribution to constitutionalism, it was by no means our only contribution. In fact, the most famous and most publicized American "invention" is our concept of federalism. It was a novel kind of federal structure totally unknown in Europe. And it was the natural outgrowth of the concept that sovereignty resided in the people and not in their governments.

The United States Constitution has not served as a world model solely because of its quality as a legal and philosophical document. It has also been called the most successful written constitution in the world. It has passed the test of time.

Another reason for the Constitution's serving as a world model is the simple fact that it was the first constitution. It has been readily available for examination for nearly two centuries. "Until the time of the American and French Revolutions," explains Wheare,

a selection or collection of fundamental principles was not usually called "the Constitution" The Americans in 1787 declared: "We the People of the United States . . . do ordain and establish this Constitution for the United States of America." Since that time the practice of having a written document containing the principles of government organization has become well established and "Constitution" has come to have this meaning.

Thus, just by being first, the United States Constitution inevitably influenced constitutionalism. Every nation

possessing a one-document constitution or committed in principle to having one—all but six countries—invariably has followed the United States model.

As I have written elsewhere, the only universally acknowledged, common characteristic of the world's 160-odd constitutions is their existence. For regardless of the name of the regime in power, regardless of its history, regardless of its constitutional heritage, virtually every nation recognized the inevitability of having a constitution.

On May 3, 1791, Poland promulgated the world's second constitution, and France adopted the third on September 3, 1791. United States influence was responsible for Article V of Poland's document, a statement of popular sovereignty, as well as the preambles and impeachment provisions of both the French and Polish constitutions.

For the constitution makers of Poland and France, the only *national* model was the Constitution of the United States. There were, however, thirteen other constitutions in existence at the time—one in each of England's former colonies of North America, south of Canada—that were also to be of influence.

Such minimal influence as the United States Constitution had *on* the short-lived 1791 French Constitution is only a footnote in constitutional scholarship. But the influence of the United States Constitution *via* the 1791 French Constitution is a different story. For constitutional historian John Hawgood notes that:

. . . the famous Spanish constitution of 1812, which breathed constitutional life into Portugal and Brazil, as a painstaking copy of most of the features of the French Constitution of 1791.

The Spanish adaptation was followed in the constitutional documents of both Naples and Sicily and was one of the principal models for the constitutions of Latin America.

The other constitution which closely followed the 1791 French model met a different fate. While it was to be of little influence beyond its own borders, Norway's 1814 document became a symbol of stability and the world's second oldest constitution in continuing existence.

The indirect influence of the United States Constitution upon Brazil, among others, via the French Constitution of 1791 and the Spanish Constitution of 1812 is typical in the constitution making of much of Europe, Latin America, and the former French, Portuguese, and Spanish colonies of Africa. The direct United States influence is acknowledged—especially in regard to the separation of powers, judicial review, the enumeration of individual rights, and, where applicable, federalism. But their constitution writers are even quicker to acknowledge their debt to neighboring states, to former colonial powers, and, above all, to France. Wrote Professor C. F. Strong:

The French, in the course of the eighty years preceding the establishment of the Third Republic in 1875, had experimented amazingly in constitution-making, a branch of practical politics in which the world had come to look upon Frenchmen as pre-eminent craftsmen, who, to quote one of their own

authorities, were accustomed to conceive of a constitution as a philosophical work In the exercise of this political ingenuity the French had contrived to devise no fewer than a dozen constitutions in the space of less than a century.

Adherents of the French influence fail to remember the continuing French love affair with American constitutionalism and democracy à l'Américaine. To quote Professor Henry Steele Commager:

It was France that welcomed the American example—welcomed it, followed it, and even improved upon it. It was in France that the “American party” triumphed, briefly, to be sure Franklin was the pivotal point, Franklin who was a legend, but a very active one, and who saw to it that the American Constitutions, and other State Papers, were translated and published in France.

Nor have the French ceased to pursue American guidelines—as manifested by United States influence in the present 1958 constitution.

The extreme example of the indirect influence of the United States Constitution is found in the preambles of the constitutions of Senegal in 1963, Mali in 1974, and the Central African Republic in 1981. All three constitutions follow a French African pattern, and all three proclaim attachment to or reaffirmation of the Declaration of the Rights of Man and of the Citizen of 1789 and the Universal Declaration of Human Rights adopted by the United Nations in 1948. Not only was the 1789 French Declaration based in part upon the Bill of Rights drafted by George Mason for the Virginia Constitution, but Thomas Jefferson, Gouverneur Morris, and other Americans participated in its actual authorship. Not only was the United Nations 1948 Declaration based upon the United States Bill of Rights, but Mrs. Franklin D. Roosevelt (chairperson) and her American staff did most of the drafting.

“By following the United States model, all of the constitution writers after 1787 could legitimize their revolutions, their independence, their nationhood.”

It must be taken as a constitutional truism that constitution makers follow precedent. Nowhere is this better illustrated than in the debates on the 1949 Constitution of India, undoubtedly the most researched and argued constitution in history. At the constituent assembly, some delegates criticized the draft constitution on the ground that most of it had been taken from other constitutions—that it could claim very little originality. B. R. Ambedkar himself, the man recognized as the father of the Indian Constitution, replied to this critique:

One likes to ask whether there can be anything new in a constitution framed at this hour in the history of the world.

More than [a] hundred years have rolled over when the first written constitution was drafted. It has been followed by many countries reducing their constitutions to writing. What the scope of a constitution should be has long been settled. Similarly, what are the fundamentals of a constitution are recognized all over the world. Given these facts, all constitutions in their main provisions must look similar. The only new things, if there can be any, in a constitution framed so late in the day are the variations made to remove the faults and to accommodate it to the needs of the country.

The third reason for the widespread influence of the United States Constitution abroad is that constitutions are written by lawyers, and lawyering inherently involves the search for source and precedent. In addition, lawyers are prolific writers and voracious readers of books and articles on constitutions; the most voluminous constitutional writings of all are devoted to the American experience. Lawyers also read and are influenced by their study of case law, which provides persuasive precedents of other lands.

The fourth reason for the great influence of the Constitution abroad is the widespread publication and distribution of literature. This literature is often distributed in the course of proselytizing and features a dedication to constitutionalism and the rule of law.

From the earliest days of the American revolutionary movement, its leaders were conscious that they were doing something of worldwide significance. They had convinced themselves that they were creating a new Eden, not only for America but for all of humanity. They had a story to tell and a message to deliver. They were proselytizers and advocates seeking to justify, legitimize, and legalize their revolution. Consequently, their Declaration of Independence, their Articles of Confederation, their state constitutions, and all of the other underpinnings of the United States Constitution were widely distributed abroad. This is the reason for the influence of the United States Constitution (in France, Switzerland, Belgium, and Poland) before it was created. “In America,” Commager writes, “politics was the universal preoccupation, legislation the universal resource, and Constitutions the universal panacea.”

Such American advocacy and proselytizing of Americanism have never stopped, nor has there been a scarcity of readers and listeners. Our international audience probably began with the publication of the Declaration of Independence and the constitutions of the founding states in the periodical *Les Affaires de l'Angleterre et de l'Amérique*, which appeared regularly from 1776 to 1778. The best-seller of the period, as one would expect, was the French translation of *The Federalist*. It was first published in the United States in 1788 and has since been translated into more than twenty languages. As of mid-1984, the United States Information Agency was considering making additional translations and freely distributing them abroad.

Upon signing the treaty of alliance between France and the United States in 1778, the state constitutional texts, which had been published in *Les Affaires de l'Angleterre et de l'Amérique*, already called the *Code*

de la Nature, were published in Paris. In 1783, Franklin obtained from Charles Vergennes, minister of foreign affairs, official authorization for a Paris printing of *Constitutions des Treize États de l'Amérique*. As early as 1786, *philosophe* Condorcet, outlining his ideas for a French declaration of rights, authored *De l'influence de la Révolution d'Amérique sur l'opinion et la législation de l'Europe*.

The Lafayette draft of the declaration of rights was even more important. Lafayette sent a copy to Jefferson in January, 1789, and Jefferson immediately sent a copy on to James Madison for comment. Gouverneur Morris, who arrived in Paris on February 3, 1789, as a representative of certain American commercial interests, also studied the draft. He recommended a number of changes, suggesting that Lafayette was "too republican for France." Advice from Jefferson, Madison, and Morris was supplemented by Lafayette's conversations on the subject with Alexander Hamilton, Benjamin Franklin, and Thomas Paine. Thus, while the famous French Declaration of the Rights of Man and of the Citizen of August, 1789, was officially the work of Lafayette, Mirabeau, and Jean Joseph Mounier, it also had claim to American parentage.

At about the same time, lawyer Jacques Vincent de la Croix (or Delacroix) was offering a course on the Constitution of the United States at the Lycée de Paris, an institution of free higher education established in 1787. The course attracted a large following and was written up from August 9 to 23, 1790, in *Le Moniteur*, the most important Paris newspaper.

In 1835, Alexis de Tocqueville published Part One of the French edition of *Democracy in America*, finishing Part Two in 1840. This enormously popular work heightened interest in the United States constitutional system both in Europe and Latin America. At roughly the same time, from 1832 to 1845, United States Supreme Court Justice Joseph Story was writing his nine *Commentaries* on the law and published his *Constitutional Classbook* in 1834. These were also influential abroad.

Information about United States constitutionalism is not confined to Western Europe. As previously noted, the Polish Constitution of 1791 preceded its French counterpart by four months. It is known that the Warsaw press carried detailed information on current developments in America. Waclaw Szyszkowski writes,

Not only were big excerpts from the Constitution published, but a periodical called *International Treaties* published, in consecutive issues, the Articles of Confederation, together with a brief history of the Revolutionary War, the text of the Treaty of Paris and, later on, the text of the new Constitution and its amendments.

The Polish leadership of the time "all knew the contemporary world through their education, travel, and contacts with the United States."

The same reasons for the influence of the United States Constitution on the later Asian experience are voiced by Professor Lawrence Ward Beer:

A basic context for American influence has been the *consultation* of American experts on constitutionalism and

law during the process of drawing up, applying, interpreting, or amending a national constitution. Concretely, the views of individual American judges and legal scholars have been solicited during visits by Asian constitutionalists to America; American legal literature (including judicial precedents) has been studied, and one or more Americans have been directly involved in some Asian constitution-making.

My own personal experience verifies the influence of the United States Constitution in Bangladesh. I was one of a group of American lawyers who had worked with Justice Abu Sayeed Chowdhury, chief spokesman abroad for Bangladesh independence. I had had the opportunity to discuss the future shape of the Bangladesh Constitution when we had met on numerous occasions in New York. When the new state was established in January, 1972, Chowdhury was named its first president, and one of the New York lawyers and myself were invited to the Capitol to discuss impending legal problems.

While there I met, for the first time, with Law Minister Kamal Hossein, who was to become the guiding spirit and principal draftsman of the constitution. I had brought with me a dozen or so constitutions which I thought had precedent value; we had long discussions in Dhaka, followed by subsequent discussions in London and New York, before the constitution was adopted in December of that year. During that period, I also sent him a number of United States law books which he made available to the others working on the constitution.

Similar examples of the influence of the United States Constitution can be reported for Africa. I can so testify from personal experience in Liberia, a nation which was established by American Blacks who had returned to Africa. For almost all of its history the nation lived under an 1847 constitution, largely drafted by Professor Simon Greenleaf of the Harvard Law School. The constitution closely followed both the United States and Massachusetts constitutions.

During the next 133 years, the judges of the Liberian courts followed the principles of American constitutional law. A high percentage of the nation's leaders were taught at American law schools. The law school of the University of Liberia continued to follow the United States pattern and use United States law books.

Following the 1980 military coup and the suspension of the 1847 constitution, the head of state announced that military rule could be of limited duration. He then created a National Constitution Commission to draft a new constitution for the transition to civilian rule. As counsel to that commission, I can testify to the extent of the United States influence in terms of ideas followed, language used, research materials examined, and legal education of the members. (The result reflected far more United States influence than I had recommended.)

The fifth reason for the extent of the influence of the United States Constitution abroad is rooted in military conquest. Germany and Japan provide the best-known examples, but it is in the former colony of the Philippines that the influence has been and

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Congress: The First 200 Years

Thomas P. O'Neill, Jr.

As we approach the Bicentennial of the Constitution and the Congress it created, it is appropriate to consider how the legislative branch of our federal government has developed during its nearly 200 years of existence. It might be both interesting and useful to see how much Congress has turned out the way the Drafters of the Constitution conceived it, as well as how much of the evolution of Congress was not anticipated by them.

Take the development of political parties, for example. It is hard to imagine our government functioning without a strong two-party system. Yet the Continental Congress and the Articles of Confederation Congress existed without parties. The idea of political parties apparently never arose at the Constitutional Convention, either; a careful reading of James Madison's *Notes of Debates in the Federal Convention of 1787* does not reveal any indication that political parties were at all anticipated by the delegates.

Such a remarkable lack of prescience on the part of this talented and experienced group has had incredible consequences for the Congress and for the Nation. We normally consider the role of political parties in the House or the Senate only in terms of partisan votes on legislative issues or the means for selection of internal leadership positions. The existence of political parties, however, has changed dramatically the basic relationship between the Congress and the president in a way unanticipated in 1787.

Specifically, when the Constitutional Convention considered the method of electing the president, only one state delegation—Pennsylvania—felt that the president of the United States should be elected directly by the people. After much discussion and negotiation, the delegates decided upon indirect election of the president, using electors meeting in their separate states to cast their votes. Because of the lack of communications facilities at the time and the lack of nationally popular leaders other than George Washington, it was commonly assumed that the electoral vote generally would be indecisive. George Mason, one of the luminaries of the Revolutionary War period and a delegate to the Convention, guessed that "nineteen times in twenty" there would be no presidential majority in the electoral college.

How, then, did the delegates think that the president would be elected? The answer, found in Article II, Section 1 of the Constitution, is that the House of Representatives—each state delegation having one vote—would usually elect the president. The candidate

with the majority of state delegations would become president. The second-place finisher would become vice president. If there were a tie for second, the Senate would choose the vice president. Coupled with modifications by the Twelfth Amendment to the Constitution, this is the arrangement today.

The two-party system completely wrecked this carefully wrought plan, for only twice (Thomas Jefferson in 1801 and John Quincy Adams in 1825) has the House been called upon to elect the president. This is not to say that the way things have developed is bad or wrong. On the contrary, I believe we have a much better system than anticipated. But the plan to make the president dependent upon the Congress for election in most instances was all part of the balance designed by the men who wrote the Constitution.

Delegates to the Convention seem to have anticipated that a candidate for president would have to forge an alliance with the House of Representatives in order to attain the presidency. Presidents would not assume office with what has been too often the case in recent years—a highly personal interpretation that they have been given a specific mandate by the American people to whip the Congress into shape and force it to respond to their own interpretation of what is best for the country. On the contrary, the Constitution does not give to the president alone the power to interpret and execute the popular will.

Even during my thirty-some years in Congress, the party system has changed a lot, and some of these changes have hurt the ability of Congress to act effectively. When I first entered the House in 1953, it seemed that most of the members had worked their way up through the ranks to get to the House of Representatives. They had worked for their party on the local or state level and had served in some kind of local office, like mayor or alderman or city commissioner. Perhaps they had served in the state legislature, as I did, and they knew what it meant to follow the leadership and learn the art of legislation. There were not many members in those days who set out on their own with complete disregard for the party to which they belonged. They had some understanding of government and how it works.

Speaker of the House THOMAS P. "TIP" O'NEILL, Jr., was elected to Congress in 1952 and has been speaker since 1977. He represents the Eighth District of Massachusetts.



The impeachment of President Andrew Johnson, 1868.

The party system is much different today, and I believe it works to our detriment as a Congress. Men and women are elected to the House without having previously held elective office. They can get elected because they raise the money and hire a media consultant and get on television. Some of them do not care about what party they belong to, and they feel as if they owe the party nothing when they take office. The House has always been a difficult body to lead; I do not believe, though, that even Henry Clay, despite the many problems he had with John Randolph of Roanoke who brought his hunting dogs on the floor of the House, ever had to deal with as many independent members as are found in the modern House of Representatives. The result has been a breakdown of party discipline and a refusal to follow party leadership, which leads in turn to congressional paralysis and an inability to act coherently as a legislative body.

Other fundamental changes have occurred in Congress over the past 200 years. Congressional tenures, for instance, have become much longer. Most of the men—there were only men in the Congress in those days—who served in the first years of the Republic stayed for only a term or two. The custom was that a representative would leave his farm or business or profession and go to Washington for a few years. He would stay in a boarding house, eat his meals with other members of the House and Senate, and curse the insects, Washington's heat and humidity, and the open sewer that ran near the Capitol building.

For the first fifty or so Congresses, very few men made a career of service in the House or the Senate. Until about 1880, more than half the men elected to each Congress were first-termers. Service of long duration, like that of Nathaniel Macon (1791–1828), Samuel Smith (1793–1833), and William R. King (1811–16, 1819–44, 1848–52), was most unusual. As we passed into the twentieth century, elective office became more of a career than a temporary public service.

Concurrent with the longer tenure in office, seniority began to acquire greater significance in leadership assignments in the Congress. Throughout the first century or so in the House of Representatives, the Speaker switched committee chairmen as he wished, often nam-

ing large numbers of new ones at the beginning of each Congress. His power to do this was enhanced by the relatively short careers of most congressmen of the time. By 1900, when the trend toward longer service in Congress was well-established, it had become accepted practice in both the House and the Senate that a member would move up in seniority as he outlasted other members of his party on a particular committee. When he reached the top of the ladder, he would become the committee chairman, provided that his party had a majority in his branch of the Congress. It still works this way in the Senate.

The House, however, has recently introduced an element of flexibility into the process of committee chair selection. The Democratic Caucus, whose rules control the House as long as the Democrats have a majority, adopted a series of reforms in 1974. These changes require a secret ballot election for committee chairmen at the beginning of each Congress and limit a member to one subcommittee chairmanship. As a practical matter, seniority is still quite important in deciding who will chair a House committee, but it is no longer the only consideration.

There are other developments in the Congress that would surprise the men who drafted the Constitution in 1787. The Constitutional Convention, for example, was able to get by with only one staff person to help with its work. The growth of federal responsibilities and activities over the past 200 years, however, has meant that every branch of the government has increased in size since the first years of the Republic. This is as true for the Congress, which began in 1789 with only ninety-one members and a minuscule staff, as for any other branch.

“It is not the duty of the House or the Senate to accede to the wishes of the president, just because the president occupies the oval office.”

For their first fifty years, the House and the Senate were able to function without having staff for particular congressional committees. By 1891, the first year for which we have good data, a total of 103 persons worked full-time for congressional committees. This assistance helped ease the committee members' workload, and as committee responsibilities have increased over the past ninety years, the number of committee staff persons has grown to just over 3000. Until almost the end of the nineteenth century, however, there was no such thing as personal staff support for a member of Congress. By 1930, the total of these congressional staffs was some 1569 persons. Fifty years later, some 14,000 individuals served the Congress as personal or committee staff members, an eightfold increase. By comparison, the national budget, for which Congress is responsible, increased by more than 172 times during this same period.

It is not unreasonable to believe that Congress has required an increase in staff assistance to enable it to cope with the growth of the national budget and the increased complexity of the federal government as a whole. The president is able to obtain information and advice from the Office of Management and Budget, the White House staff, and the thousands of analysts, statisticians, and managers elsewhere in the executive branch of the government. If the Congress is to consider legislation, appropriate hundreds of billions of dollars, perform its oversight of executive branch operations, answer millions of letters, and act as ombudsman for harassed constituents, it needs a staff much greater than the one man who served the delegates to the Constitutional Convention in 1787.

Although the role of members of Congress has expanded greatly over the past 200 years, they still have a responsibility to their constituencies. The difference, however, is the scope of these duties. Just over 100 years ago (1882) a congressman from Michigan, Roswell G. Horr, placed in the record an account of the typical constituent-service duties and activities:

... I think it is safe to say that each member of this House receives fifty letters each week; many receive more Growing out of these letters will be found during each week a large number of errands, a vast amount of what is called department work. One-quarter of them, perhaps, will be from soldiers asking aid in their pension cases, and each soldier is clear in his own mind that the member can help his case out if he will only make it a special case and give it special attention.

Another man writes you to look up some matter in reference to a land patent. Another says his homestead claim should be looked after and he wants you to learn and let him know why he does not receive his full title. Another has invented some machine and the department have [*sic*] declared his discovery to be already supplemented by some former inventor, and have [*sic*] refused his patent. He would like you to go through the Patent Office and look over the patent laws and see if great injustice has not been done in his case. Another has a son or brother in the Regular Army whom he would like to have discharged.

Another has a recreant son whom he would like to get into the Regular Army or Navy. In conformity with these requests you are liable to be called upon, perhaps several times in one week, by these applicants in personam, and they will require you to go at once and exert your enormous powers.

Recall that the members who preceded Representative Horr, as well as those who came along many years after, performed all of these functions personally. The fifty letters a week received by Representative Horr, however, have become more than 5000 a week for the typical member of the House. All of this mail needs to be answered, even if it is only a simple acknowledgment.

Much of this incoming mail is issue-oriented, and the marriage of the computer to the high-speed printer enables a well-organized, well-financed interest group to generate literally millions of letters to Congress on a given topic. If members did not in turn rely upon their own computers and computer operators to respond to this mass-generated correspondence, they would slowly disappear beneath a sea of paper. The computer age is upon us, and for better or worse the Congress has had

to adjust its way of doing business to reflect this reality.

Certain realities have not changed. Constituents need help with some agency or department of the executive branch. By the time someone writes his or her member of Congress, you can be fairly certain that a long and frustrating history has already taken place. Many citizens today feel with some justification that too much of government has become large and impersonal. When there is a problem with their Social Security benefits or their Veterans Administration benefits, the ordinary

“If I could accomplish one thing as Speaker of the House of Representatives, it would be to teach the American public that the Congress is a coequal branch of the federal government”

citizen often feels reduced to nothing more than a multi-digit number, dealt with in an impersonal fashion. The member can step in, cut through the Gordian knot of bureaucracy, and see to it that the citizen receives his or her due. Members of Congress have been helping their constituents in this manner since the beginning of the Republic, and I cannot imagine that anyone today would suggest that this is not an appropriate role for the Congress.

Finally, I would like to consider the relationship of the Congress and the president, in its idealized state, as it actually exists, and as I believe it should exist. When most of us were going through what used to be called civics class, we were taught that there were three branches of government at the national level. The legislative branch, we were taught, makes the laws; the executive branch enforces the laws; and the judicial branch interprets the laws. In a general sense, this scheme is correct.

But the distinction between making and enforcing laws has become blurred over the years with the advent of executive branch regulation making and the congressional veto. Even the courts have gone far beyond merely “interpreting” the law and have been performing such executive functions as administering state prison systems and redrawing school district boundaries. I believe that this blurring of duties will continue for the foreseeable future, and no amount of railing for a return to the good old days will do one bit of good.

If I could accomplish one thing as Speaker of the House of Representatives, it would be to teach the American public that the Congress is a coequal branch of the federal government, with its own set of powers

and responsibilities. It is not the duty of the House or the Senate to accede to the wishes of the president, just because the president occupies the Oval Office. Indeed, the Congress and the president were intentionally set at cross-purposes by the men who drafted the Constitution. Sometimes a powerful president has been able to dominate the Congress; sometimes the Congress has run over a president. The locus of power in the government swings back and forth between these two branches.

In my own lifetime, the man who was most responsible for concentrating power in the presidency was Franklin D. Roosevelt. A dynamic individual, he knew how to make the Congress bow to his will. After him other presidents, regardless of party, were able to build on Roosevelt's legacy and increase the power of the presidency.

The growth of personal and committee staffs has certainly given the Congress a better chance to meet the president on an equal basis. There are also certain congressionally initiated statutes that have recently increased the power and influence of the House and Senate, specifically the War Powers Act and the anti-impoundment provisions of the Budget Act of 1974.

The War Powers Act was passed over President Richard M. Nixon's veto in 1973 by a Congress that was reasserting its constitutional primacy in the war area. Twice since 1950—in Korea and in Vietnam—the United States has found itself in a hot war without a specific congressional declaration of war. Some people might argue that the War Powers Act is too much of a restriction on the president, but I see it as a return to the intent of the Constitution. I see the same principle in the anti-impoundment law incorporated in the Budget Act of 1974, which was largely a reaction to President Nixon's refusal to spend certain funds that had been appropriated by Congress.

In 1972 alone, President Nixon refused to spend \$2.5 billion for highway construction, \$1.9 billion in defense funds, and \$1.5 billion for such programs as food stamps, rural water and waste disposal, and rural electrification. The proper and constitutional way for him to object to these appropriations would have been to veto the appropriations bill. Such action would have given the Congress an opportunity to override him; impoundment—refusing to spend the money that had been appropriated—leaves the Congress high and dry with little means to protest effectively. I believe this law was greatly needed and helps restore a balance to the government. Parenthetically, I would point out that the much-discussed presidential line-item veto would undermine congressional power in the budget process and could result in the elimination of many programs, such as federal aid to libraries or museums, that are favored by a majority of the Congress but opposed by an administration. The anti-impoundment law is the sole protector of these programs today.

The biggest advantage a modern president has is the six o'clock news. Presidents can be on the news every night if they want to—and usually they want to. They

can easily make themselves the focus of every major news report, because the president of the United States is unarguably the most powerful individual in the world. And it is precisely for this reason that the Congress has a duty and a responsibility to act to counterbalance this power. The Congress is composed of the collective wisdom of 435 members of the House and 100 members of the Senate, men and women who bring to the Nation's capital every conceivable combination of education and experience, 535 individuals who together represent the richness and diversity of our country. Who is to say that this group, this Congress, should bow to the wishes of any one individual, no matter who that individual may be? No, the Congress has its own role to play, and it has always been a difficult one.

One of my predecessors as Speaker, Nicholas Longworth, a Republican who served with a Republican president in a Republican Congress, spoke some sixty years ago of the public perception problem faced by the Congress. His words are humorous, but I do not feel they are exaggerated:

I have been a member of the House of Representatives ten terms. That is twenty years. During the whole of that time we have been attacked, denounced, despised, hunted, harried, blamed, looked down upon, excoriated, and flayed.

I refuse to take it personally. I have looked into history. I find that we did not start being unpopular when I became a Congressman. We were unpopular before that time. . . .

From the beginning of the Republic it has been the duty of every free-born voter to look down upon us, and the duty of every free-born humorist to make jokes at us.

Always there is something—and, in fact, almost always there is almost everything—wrong with us. We simply can not be right.

Let me illustrate. Suppose we pass a lot of laws. Do we get praised? Certainly not. We then get denounced by everybody for being a "Meddlesome Congress" and for being a "Busy-body Congress." Is it not so?

But suppose we take warning from that experience. Suppose that in our succeeding session we pass only a few laws. Are we any better off? Certainly not. Then everybody . . . denounces us for being an "Incompetent Congress" and a "Do-Nothing Congress."

We have no escape—absolutely none.

We have no chance—just absolutely no chance. The only way for a Congressman to be happy is to realize that he has no chance.

Speaker Longworth's words often seem as accurate to me today as when they were first published in the mid-1920s. I hope we can change this situation in the future. If we can use this Bicentennial to restore in the public mind the equality that was intended between the Congress and the president, then we will have accomplished something truly significant and historic. In so doing we offer the greatest possible tribute to those men who almost 200 years ago sat through a hot summer in Philadelphia and drafted the greatest Constitution the world has ever known, and we will have accomplished something that will have a lasting effect on our great nation long after we and this Bicentennial are only distant memories. **NF**

T Ronald W. Reagan

The Presidency: Roles and Responsibilities

The Declaration of Independence not only proclaimed our freedom from Great Britain, but also set forth the principles for which the Founding Fathers were willing to pledge their lives, fortunes, and sacred honor: ". . . that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The battles of the Revolution secured the independence proclaimed in the Declaration; it remained for the revolutionaries to put the ideals of liberty into practice. History has recorded many tragic episodes that bear witness to President Millard Fillmore's caution "that revolutions do not always establish freedom." Ours did, largely because it was followed shortly by the framing of the Constitution, what the great American historian George Bancroft termed "the most cheering act in the political history of mankind."

One of our more able statesmen and constitutional lawyers, Daniel Webster, once wrote: "We may be tossed upon an ocean where we can see no land—nor, perhaps, the sun or stars. But there is a chart and a compass for us to study, to consult, and to obey. The chart is the Constitution." For nearly 200 years, the Constitution has endured with relatively few amendments as a blueprint for freedom. In commemorating the Bicentennial of the Constitution we celebrate not simply the historic event that took place in Philadelphia on September 17, 1787, but the process by which we govern ourselves today.

The very notion of self-government was novel when the Framers embarked upon the constitutional experiment. James Madison, in "The Federalist Papers," urged his fellow citizens not to oppose ratification of the Constitution because of its novelty. He argued that it was the glory of the American people that they were not blindly bound to the past but willing to rely on "their own good sense" and experience in charting their future. "To this manly spirit posterity will be indebted for the possession, and the world for the example, of the numerous innovations displayed on the American theater in favor of private rights and public happiness."

Madison's prediction has proven true. Americans are indebted to the Framers for their brave willingness to govern themselves, and the world is indebted to America for the example it continues to provide of democratic self-government. But while the Framers had to overcome the fear of the new, we now must fight with equal vigilance against complacency toward the old. A people who have lived with freedom under law for two centu-

ries are in peril of forgetting how rare and precious that condition is.

An active and informed citizenry is necessary to the effective functioning of our constitutional system. As Chief Justice John Marshall, who knew a thing or two about the Constitution, once wrote, "the people make the Constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will." All of us have an obligation to study the Constitution and participate actively in the system of self-government it establishes. This is an obligation we owe not only to ourselves and our posterity, but to the Framers, who risked everything for freedom, and to the brave men and women who throughout our history have preserved the Constitution, often at the cost of their lives. There is no better time than this Bicentennial period to refamiliarize ourselves with the Constitution and rededicate ourselves to the values it embodies.

The central challenge confronting the Framers of the Constitution was to create a strong national government that would not threaten the liberties so recently won. Experience under the Articles of Confederation had demonstrated the inadequacies of a weak government "destitute of energy"; the colonial rule of George III had demonstrated the threats posed by strong central government. The challenge was to reconcile those two experiences. As Madison wrote, the difficulty lay in "combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form."

The solution the Framers embraced was to diffuse the national governmental authority. Power was to be shared among separate institutions—the legislature, the executive, and the judiciary—in order that no single branch could become so powerful as to threaten the liberties of the people. In our study of the allocation of authority in the Constitution, it is important to keep in mind the purpose of this allocation—nothing less than the preservation of liberty. This is what Alexander Hamilton meant when he wrote that the unamended Constitution "is itself, in every rational sense, and to every useful purpose, a bill of rights." Our liberties have been preserved in large part because of the allocation of powers in the Constitution.

This central fact—that the unamended Constitution is itself a bill of rights and that the allocation of powers in

RONALD W. REAGAN is the fortieth president of the United States.

the Constitution preserves liberty—imposes a special obligation on those who hold office under the Constitution. Public officials must not only discharge their responsibilities but also must respect the constitutional restraints on their offices and, equally important, preserve the constitutional prerogatives of their offices. Any individual president is a trustee of the powers of the office and cannot yield those powers for expediency or any other purpose. Presidents may at times prefer that another branch make a difficult decision or take action vested in the executive; or they may sometimes be willing to countenance an intrusion on their powers to achieve a particular result. At such times, the chief executive must recall that the Constitution allocated powers not simply for efficiency but to preserve liberty. In defending the constitutional prerogatives of the office, the president is protecting liberty by fulfilling the Framers' design.

The Framers looked primarily to the president to provide the critical element of "energy" in the government. The problem with the government of the Articles of Confederation had been that it was "destitute of energy." The Drafters of the Constitution redressed that problem by vesting "competent powers" in the executive to lead the Nation. As Hamilton wrote:

Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.

The president's popular mandate justified this grant of authority. The president and the vice president with whom he runs are the only officials in our government elected through a process involving all the voters. Only the president can claim to speak for all the people, because, as Hamilton wrote, his selection looks "in the first instance to an immediate act of the people of America." The office of president has "a due dependence on the people, and a due responsibility."

Perhaps the most pervasive responsibility of the president is to administer the executive branch. The Framers were practical men who recognized, as Hamilton wrote, "that the true test of a good government is its aptitude and tendency to produce a good administration." The people look ultimately to the president to ensure the efficient performance of duty by the millions of federal employees scattered among the various departments and agencies. I doubt that any of the Framers, prescient as they were, could have imagined the size and scope of today's federal establishment. They nonetheless afforded the presidency the tools necessary "to produce a good administration."

The Framers gave the president the responsibility to "take Care that the Laws be faithfully executed" and the power to appoint officers to assist him in discharging that responsibility. The Constitution provides that the president shall nominate, and by and with the advice and consent of the Senate, shall appoint the officers of



President William Howard Taft (1857-1930).

the United States. In the landmark case of *Myers v. United States*, Chief Justice William Howard Taft, a former president, wrote that it was a "reasonable implication" from the president's obligation to execute the laws that "he should select those who were to act for him under his direction in the execution of the laws." The chief justice went on to recognize the principle that the president's appointment power carried with it the corollary power to remove those officers in whom he could no longer place his confidence: "as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible." As the Framers recognized, this power to appoint and remove officers of the United States is necessary if the president is to be responsible for the faithful execution of the laws and the provision of "a good administration."

The challenge confronting the modern presidency is to "produce a good administration" when the federal establishment has grown so far beyond anything the Framers could have imagined. It is an amazing fact that there are more federal employees today than people living in America when the Framers drafted the Constitution. Perhaps President George Washington could play an active role in supervising the details of the first administration, but it is now the responsibility of his successors to create mechanisms for the control and coordination of the executive branch. One such mechanism is Executive Order 12291, which I issued during my first month in office. Executive Order 12291 for the first time provided effective and coordinated management of the regulatory process. Under the Executive Order, all regulations issued by executive departments and agencies must be reviewed by the Office of Management and Budget before being issued in order to determine whether they conform to the president's policies and to consider, to the extent possible, whether their social benefits will exceed their social costs. The administration has issued a comprehensive statement of regu-

latory policy, and established procedures to ensure that this policy is reflected in the actions of individual agencies.

Other initiatives include the recent establishment of the President's Council on Management Improvement, an interagency committee charged with improving management and administration throughout government; the President's Council on Integrity and Efficiency, established in 1981 to root out fraud, waste, and mismanagement; and the President's Private Sector Survey on Cost Control's comprehensive review of the functioning of the government. Given the size and scope of the federal bureaucracy, Hamilton's admonition that the executive "produce a good administration" requires careful, continuous attention to regulatory and managerial reform.

"In the areas of defense and foreign affairs, the Nation must speak with one voice, and only the president is capable of providing that voice."

At the same time, however, it is fitting to consider whether the federal government is trying to do too much. The Framers did not charge the national government with solving all the problems that might confront the citizens of the Republic: the early Americans were too jealous of their freedom to sanction such an expansive view of central authority. It is the responsibility of the president not only to manage government efficiently, but also to offer leadership in recognizing that government spending must be limited to functions that are the proper responsibility of government and that taxing by government must be limited to providing revenue for legitimate government purposes.

The president has no more important responsibility under the Constitution than the conduct of foreign affairs. As John Marshall noted on the floor of the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." In the famous *Curtiss-Wright* decision of 1936, the Supreme Court agreed with Marshall's assessment: "In this vast external realm . . . the President alone has the power to speak or listen as a representative of the nation." The president's foreign policy powers derive from the general grant of executive power, the more specific grants of authority to make treaties and appoint and receive ambassadors, and his role as commander in chief of the armed forces.

The Framers recognized that of the two democratic branches, only the executive could successfully conduct foreign relations. Hamilton noted in his description of the executive that "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number," and John Jay—

himself one of our most successful early diplomats—argued that "the President will find no difficulty to provide" those qualities, though they were beyond the capability of a basically deliberative body such as Congress.

When it came to the defense of the Nation, the Framers were even more unambiguous. Hamilton, who served at General Washington's side during the American War of Independence, knew that:

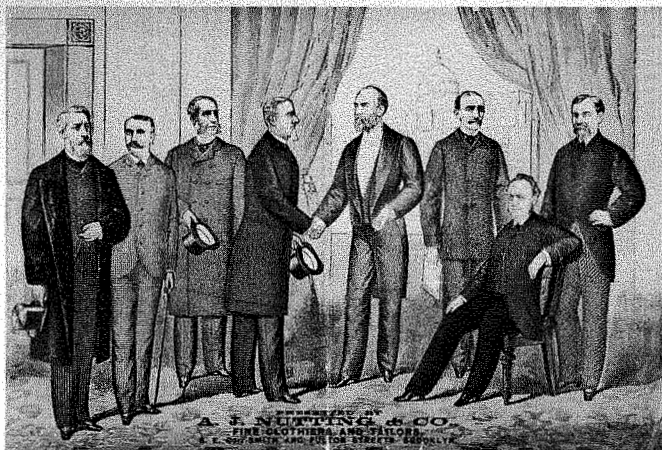
the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.

In the areas of defense and foreign affairs, the Nation must speak with one voice, and only the president is capable of providing that voice.

This is not to denigrate the role of Congress in the development of foreign policy. On the contrary, the Framers required the assent of two-thirds of the senators to a treaty, and of course only Congress possesses the power to declare war. Beyond these defined roles, the support of Congress has been indispensable to an effective foreign policy throughout our history.

The 1970s saw a rapid rise in congressional efforts to affect directly the formulation and implementation of foreign policy by the executive. A large number of prohibitions and restrictions on presidential authority were enacted in the areas of trade, human rights, arms sales, foreign aid, intelligence operations, and the deployment of United States armed forces abroad. Scholars and officials differ over the constitutionality of several of these initiatives. It is important to note, however, that efforts by Congress to participate in the development of American foreign policy must be accompanied by a recognition of the concomitant responsibility for developing bipartisan consensus. We need to restore the honorable American tradition that partisan politics stops at the water's edge. As Congress attempts to augment its foreign policy role, it must ensure that its efforts do not result in America presenting multiple and perhaps discordant voices to the world, to the detriment of its security and interests. The president—"the sole organ of the nation in its external relations"—must continually seek the means of developing a bipartisan legislative-executive consensus on America's role in the world and the means of safeguarding that role. As Congress increasingly enters the foreign policy realm, it too must recognize a greater responsibility for developing such a consensus.

Apart from executive functions, the Constitution accords the president a significant role in the legislative process. The president has not merely the power but the duty to "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . ." The people have grown to expect leadership from the president not only in executing the laws but also in presenting a legislative program to Congress for consideration.



President James Garfield and his cabinet.

Perhaps the most prominent of the president's legislative powers is the qualified veto power. This power is qualified in the sense that a bill returned by the president with disapproval can nonetheless be enacted into law by a two-thirds vote of both houses. The Framers accorded the president a veto power for two reasons. First, they recognized the "propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments" and provided the president a veto so that he could defend the prerogatives of his office. The second purpose of the veto was as "an additional security against the enactment of improper laws."

The unique perspective the president can bring to bear on legislation was recognized by Chief Justice Taft:

The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide.

The intent of the Framers in providing the president a qualified veto power has been frustrated to a large extent by the development of the congressional practice of combining various items in a single appropriations bill. The Framers undoubtedly anticipated that Congress would pass separate appropriations bills for discrete programs or activities, and that the president would be able to review each program. Until about the time of the Civil War, this was the practice of Congress. Since that time, however, Congress has increasingly combined various items of appropriation in omnibus appropriations bills. This makes it difficult for the president to discharge the responsibility vested in him by the Framers, because a president cannot consider the individual items of appropriations separately, but must either veto or approve the package as a whole. The president is thus prevented from using the veto as the Framers intended, "to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design."

It is for this reason that we have proposed restoring

the Framers' original design through a constitutional amendment granting the president line-item veto authority. The constitutions of no fewer than forty-three states grant some such authority to the governor, and the experience at the state level suggests a line-item veto would work well at the federal level.

The powers of the presidency are limited, and the president discharges constitutional responsibilities in a system according other powers to the coordinate branches of the legislature and the judiciary. As the Supreme Court has remarked, there is a

... never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances.

The members of all three branches take an oath to uphold the Constitution, and it is a monument not only to the genius of the Framers but also to the statesmanship of those who have held office under the Constitution that the system has worked as well as it has.

Thomas Jefferson called the presidency "a splendid misery." The Framers intended, as Hamilton wrote, that "the executive should be in a situation to dare to act his own opinion with vigor and decision." Presidents have learned advisors at their disposal, and they can consult with Congress, but the difficult and potentially momentous decisions the Constitution vests in the executive are, in the final analysis, the president's alone. Our most tested president, Abraham Lincoln, announced a guide for making those decisions that has yet to be bettered:

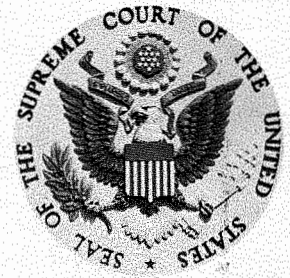
I desire to so conduct the affairs of this Administration that if, at the end, when I come to lay down the reins of power, I have lost every other friend on earth, I shall at least have one friend left, and that friend shall be down inside of me.

As we prepare to commemorate the Bicentennial of the Constitution, let us honor the memory of the Framers who drafted our blueprint for freedom, as well as those who, like Lincoln, did not permit their dreams to die. But let us also recognize the workings of a greater force. The Signers of the Declaration of Independence acted with "a firm reliance on the Protection of Divine Providence," and Madison, reviewing the work of the Constitutional Convention, noted that "it is impossible for the man of pious reflection not to perceive in it a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution." What President Grover Cleveland said on the occasion of the Centennial of the Constitution rings even truer today:

As we look down the past century to the origin of our Constitution, as we contemplate its trials and its triumphs, as we realize how completely the principles upon which it is based have met every National peril and every National need, how devoutly should we confess, with Franklin, "God governs in the affairs of men." **NF**

Warren E. Burger

The Judiciary: The Origins of Judicial Review



Lord Bryce, the noted English political thinker, once said that:

No feature of the government of the United States has awakened so much curiosity . . . caused so much discussion, received so much admiration, and been more frequently misunderstood, than the duties assigned to the Supreme Court and the functions which it discharges in guarding the Ark of the Constitution.

In some quarters the Supreme Court's guardianship of that Ark probably has received more guarded praise than in distant places. Lord Bryce, of course, had reference to the doctrine of judicial review, sometimes described as the doctrine of judicial supremacy, in the interpretation of constitutional terms and principles.

It is helpful to an understanding of the issues surrounding the unique role of the judiciary in the American constitutional system to examine one particular aspect. The setting in which *Marbury v. Madison* was decided in 1803, with all its momentous consequences for our country, is important. That great case had its antecedents in our colonial experience and its taproots in the declarations of fundamental rights of Englishmen dating back to the Magna Carta almost 500 years before our independence.

The colonial experience of living under a distant parliamentary system with no check on the legislative or executive, except that of popular will in a very limited way, led our Founding Fathers to feel strongly the need for limitations on all branches of government. They were skeptical if not suspicious of power. The intellectual spadework for the system ultimately adopted for our federal government had been done by such seventeenth- and eighteenth-century political theorists as Thomas Hobbes and John Locke. The great rationalist Montesquieu contributed the idea of a separation of powers within the government itself, with each branch acting as a kind of brake upon the others.

As the system worked, one of the functions exercised by the Supreme Court involves measuring executive or legislative action—or that of the states—against the Constitution whenever a challenge to such action is properly brought within the framework of a "case" or "controversy." The Supreme Court does not "reach out" for cases as the popular media occasionally imply; it can select cases for review, but a significant portion of the cases argued are appeals that the Court is required to review.

Some commentators on the development of the Constitution in the United States have suggested from time

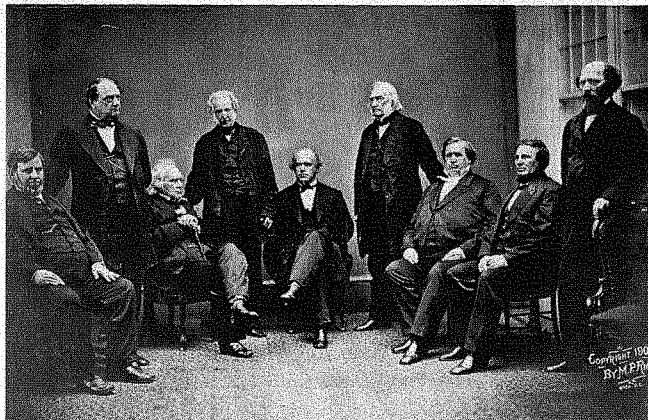
to time that the subject of judicial review of legislative action was not in the minds of the delegates to the Constitutional Convention in 1787. However, such an obviously important question could not have entirely eluded their attention. Some of the delegates, without doubt, looked to an independent judiciary with fixed tenure as a means of protecting the states and the people against the powers of the new national government, whose scope was as yet unseen and unknown and was therefore feared. Others, particularly the propertied classes, probably regarded a Supreme Court and an independent federal judiciary as a source of protection against the egalitarian, popular government that attracted considerable support as the French upheavals of the eighteenth century unfolded; Thomas Jefferson gave support to this trend. The delegates could not have failed to be aware that the exercise of such powers by the judiciary must in some way involve limitations on legislative and executive action that was contrary to fundamental law as expressed in the Constitution.

Some residual controversy remains as to the exercise of judicial review today, but it is largely as to scope, not as to authority. It is now accepted that the first significant exercise of the power by the Supreme Court in 1803 was not judicial usurpation as Jefferson charged. But when a case or controversy is properly brought before the Court on a claim that some governmental action is contrary to the Constitution, someone must decide the issue: the Court must decide. Needless to say, the major challenges to the Court's power have occurred during those periods when, for whatever reason, the Supreme Court has been under attack for its role in contemporary affairs. As an example, many polemics as well as some of the most thoughtful and scholarly challenges were written during the 1930s when, to many of its critics, the Supreme Court represented the dead hand of the past, impeding legitimate experimentation and innovation while the legislature and the executive were trying to cope with a national economic crisis.

It is often assumed that the doctrine of "judicial review" was the invention of Chief Justice John Marshall in the most famous of all his opinions. It is true that Chief Justice Marshall first applied this keystone doctrine of our constitutional law in the *Marbury* case. But Marshall did not originate, and never claimed to

WARREN E. BURGER is the fifteenth chief justice of the United States.

M. P. Rice



The Chase Court, 1865.

have originated, a novel doctrine: he was well aware of the general acceptance of the idea that constitutional adjudication was inherent in the very nature of the separation of powers under our written Constitution. This is not to disparage Marshall, for he was the one who recognized the need to enunciate the doctrine as part of federal jurisprudence, and he seized—some have said he strained—to take the first opportunity to assert the power of the Court to measure an act of Congress by the yardstick of the Constitution.

In 1776, the very year of the Declaration of Independence, and a quarter of a century before Marshall became chief justice, the people of the town of Concord, Massachusetts, held a town meeting and adopted a resolution that “a Constitution alterable by the Supreme Legislative is no security at all to the subject, against encroachment of the Governing Part on any or on all their rights and privileges.” Earlier, when the colony of Massachusetts Bay was under British colonial rule, the sturdy farm people of Berkshire County refused to let the colonial courts sit from 1775 to 1780 until the people of Massachusetts adopted a constitution with a bill of rights enforceable by judges. These episodes were well known to the delegates who labored in Philadelphia.

The premise in these events, twenty-five years before *Marbury*, was that by its very nature as an organic document defining and delegating powers to three separate coequal branches of government, a written constitution would be a limit on the acts of the legislature and executive so as to protect fundamental liberties. Where else but in the judicial branch was the appropriate vehicle for providing that protection.

In 1793, Chief Justice Spencer Roane of Virginia’s highest court, and an intimate of Thomas Jefferson, wrote in *Kemper v. Hawkins*:

If the legislature may infringe this Constitution [of Virginia], it is no longer fixed; . . . and the liberties of the people are wholly at the mercy of the legislature.

To be sure, Chief Justice Roane was speaking about the power of the state courts to strike down legislative acts contrary to the state constitution, but conceptually his view agrees with Marshall’s in *Marbury*.



The Burger Court, 1981.

The English Magna Carta, of course, was intended primarily by the barons as a limitation on King John, but it has come to stand for a limitation on princes and parliaments alike. In one of the very early opinions of the Supreme Court of the United States, one of many containing references to the Magna Carta, it was said:

. . . after volumes spoken and written [about the guarantees of Magna Carta], the good sense of mankind has at length settled down to this: *that they were intended to secure the individual from the arbitrary exercise of the powers of government . . .* [Emphasis added.]

If the judiciary could not “secure the individual from the arbitrary exercise” of a power that in reality the Constitution did not grant, then truly the Constitution, as the Concord Town Meeting Resolution declared, was “no security at all.”

Another thread of influence originates with the struggle between Lord Coke and the Stuart kings. Coke’s writings and reports were well known to the American colonists; and even though the dictum in *Dr. Bonham’s Case* is not precisely followed in England, it has been seminal in our law. In that case Coke asserted that:

. . . in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.

And even the super authoritarian Oliver Cromwell, 150 years before *Marbury v. Madison*, said: “In every government, there must be something fundamental, somewhat like a Magna Carta which would be unalterable. . . .” Whether the stern, dictatorial Mr. Cromwell intended to propound the idea that a judicial body like our Supreme Court, independent of and coequal with the executive and legislative branches, should be empowered to act as a sort of umpire is doubtful, but plainly he was asserting that “there must be something” to make sure fundamental rights would be “unalterable.”

More than a decade before *Marbury*, justices of the Supreme Court sitting on circuit held that state laws contrary to the federal Constitution were invalid, and

this was confirmed in *Van Horne Lessee v. Dorrance*. In his opinion in that case, Justice William Paterson, sitting on circuit, asserted flatly:

I take it to be a clear position; that if a legislative act oppugns a constitutional principle, the former must give way, and . . . it will be the duty of the Court to adhere to the Constitution, and to declare the act null and void.

We see, therefore, that long before *Marbury*, American political leaders, including many of the most distinguished lawyers and judges, accepted as fundamental that a written constitution was a restraint on every part of the federal government. It does not disparage John Marshall's greatness as a judge or a statesman to say that when he wrote the opinion in *Marbury*, he was doing little more than declaring what was widely accepted by so many of the best legal minds of his day—at least when they could divorce politics from reason! Had it not come in *Marbury*, it would have come later, but John Marshall was not a man to wait for perfect opportunities if a plausible one offered itself. It had to be said, and *Marbury* was the fortuitous circumstance that made it possible to establish this great principle early in our history.

Although the American doctrine of judicial review, as formally articulated in *Marbury v. Madison*, is the great formal pronouncement, it is equally clear that the very words of Article III of the Constitution permit no other conclusion.

The setting in which this great case developed is familiar and important. The incumbent President John Adams was defeated by Thomas Jefferson in November 1800. Between the time of the election and the following March when Jefferson actually took office, Adams remained in office and his Federalist party controlled the "lame duck" Congress. Soon after his defeat, Adams encouraged the ailing Chief Justice Oliver Ellsworth to resign. Adams was deeply concerned about the future and undoubtedly about what Jefferson and his party might do to the independence of the Supreme Court.

Jefferson's choice for chief justice, had Marshall not been appointed, would almost certainly have been Chief Justice Roane, who was described by Professor Charles Warren as "an ardent strict constructionist on the Constitution." Roane had shown his basic agreement with Marshall on the subject of judicial review in an opinion for Virginia's highest court in 1793, stating:

It is the province of the judiciary to expound the laws. . . . It may say too, that an act of assembly has not changed the Constitution [of Virginia], though its words are expressly to that effect. . . . [I]t is conceived, for the reasons above mentioned, that the legislature have not power to change the fundamental laws. . . .

Underlying Jefferson's hostility to judicial power was the very fundamental difference between the Federalist belief that a strong national government was the key to the future of the new nation and the opposing belief of the Jeffersonians, who sincerely feared centralized power and wanted to keep the states the strong and indeed the dominant political power.

Whatever his earlier beliefs, by 1803 Jefferson's distrust of and opposition to the federal judiciary had crystallized. From then onward, Jefferson did not waver in his attitude. In a letter to a friend dated August 18, 1821, Jefferson wrote, some would say prophetically:

It has long . . . been my opinion, and I have never shrunk from its expression . . . that the germ of dissolution of our federal government is in the Constitution of the federal judiciary; an irresponsible body (for impeachment is scarcely a scare-crow), working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States, and the government of all be consolidated into one. To this I am opposed. . . .

Like a thief!

Adams, as I have noted, was a "lame duck" president after November 1800, with a "lame duck," Federalist-controlled Congress on hand for four months after the election. Naturally, he made as many appointments as possible—persuading Ellsworth to resign to make way for Marshall was but one step. The appointment of a goodly number of federal judges was another. But the far-lesser post of a local justice of the peace was the grist of *Marbury's* case.

The story is too well known to be chronicled in detail. *Marbury* was one of those whose commission as justice of the peace was signed by President Adams and attested to by Marshall, who was still acting as President Adams's Secretary of State even after being appointed chief justice and confirmed by the Senate. But *Marbury's* commission was not delivered.

Marbury then sought mandamus in the Supreme Court against Madison, Jefferson's Secretary of State, to compel what *Marbury* claimed was the purely ministerial act of delivering the commissions. In the Supreme Court the first reaction may well have been, "of course," since the Judiciary Act provided that precise remedy.

But if, as no one had even remotely suspected up to that time, Congress could not constitutionally grant original jurisdiction to the Supreme Court in any cases except those specifically recited in Article III, then the Court could say, "Yes, *Marbury* was duly confirmed"; and "Yes, the Commission was duly signed and sealed"; and "Yes, this Court may examine the manner in which the executive conducts its affairs"; and "Yes, delivery is a purely ministerial act"; and "Yes, it is improper that the new administration will not perform the simple ministerial act of delivery"; but the Court could also say, "However, this Court has no power under the Constitution to entertain any original action except those specified in Article III, and this case is not one of them. That being so, Section 13 of the Judiciary Act of 1789 purporting to give the Supreme Court such authority would be invalid and any action to compel the executive to deliver the commission to *Marbury* could not be entertained as an original action." This, in essence, is what Marshall wrote.

Jefferson and Madison had won the lawsuit—the

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Do We Have a Living Constitution?

Walter Berns



In the first of the eighty-five "Federalist Papers," Alexander Hamilton emphasized that

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

Now, almost 200 years later, we are in a position to say that, under some conditions, some "societies of men" are so capable, but that most are not. This is not for lack of trying; on the contrary, constitutions are being written all the time—of some 164 countries in the world all but a small handful (seven by latest count) have written constitutions—but most of them are not long-lived.

In September 1983, the American Enterprise Institute sponsored an international conference on constitution writing at the Supreme Court of the United States; some twenty-odd countries were represented. With the exception of the Americans, the persons present had themselves played a role—in some cases a major role—in the writing of their countries' constitutions, most of them written since 1970. Only the constitution of the French Fifth Republic predated 1970; and the Nigerian, so ably discussed and defended at the conference by one of its framers, has subsequently been subverted, much as the four previous French republican constitutions had been subverted. It would seem that many peoples are experienced in the writing of constitutions, but only a few of them—and conspicuous among these we Americans—have an experience of stable constitutional government. In that sense, we surely have "a living Constitution."

That is not, however, the sense in which the term is ordinarily used in the literature of constitutional law. In the ordinary sense, a "living Constitution" is not first of all one that is long-lived; its longevity is a secondary or derivative quality which is attributed to its flexibility or, better, its adaptability. It is this quality that allows it to be "kept in tune with the times," as the members of this school sometimes say. A living Constitution is first of all a protean constitution, one whose meaning is not fixed.

In this respect, it is similar to the Constitution as understood by the "judicial power" school. Some judicial power advocates go so far as to say that, until the judges supply it in the process of adjudication, the

Constitution has no meaning whatever. Here are the words of Lynn D. Compton, a California appellate judge, writing in 1977 in the pages of the *Los Angeles Times*:

Let's be honest with the public. Those courts are policy-making bodies. The policies they set have the effect of law because of the power those courts are given by the Constitution. The so-called "landmark decisions" of both the U.S. Supreme Court and the California Supreme Court were not compelled by legal precedent. Those decisions are the law and are considered "right" simply because the court had the power to decree the result. The result in any of those cases could have been exactly the opposite and by the same criteria been correct and binding precedent.

In short, these precedent-setting policy decisions were the product of the social, economic and political philosophy of the majority of the justices who made up the court at a given time in history. . . .

So extreme a view of judicial power is not likely ever to be expressed in the official reports; there (perhaps in order to be "[dis]honest with the public") even the most inventive judge will claim to be expounding the Constitution, if not its explicit provisions then, at least, its emanations, penumbras, or lacunae (*Griswold v. Connecticut*). What is of interest is that a judge should be willing to express it anywhere, for what it means is that a constitutional provision can be interpreted but not misinterpreted, construed but not misconstrued. More to the point here, it means that the Constitution is a living charter of government only because it is repeatedly being reinvented by the judiciary.

Although the two schools are likely to be indistinguishable at the margins, they derive from unrelated and distinct sources. "Judicial power" is a product or an extension of legal realism, the school of thought whose advocates, from the beginning of the twentieth century, have argued that the essence of the judicial process consists not in interpreting law, whether statute or constitutional, but in making it. Its advocates today

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speak with a certain insouciance of "creating" constitutional rights (*Moore v. City of East Cleveland*), and, when pressed to cite their authority for doing so are likely to point to the work of contemporary legal theorists like Ronald Dworkin and his book *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977). It is Dworkin who has purportedly given this sort of constitutional lawmaking what it has always lacked—a philosophical underpinning. As he sees it, rights cannot be taken seriously until there has been "a fusion of constitutional law and moral theory," and to make it clear that he is not referring to any particular moral theory that may have informed the Constitution as written, he finishes that sentence by saying that that fusion "has yet to take place." As it turns out, however, the moral theory he propounds, and which he hopes to fuse with constitutional law, proves to be nothing more than a fancy way of justifying what the Judge Comptons among us have been doing all along.¹ And what they have been doing is, essentially, treating the Constitution as a thing without form or substance except insofar as it authorizes the judges to give it substance.

Admittedly, few proponents of the idea of a living Constitution would treat the constitutional text in so cavalier a manner. In their view, a constitutional provision—for example, the clause forbidding states to impair the obligations of contracts—has an ascertainable meaning, and judges should be governed by it unless, because of circumstances, the consequences of being governed by it are politically unacceptable (*Home Building & Loan Association v. Blaisdell*). It is only then, out of a necessity imposed by contemporary conditions, that the Constitution changes its meaning.

“. . . their concern was not to keep the Constitution in tune with the times but, rather, to keep the times, to the extent possible, in tune with the Constitution.”

The living Constitution school also claims to have a source more venerable than legal realism or Ronald Dworkin. One constitutional scholar, C. Herman Pritchett, a former president of the American Political Science Association, argues that the idea of a "living Constitution" . . . can trace its lineage back to John Marshall's celebrated advice in *McCulloch v. Maryland* (1819): "We must never forget that it is a Constitution we are expounding . . . intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs." The words quoted here are certainly Marshall's, but the opinion attributed to him is at odds with his well-known statements that, for example, the "principles" of the Constitution "are deemed fundamental [and] permanent" and, except by means of formal amendment, "unchangeable" (*Marbury v. Madison*). But the discrepancy is not Marshall's; it is largely the consequence of the manner in which he is quoted:

ellipses are used to join two statements separated by some eight pages in the original. Marshall did not say that the Constitution should be adapted to the various crises of human affairs; he said that the powers of Congress are adaptable to meet those crises. The first statement appears in that part of his opinion where he is arguing that the Constitution cannot specify "all the subdivisions of which its great powers will admit"; if it attempted to do so it would "partake of the prolixity of a legal code" (*McCulloch v. Maryland*). In the second statement, Marshall's subject is the legislative power and specifically the power "to make all laws which shall be necessary and proper for carrying into execution" the explicitly granted powers. It is this provision that "is made in a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs" (*McCulloch v. Maryland*). The immediate sequel makes it even clearer that it is the legislative power that is said to be adaptable, not the Constitution itself:

To have prescribed the means by which the government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument [i.e., the Constitution], and give it the properties of a legal code.

Neither Marshall nor any other prominent member of the founding generation can be coopted by the living Constitution school. His and their concern was not to keep the Constitution in tune with the times but, rather, to keep the times, to the extent possible, in tune with the Constitution. And that is why the Framers assigned to the judiciary the task of protecting the Constitution as written. They were under no illusions that this would prove to be an easy task. Nevertheless, they had reason to believe that they had written a constitution that deserved to endure and, properly guarded, would endure. Hence, Madison spoke out forcefully against Thomas Jefferson's suggestion of frequent constitutional appeals to the people because, among other reasons, he hoped it would become an object of veneration, and a constantly changing constitution cannot be venerated.² Marshall had this Madisonian passage in mind when, in his opinion for the Court in *Marbury's* case, he wrote:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental: and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

The Framers knew that the passage of time would surely disclose imperfections or inadequacies in the Constitution, but these were to be repaired or remedied by formal amendment, not by legislative action or judicial construction (or reconstruction). Hamilton (in *The Federalist*, No. 78) was emphatic about this:

Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon them collectively, as well as individually; and no presumption,

or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act.

The Congress, unlike the British Parliament, was not given final authority over the Constitution, which partly explains why the judicial authority was lodged in a separate and independent branch of government. In Britain the supreme judicial authority is exercised by a committee of the House of Lords, which is appropriate in a system of parliamentary supremacy, but, although it was suggested they do so, the Framers refused to follow the British example. The American system is one of constitutional supremacy, which means that sovereignty resides in the people, not in the King-in-Parliament; and the idea that the Constitution may be changed by an act of the legislature—even an act subsequently authorized by the judiciary—is simply incompatible with the natural right of the people to determine how (and even whether) they shall be governed.

Unlike in Britain where, formally at least, the queen rules by the grace of God (*Dei gratia regina*), American government rests on the consent of the people; and, according to natural right, the consent must be given formally. In fact, it must be given in a written compact entered into by the people. Here is Madison on the compacts underlying American government:

Altho' the old idea of a compact between the Govt. & the people be justly exploded, the idea of a compact among those who are parties to a Govt. is a fundamental principle of free Govt.

The original compact is the one implied or presumed, but nowhere reduced to writing, by which a people agree to form one society. The next is a compact, here for the first time reduced to writing, by which the people in their social state agree to a Govt. over them. [In a letter to Nicholas P. Trist dated February 15, 1830.]

Neither civil society (or as Madison puts it, "the people in their social state") nor government exists by nature. By nature everyone is sovereign with respect to himself, free to do whatever in his judgment is necessary to preserve his own life—or, in the words of the Declaration of Independence, everyone is endowed by nature with the rights of life, liberty, and the pursuit of a happiness that he defines for himself. Civil society is an artificial person (constituted by the first of the compacts) to which this real person, acting in concert with others, surrenders his natural and sovereign powers; and it is civil society that institutes and empowers government. So it was that we became "the People of the United States" in 1776 and, in 1787–88, that we ordained and established "this Constitution for the United States of America."

In this formal compact we specified the terms and conditions under which we, "ourselves and our posterity," would be governed: granting some powers and withholding others, and organizing the powers granted with a view to preventing their misuse by the legislative, the executive, and the judicial branches alike. We were authorized by natural right to do this, and we were authorized to act on behalf of our posterity only insofar as we respected their right to change those terms and

conditions. This we did in Article V of the Constitution, the amending article, which prescribes the forms to be followed when exercising that power in the future. What we were not permitted to do in 1787–88 was to deprive—or pretend to deprive—our posterity of their natural right to do in the future what we did in 1776. Nor could we, by pretending to delegate it to Congress, the president, or the Supreme Court, deprive them of their sovereign power to change the Constitution.

What I have attempted to do here is provide (within a very brief compass indeed) an accurate statement of the principles underlying the American Constitution: pointing to (but by no means elaborating) the political theory from which they derive and the constitutional conclusions to which they lead. Among the latter is the untenability of the proposition that constitutional limitations can be jettisoned, constitutional power enhanced, or the constitutional division of powers altered, by means other than formal constitutional amendment. It may sometimes be convenient to allow the Senate to originate a bill "for raising revenue," but convenience is not a measure of constitutionality. There is much to be said in favor of the legislative veto—Who would, in principle, deny the need of checks on administrative agencies?—but, as the Supreme Court correctly said, the Framers anticipated that Congress might find reason to employ such devices and, when designing the so-called presentment clause in Article I, Section 7, forbade them (*Immigration and Naturalization Service v. Chadha*). And from a particular partisan perspective it is surely frustrating, simply because the required number of states had not yet ratified the Equal Rights Amendment, to be denied the power to promote the cause of sexual equality; but frustration alone cannot justify a judicial attempt to preclude the necessity of formal ratification.³ Those who would have it otherwise, who insist that it lies within the powers of the Court (or the Congress or the executive) to effect constitutional change, can be charged with a lack of respect for the principles on which "the whole American fabric has been erected."

We are told that it is unreasonable—even foolish—to expect that the Framers could have written a Constitution suitable alike for a society of husbandmen and a society of multinational corporations, to say nothing of one as well adapted to the age of the musket and sailing ship as to the age of intercontinental nuclear-tipped missiles. As the problems have changed, the argument goes, so must the manner in which they are confronted and solved, and the Constitution cannot be allowed to stand in the way. Indeed, there is no reason to allow it to stand in the way because, it is said, the Framers intended it to be flexible. Ironically, the very case cited in support of this conclusion, when properly read, demonstrates that John Marshall, at least, saw no need for flexibility in the Constitution.

As every student of constitutional law will remember, the initial and narrow question presented by *McCulloch v. Maryland* was whether Congress had the authority to charter a bank, but, as he was accustomed to doing in

these early constitutional cases, Marshall chose to address the much broader issue of the general scope of national powers. The Constitution must be construed to

... allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.

Having said this, Marshall proceeded to offer this rule of construction:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. [*McCulloch v. Maryland*]

But how do we determine whether an end is legitimate? Except in the Preamble, to which Marshall does not refer, the Constitution does not speak of ends. Instead, it speaks of powers, and it is from these powers—to tax, borrow, regulate commerce, make war, and so forth—that Marshall infers the end, which, to put it simply, is the large, busy, wealthy, powerful, commercial republic, the sort of republic that is likely to get into trouble with its nonrepublican neighbors. (“Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported” [*McCulloch v. Maryland*]. The United States was not intended to be a simple society of husbandmen.) Thus, the powers enumerated in the Constitution point to the end, and the end begets the means. Clearly, as Marshall expounds it, the Constitution empowers Congress (and, more broadly, the national government) to do whatever is required to meet “the various crises of human affairs.” The powers, not the Constitution, are flexible, and whether the powers should be exercised depends largely on the assessment by Congress of circumstances. Necessary and proper comes to mean “advantageous,” or at the “discretion” of Congress.⁴

Yet, as Marshall also emphasizes, “the government of the Union [though] supreme within its sphere of action, [is] limited in its powers.”⁵ It might therefore be asked how a government empowered to do what it finds “advantageous” is nevertheless limited in what it might do—or limited in what it does. The answer is to be found in the way the Constitution imposes limits. Our inclination today is to point to the provisions where Congress is explicitly forbidden to do certain things. But, in the original, unamended Constitution, those provisions are very few indeed; almost all of them are to be found in the ninth section of Article I, and almost none of them amounts to a severe restriction on the powers that Congress might find “advantageous” to exercise. (Congress is not likely to grant a title of nobility or prefer the ports of one state over another, or [with reference to Article VI] to prescribe a religious test. And, as Abraham Lincoln demonstrated, the Constitution allows the president to decide when the “public safety” requires suspension of “the privilege of the

writ of habeas corpus” and when unappropriated money may be “drawn from the treasury.”) As to the specific prohibitions listed in the Bill of Rights, their role in limiting the national government is grossly exaggerated. Prior to 1925 when, in *Gitlow v. New York*, the Court began the process by which the Bill of Rights was made applicable to the states, there were only fifteen cases in which a government action was held to conflict with any of its provisions; one of these was *Dred Scott v. Sandford* (scarcely a monument to liberty) and another was *Hepburn v. Griswold*, which was promptly overruled. Not once during these first 136 years did the Supreme Court invalidate an act of Congress on First Amendment grounds. This did not occur in a speech case until 1965 and in a religious case until 1971 (*Lamont v. Postmaster General*, and *Tilton v. Richardson*).

This record confirms the Founders’ judgment that limitations would be enforced not by these “parchment barriers,” but by the constitutional structure itself. They defined tyranny as the “accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective” (*The Federalist*, No. 47), and the structure they contrived was designed to prevent that accumulation. Most to be feared was the accumulation of all powers into the hands of a factious majority, and to prevent that they designed the institutional arrangements familiar to any student of *The Federalist*: a regular distribution of power into distinct departments, a system of legislative balances and checks, an independent judiciary, a system of representation, and an enlargement of the orbit “within which

“This record confirms the Founders’ judgment that limitations would be enforced not by . . . ‘parchment barriers,’ but by the constitutional structure itself.”

such systems are to revolve.”⁶ Together these institutions constitute a structure designed to insure that the country will be governed not by simple majorities but by constitutional majorities.

A simple majority is one assembled—by a populist or a demagogue, for example—directly in and from the people; it was to be feared because it would almost certainly misuse the powers it gained. A constitutional majority is one assembled in the governing process, and its constituent elements are representatives of the people. For the reasons elaborated in *The Federalist*, and especially in *The Federalist* No. 10, such a majority could more readily be trusted not to misuse the great powers it would enjoy. Those powers are sufficient to allow the government to meet “the various crises of human affairs”—no constitutional changes are required in this respect—and to the judges is assigned the duty, as “faithful guardians of the Constitution,” to preserve the integrity of the structure, for it is by the structure

(more than by "parchment barriers") that the government is limited. It would be only a slight exaggeration to say that, in the judgment of the Founders, the Constitution would "live" as long as that structure was preserved. **NF**

Notes

1. We should note that Dworkin rightly criticizes legal positivism for insisting that a legal system can be understood in terms only of rules which are considered legitimate when properly enacted. These rules, he says, derive from moral principles, and these principles constitute an integral part of the legal system. So far, so good: the greatest of our judges—John Marshall, for example—have always repaired to the principles which, they insisted, were to be found in the political philosophy that informed the Framers of the Constitution. Dworkin, however, ignores their example. Instead, he begins by finding those of our "intuitions" that conform to our contemporary "moral sense," and, with them, proceeds to "construct" a model of justice built on the rights each individual has against all other individuals. He calls these "natural rights" (although, unlike John Locke, for example, he does not even attempt to demonstrate that they are intrinsic to man as man), and he simply posits as fundamental the right to "equal concern and respect," a right he never defines with any precision. Not at all strangely, this account of rights allows him to end where he probably wanted to end: with an argument that supports "precisely those reactions to current policy issues that a conventional liberal academician is likely to have." (See Thomas Pangle, "Rediscovering Rights," *The Public Interest*, No. 50 [Winter 1978], p. 159.) Civil disobedience is a right, he says, and so is conscientious objection to the draft; but property rights find almost no support in his system.

2. *The Federalist*, No. 49. Jefferson, who advocated the periodic exercise by the people of their right of revolution, might be the exception to my statement about the Founders.

3. In *Frontiero v. Richardson* (411 U.S. 677 [1973]), the Supreme Court was divided on the issue of whether sex, like race, should be treated as a suspect classification. We are told that Justice Brennan circulated a draft opinion in which he proposed to declare classification by sex virtually impermissible and that he knew this would have the effect of "enacting" the pending Equal Rights Amendment. "But Brennan was accustomed to having the Court out in front, leading any civil rights movement." Hence, we are further told, he saw "no reason to wait several years for the states to ratify the amendment." (Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* [New York: Simon and Schuster, 1979], p. 254.) No reason, that is, other than the fact, which Brennan implicitly acknowledged, that the Constitution as then written, and which had not yet been rewritten by the only people authorized to rewrite it, did not support the rule he would have the Court hand down.

4. *McCulloch v. Maryland*, at p. 419. "But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power." (*Id.*, at p. 423.)

5. *Id.*, at p. 405.

6. *The Federalist*, No. 9. For a more comprehensive discussion of these questions see Walter Berns, "The Constitution as Bill of Rights," in Robert A. Goldwin and William Schambra (eds.), *How Does the Constitution Secure Rights?* (Washington, DC: American Enterprise Institute, forthcoming 1984).

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battle; *Marbury*, the *Federalist*, had lost; but the real war, the great "war" over the supremacy of the Supreme Court in constitutional adjudication, had been won by the Court—and by the country. Not for fifty-four years after *Marbury* did the Court hold another act of Congress unconstitutional, although in *Martin v. Hunter's Lessee* (1816), Justice Joseph Story for the Court firmly asserted the power of the Supreme Court to invalidate a state statute contrary to the federal Constitution.

As with so many great conceptions, the idea of judicial review of legislation now seems simple and inevitable in the perspective of history. The people of the states delegated certain powers to the national government and placed limits on those powers by specific and general reservations. After having flatly stated certain guarantees relating to religious freedom, to speech, to searches, seizures, and arrests, would it be reasonable to think that Congress and the executive could alter those rights? Standing alone, the explicit procedures carefully providing for constitutional amendments negate the idea that a written constitution could be altered by legislative or executive action. The language of Article III vesting judicial power "in one Supreme Court" for "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties. . ." would be sterile indeed if the Supreme Court could not exercise that judicial power by deciding cases involving conflicts between the Constitution, federal laws, and treaties on the one hand, and acts of Congress, the executive or states on the other.

Given the extraordinary power that judicial review vests in the judiciary, the question may be raised: Who

will watch the watchmen? This was a concern to some of those who opposed ratification of the Constitution. Anti-Federalist commentator "Brutus" argued that "this power in the judicial, will enable them to move the government into almost any shape they please." Another Anti-Federalist, "A Columbia Patriot," similarly wrote: "There are no well-defined limits of the Judicial Powers, they seem to be left as a boundless ocean."

It is clear that when Congress disagrees with the judicial interpretation of a statute, Congress can enact a new statute that supersedes that judicial interpretation. Congress has done this many times in our history. Similarly, in four instances Congress and the state legislatures have overridden a Supreme Court opinion through constitutional amendment. Furthermore, when appointments are made to the Supreme Court, it is surely not unnatural that presidents try to appoint, subject to Senate confirmation, justices who they hope will interpret the Constitution "properly." President Franklin D. Roosevelt failed in his effort to control the Supreme Court by seeking to increase it to fifteen justices; yet in his four terms, he appointed eight justices.

It is true that in the tenure of office of all federal judges, so essential to their independence, there is risk that power can be abused, but three tiers of federal courts have mitigated that risk, although not always to every person's satisfaction. The Draftsmen were aware of those risks, but the risks were unavoidable, since "someone must decide."

Chief Justice Harlan Fiske Stone reminded all federal judges that "the only check upon our own exercise of power is our own sense of self-restraint." **NF**

Orrin G. Hatch

Civic Virtue: Wellspring of Liberty

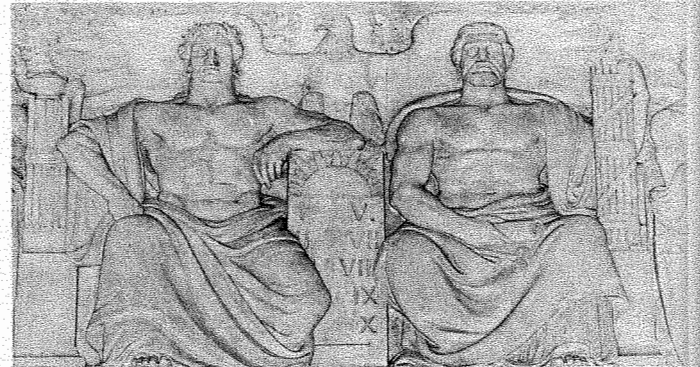
The constitutional watchwords of recent generations have been "liberty" and "equality." Invoking these august principles, litigants have flooded federal courts with relentless requests for new individual rights. These judicial contests are often characterized by claimants citing statements of the Framers of the United States Constitution to justify their unprecedented libertarian or egalitarian claims. No doubt liberty and equality under the law were primary objectives in an era devoted to the achievement of lasting independence. Nevertheless, the Framers of the Constitution were convinced that these lofty aspirations could be nurtured and realized only in a climate of civic virtue.

Recent generations have devoted great energies to the pursuit and protection of individual rights. While there is much to commend in these efforts, they have not been matched by an equivalent zeal to encourage individual responsibilities. Early Americans, who prized their dearly won right to vote, might marvel upon learning how few eligible voters today go to the polls. Early Americans, who built a prosperous nation on principles of self-reliance, might wonder at the modern emphasis on statist controls and citizen entitlements. Early Americans, who fought the Revolutionary War as volunteers, might express surprise upon learning of the enormous efforts necessary in our day to secure personnel for military service. Early Americans, educated at their parents' knees or in one-room schoolhouses, might question whether the billions spent on national education today will be directly responsible for producing many George Washingtons. Early American parents might express revulsion upon learning of the rampant drug epidemic and the accompanying violent crime epidemic in modern America, and they might marvel that their progeny has neglected many virtues accepted as duties by their generation.

Standing beside the cradle of the new government, the Framers were convinced that the endurance of the Republic depended on inspiring individual responsibility. In the words of James Madison, "all our political experiments rest on the capacity of mankind for self-government." Nine years prior to assuming the chairmanship of the Constitutional Convention, George Washington explained the relationship between individual rights and civic virtue:

Human rights can only be assured among a virtuous people. The general government . . . can never be in danger of degenerating into a monarchy, an oligarchy, an aristocracy, or

Lee Anderson



"The Ten Commandments" above the Supreme Court bench.

any despotic or oppressive form so long as there is any virtue in the body of the people.

Like many of President Washington's sentiments, his conviction that virtue precedes liberty and human rights was more than his own opinion or even the opinion of a majority; it was fundamentally accepted and presumed by the creators of our government.

This presumption did not originate with the Framers but was an American adaptation of centuries of philosophical examination of the conditions necessary to preserve liberty. Writing in the seventeenth century, the French philosopher Montesquieu, credited with laying the foundation for our separation-of-powers doctrine, concluded: "Fear is the principle of a despotic, honour of a kingly, and virtue is the principle of a republican government." Edmund Burke, the renowned philosopher and celebrated member of Parliament, explained why virtue is indispensable to a free society:

Men are qualified for civil liberty in exact proportion to their disposition to put moral chains on their appetites . . . in proportion as they are more disposed to listen to the counsels of the wise and good in preference to the flattery of knaves.

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Society cannot exist unless a controlling power upon will and appetite be placed somewhere, and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things, that men of intemperate minds cannot be free. Their passions forge their fetters.

Burke presented the choice as the generation of the Framers perceived it: either employ dictatorial police powers to maintain order by force or place strict limits upon governmental powers and rely upon citizens to govern their own passions. Under England's rule, the power and might of the king forced compliance with those basic standards of conduct necessary to preserve order. When "the people are king," as Gouverneur Morris exclaimed during the Convention, the people must exercise self-control or risk anarchy and tyranny.

In the first attempts at constitution writing in America, no effort was made to define or explicate the concepts of liberty or equality, but five of the state constitutions adopted prior to 1787 carefully identified the principal elements of the prevailing notions of virtue. The Pennsylvania and Vermont constitutions specified that "a frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality are absolutely necessary to preserve the blessings of liberty and keep a government free. . . ." Massachusetts adopted the Pennsylvania formulation but added "piety" to the list of qualities. New Hampshire replicated the Massachusetts formulation, but deleted "piety." Virginia, the first state to develop a contract with the governed, included virtue in its list. Each of these early testing grounds for the great 1787 experiment affirmed that the prevalence of certain voluntary standards of conduct was a prerequisite for preserving national liberty.

In September of 1787, the thirty-nine men who signed the Constitution for a nation of barely 4 million had witnessed the willingness of countless friends to sacrifice for the cause of self-government. They had heard the warning of the revered Benjamin Franklin that the new government might "be well administered for a course of years," but would "end in despotism, as other forms have done before it, when the people shall have become so corrupted as to need despotic government, being incapable of any other." Franklin embellished this thought outside the Convention: "Only a virtuous people are capable of freedom. As nations become more corrupt and vicious, they have more need of masters." The delegates shared James Madison's observation that his fellow Americans must "perceive in [the Constitution] a finger of that Almighty hand which has been so frequently . . . extended to our relief in the critical stages of the revolution." Often the debates over constitutional provisions turned on the delegates' various assumptions about the capacity of the people for the virtuous conduct required for self-government.

The submission of the Constitution to the states did not signal an end to the national search for the most virtuous form of government. Three notable delegates refused to sign and launched an Anti-Federalist campaign to prevent its ratification. They contended that the people might be virtuous, but power would corrupt

their elected leaders. In the words of George Mason, "all governments were drawn from the people, though many were perverted to their oppression." Citing the absence of explicit protections for many fundamental human rights, the Anti-Federalists contended that the Constitution was inadequate to protect liberty against corrupt governors.

The Federalists responded that the elected leaders would be no more corrupt than the people they represent:

To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea. If there be sufficient virtue and intelligence in the community, it will be exercised in the selection of these men; so that we do not depend upon their virtue or put confidence in our rulers, but in the people who are to choose them.

In *The Federalist* No. 76, Alexander Hamilton noted that "the institution of delegated powers implies that there is honor and virtue among mankind." Indeed a "Republican government," asserted Madison in *The Federalist* No. 55, "presupposes these qualities in a higher degree than any other form."

At length, the heat and high stakes of this intellectual battle moved Madison to unleash a harsh attack on the Anti-Federalists' assumptions about the virtue of the Nation:

Were the pictures which have been drawn by the political jealousy of some among us faithful likenesses of the human character, the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.

This debate came to a conclusion on April 30, 1789, when the first president to serve under the new "supreme law of the land" was inaugurated. The Anti-Federalists' warnings, however, prompted President Washington to heal the wounds by calling for a bill of rights. The recognized need for voluntary national virtue was tempered somewhat by constitutional protections against abuse of power. On the eve of the Bicentennial of the Constitution, generations of Americans should be genuinely grateful to the Federalists and Anti-Federalists alike for the prolonged debate over virtue which produced the Constitution and its first ten amendments.

The warnings of the Anti-Federalists have not lost their relevance. In fact, they have been continually underscored by succeeding philosophers. These cautions are particularly compelling when they come from visitors and newcomers to the United States. The noted French jurist Alexis de Tocqueville admonished later generations that "America is great because she is good, and if America ever ceases to be good, America will cease to be great." Austrian immigrant and social commentator Francis Grund echoed:

Change the domestic habits of the Americans, their religious devotion, and their high respect for morality, and it will not be necessary to change a single letter in the Constitution in order to vary the whole form of their government.

These enlightened warnings ring just as loudly today as they did in our nation's infancy. They call to mind the Framers' primary concern that their work pass from generation to generation. The Framers recognized, however, that the odds were against them. Other nations had striven to establish a limited government for a virtuous society only to witness its destruction. The early, great democracies of Greece and Rome ended in tyrannical dictatorships. Contemporary history also confirmed their fears as the republics of Poland, Hungary, Austria, Italy, Switzerland, and most notably France had perished in horror just years after their revolutionary births.

These terrifying precedents must have weighed heavily upon the mind of George Washington when he arose to bid America farewell as its president. Washington must have pondered what it would take to preserve American democracy when so many others had failed. His answer was simple and profound:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable [sic] supports. . . . let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

George Washington was not alone in arriving at this answer to the Framers' greatest question. President John Adams affirmed that "our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." Supreme Court Justice Joseph Story declared: "Piety, religion, and morality are intimately connected with the well-being of the state, and indispensable to the administration of civil justice. It is indeed difficult to conceive how any civilized society can well exist without them." Likewise, de Tocqueville's poetic answer has been often quoted:

I sought for the greatness and genius of America in her commodious harbors and her ample rivers, and it was not there; in her fertile fields and boundless prairie, and it was not there; in her rich mines and vast commerce, and it was not there. Not until I went to the churches of America and heard her pulpits aflame with righteousness did I understand the secret of her genius and power.

This was not a new answer to the abiding question. It could almost be termed "the American answer." Even prior to the Declaration of Independence, the Continental Congress had repeatedly called upon the fledgling nation to observe days of "publick humiliation, fasting and prayer" as well as days of "thanksgiving." On June 12, 1775, it issued a communication from Philadelphia to the thirteen colonies:

. . . that we may with united hearts and voices unfeignedly confess and deplore our many sins, and offer up our joint supplications to the all-wise, omnipotent, and merciful Disposer of all events . . . to remove our present calamities, to avert those desolating judgments with which we are threatened . . .

Barely a year later those prayerful entreaties for

deliverance took concrete form in the Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . . .

Thus the Nation's first official act sprang from the Judeo-Christian faith that the creator endowed men with inalienable rights, the defense of which was the purpose of government. Again this concept is best articulated by President Washington:

No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States. Every step by which they have advanced to the character of an independent nation seems to have been distinguished by some token of providential agency . . . the foundation of our national policy will be laid in the pure and immutable principles of private morality.

"Standing beside the cradle of the new government, the Framers were convinced that the endurance of the Republic depended on inspiring individual responsibility."

In the minds of the Framers and early leaders of this nation, the American experiment in self-government would work because the people were virtuous; they were virtuous because they were moral; and they were moral because they were religious. Will and Ariel Durant, scholars of human history from the early civilizations to the present, likewise conclude "[t]here is no significant example in history . . . of a society successfully maintaining moral life without the aid of religion." Unlike failed democracies, America would be secure in its liberty by adherence to principles of civic virtue. Thus, the First Congress often authorized federal assistance for religious educators. For instance, the Northwest Ordinance of 1787 explained Congress's commitment to aiding moral education: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools, and the means of learning shall forever be encouraged."

The First Congress, however, perceived danger in allowing any single sect to gain preeminent recognition by the federal government. A government-sponsored orthodoxy would stifle, rather than promote, healthy religious liberty. Accordingly, when state ratification debates suggested that a bill of rights would be necessary to preserve national confidence in the new Constitution, James Madison produced an initial draft to provide specific protections for religious liberty: "The Civil rights of none shall be abridged on account of religious belief or worship, nor shall any national reli-

gion be established." Madison clearly meant to preclude Congress from establishing a single national religion or from giving special preferences to any single sect.

"Washington must have pondered what it would take to preserve American democracy when so many others had failed."

This language underwent numerous revisions in the legislative crucible of the First Congress, but Madison stated that his original objective remained uncompromised. Hence, the amendment would permit nondiscriminatory governmental support for religion in general. The First Congress confirmed this intent by enacting several laws providing federal assistance for religious education.

Justice Story's understanding of the First Amendment was identical to that of its author as noted in his landmark treatise *Commentaries on the Constitution*: "The real object of the amendment was . . . to prevent any national ecclesiastical establishment which would give to an hierarchy the exclusive patronage of the national government." The speeches of Congressmen Samuel Livermore and Elbridge Gerry in the First Congress, and of other authors of the amendment and countless subsequent interpreters of their intent, support the reading Madison and Story gave this language.

Revisiting briefly the historical origins of the First Amendment is important as a contrast to modern interpretations of our constitutional protections for freedom of religion. In 1947, the Supreme Court departed from a reading of the First Amendment which had prevailed for nearly 170 years (*Everson v. Board of Education*). The Court concluded that "the clause against establishment of religion by law was intended to erect a 'wall of separation between church and state.'" Applying this reasoning, the Court declared in 1962 that voluntary classroom recitation of a nondenominational prayer composed by a state school board was unconstitutional (*Engel v. Vitale*). The following year, the Court overturned state laws encouraging the reading of selected scriptures at the outset of the public school day (*Abington v. Schempp* and *Murray v. Curlett*). According to a report of the Committee on the Judiciary of the United States Senate, these cases rendered laws in more than forty-one states unconstitutional.

Advocates of this recent interpretation of the establishment clause generally rely on Thomas Jefferson's statement about the "wall of separation." Although the Founders were ambivalent concerning the appropriate relationship between government and religion, historical inquiry supports the thesis that these great leaders did not mean the First Amendment to erect an impenetrable wall between church and state. Jefferson himself, when prescribing curricula for the University of Virginia, planned to include religious teachings in a way calculated to encourage morality and a belief in God

while avoiding preferential elevation of one sect over another. Either Jefferson's "wall" was easy to climb, or he agreed with Madison that the establishment clause merely prohibited creation of a theological republic.

The controversial Supreme Court rulings on the First Amendment have spawned concerted efforts in recent Congresses to restore the historic meaning of the establishment clause. During the Ninety-Eighth Congress, a constitutional amendment restoring the right of states and localities to authorize voluntary school prayer garnered fifty-six votes in the Senate—a solid majority, but still short of the two-thirds necessary for approval. This majority vote will certainly perpetuate the effort to reverse the Supreme Court's rulings by constitutional amendment.

The effort in Congress is not limited to school prayer debate. As chairman of the Constitution Subcommittee, I have witnessed the introduction of hundreds of constitutional amendments for congressional consideration. In recent years, the bulk of these amendments have been proposed, not to reform the Constitution, but to restore the intent of the Framers to the words of the Constitution. Regardless of the merits of each of these proposals, it is significant that the advocates of most current constitutional-amendment proposals state as their objective the restoration of the Constitution's original meaning that has been altered by subsequent court interpretations.

Some recent decisions of the Burger Court have permitted accommodations between government and religion, such as allowing chaplains to be employed by legislatures, allowing tuition tax credits for parents of children attending private religious schools, and allowing local governments to sponsor and exhibit nativity scenes. Nonetheless the "wall of separation" doctrine continues to bar or threaten to bar many important expressions of religious values from public life. The original intent of the establishment clause—that Congress must remain neutral between competing religious views—has been transformed into the notion of neutrality between religion and irreligion. This position, as stated earlier, is rather difficult to reconcile with the opinions of direct participants in the drafting of the Bill of Rights. For instance, George Washington stated in his first inaugural address that our government cannot afford to be neutral concerning "the eternal rules of order and right which Heaven itself has ordained." Justice Potter Stewart correctly apprehended that the Supreme Court decisions deprive American children of "the opportunity of sharing in the spiritual heritage of our Nation" and that "religion is placed at an artificial state-created disadvantage" in our public institutions. Again, the current regime is hard to square with de Tocqueville's observation that religion was America's "foremost political institution."

It is startling to compare the observations of modern immigrants and visitors such as Alexander Solzhenitsyn and Arianna Stassinopoulos with those of their predecessors, de Tocqueville and Grund. At Harvard, Solzhenitsyn lamented: "How did the West decline? . . . I am referring to the calamity of a despiritualized and irreligious humanistic consciousness . . . It will exact

from us a spiritual upsurge." Stassinopoulos, former president of Cambridge University, wrote: "The delegation of religion and spirituality to the irrational has been one of the most tragic perversions of the great achievements of Western rationality, and the main reason for the disintegration of Western culture." These warnings, which echo 200 years later the Anti-Federalists' and Framers' plaintive cries, should awaken us to the danger of forfeiting the advantages of a government backed by virtue.

When Congress enacted my bill establishing a commission to commemorate the Bicentennial of the Constitution, it noted that "the maintenance of the common principles that animate our republic depends upon a knowledge and understanding of their roots and origins." Perhaps in no other area is our contemporary understanding of the roots of the Constitution's principles more lacking than in regard to the role of public virtue and the government's tacit approval and encouragement thereof in perpetuating our cherished liberties. With all our generation's emphasis on liberty and hu-

man rights, the Framers' vision that the flower of freedom is nourished only in a virtuous garden seems to have eluded us. Fortunately, this Bicentennial commemoration offers us an opportunity to reinvigorate our national commitment to these basic principles.

It is as true today as it was 200 years ago that America's future depends on her people's capacity for self-governance. America is only as strong as the character and will of the people who comprise it. If ever more Americans are content to lean than are willing to lift or if more are content to surrender than are willing to defend freedoms or if more are content to cheat than are willing to enforce the law, freedom as we have enjoyed it will soon become as much a relic of history as the glory of Rome and Greece. We carry the obligation to pass to our children the freedoms entrusted to us. Accordingly, we must be as committed to principles of virtue as those who founded our republic. If we are so committed, nothing can prevent our nation from one day celebrating the 400th anniversary of the signing of the Constitution. NF

BLAUSTEIN—continued from page 17

is the most pervasive. Further illustrations of United States constitutional influence as a result of military intervention are found in Cuba, Panama, Haiti, and South Vietnam, and possibly other nations as well. Of course, this is a manifestation of colonialism. And this came from the nation which, via its great Constitution, had solved the problem of colonialism!

Commager wrote that:

No Old World nation had known what to do with colonies except to exploit them for the benefit of the mother country. The new United States was born the largest nation in the Western world and was, from the beginning and throughout the 19th century, a great colonizing power with a hinterland that stretched westward to the Mississippi and, eventually, to the Pacific. By the simple device of transforming colonies into states, and admitting these states into the union on the basis of absolute equality with the original states, the Founding Fathers taught the world a lesson which it has learned only slowly and painfully down to our own day.

United States influence on the post-World War II constitutions of Germany and Japan are too extensive and too well known to be repeated here.

There was a United States influence in the drafting and implementation of the South Vietnam Constitution of 1967. It was inevitable. Americans were running almost everything in Saigon, and lawyering and constitution making were not to be exceptions. Of this, I can also report on the basis of personal experience.

Constitutional ferment has now hit the Philippines—again. A new constitutional convention will probably be called soon, and after much debate, either new amendments or an entirely new constitution will be forthcoming. But whatever the provisions, they will only be variations on the basic United States theme. The Republic of the Philippines was under American sovereignty from 1898 to 1946, and a Commonwealth Consti-

tution was promulgated in 1935. Several constitutional changes have been made since that time, but they have not diminished the American influence. Indeed, the Philippines has roughly ninety years of experience with United States-style judicial opinions which used United States Supreme Court opinions as precedent. During these years, American models provided guidelines for much of the legislation there.

Thus far we have considered only part of the story of the influence of the United States Constitution. We have not even raised questions concerning the extent to which commentators have ignored this influence. We also have not considered the extent to which foreign leaders perceived the Constitution's influence as inconsequential or even detrimental to their countries. Why, for example, did stable government and the blessings of liberty fail to take root in the countries of South and Central America which became independent of Spain early in the nineteenth century and employed various copies of the Constitution? We have also avoided allusions to the many ways in which the United States Constitution has been improved upon both in rites of passage and through pragmatic experience.

Such studies as we have undertaken possess three-fold significance. First, by examining the influence of United States constitutional concepts abroad, we can learn which have traveled well—and are thus best for export. Second, by studying how the ideas of the United States Constitution fared in other times, in other societies, and under other circumstances, we can gain greater insights into our own understanding of the Constitution. Third, in an era of competition in the world of ideas, we will be organizing the evidence of the successes—and failures—of American ideology in order to proselytize individuals who must first understand and appreciate before accepting and adopting the rule of constitutional law. NF

Wade H. McCree, Jr.

Civil Liberties and Limited Government

Lee Anderson



Supreme Court, west pediment.

Revolutions, and even less fundamental political upheavals, often release, far beyond the expectation of the participants, the forces that hold the social order together. History records instance after instance in which revolutionary leaders lost control of their enterprise, resulting in a new regime that was often less desirable than the one overthrown. Many patriots who have sown the wind have reaped the whirlwind.

The personal and individual goals of the several leaders of the American Revolution were varied, but there was an overwhelming consensus about securing for the people a body of rights, painted with a broad brush in the Declaration of Independence. In his characteristically persuasive language, Justice Louis Brandeis declared in his famous dissenting opinion in *Olmstead v. United States* (1928):

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

To protect this "right to be let alone," the Framers of the Constitution were determined not to permit the power of government to be concentrated anywhere in sufficient magnitude to tempt anyone to its autocratic abuse. The proposed national government, which was to avoid the ineffectiveness of the weak government under the Articles of Confederation, was to be one of limited authority ceded to it by the sovereign states and granted no more power than was absolutely necessary for an efficient central government.

But even this design of federalism was not thought to afford sufficient protection from the apprehended possible abuse by a national government. Thus, the Framers

apportioned the power ceded by the states among three separate branches.

Even within the coordinate branches there was a further dispersal of power. For example, the Constitution provided that there should be two houses of the national legislature, each to be elected by different constituencies for different terms. Members of the House of Representatives were to be elected by popular vote for two-year terms, and members of the Senate were given six-year terms so that no more than one-third would be chosen biennially; they were to be selected, not by popular vote, but by the legislatures of the several states. Also, although each state regardless of population was to have two senators, the number of representatives would be determined by the population of each state according to a formula that excluded Indians and included three-fifths of "other Persons," the anomalous circumlocution for "slaves"—a word that could not be written into a charter of liberty.

Still, these provisions, designed to avoid a concentration of power, were thought by some Anti-Federalists to be insufficient, and they insisted upon a bill of rights specifically limiting the powers of the central government. Despite the logic of the arguments advanced by the Federalists—that it was unnecessary to impose explicit limitations on the powers of a central government all of whose powers were conferred by express cessions from sovereign states—the risk of rejection of the proposed Constitution persuaded the Federalists to promise the adoption of a declaration of rights to assure ratification without express conditions that might have required a second constitutional convention.

The campaign for ratification was successful, and the Constitution that was approved in 1788 was duly amended by the first ten amendments, the Bill of Rights, on December 15, 1791.

The provisions of the Bill of Rights are familiar to most Americans, although many may have forgotten that they were originally interpreted as limitations only upon the power of the central government and were not deemed applicable to the states. Many of us may not recall that Connecticut until 1818 and Massachusetts until 1833 imposed taxes to support an established state church.

As amended by the Bill of Rights, the Constitution can be regarded as having accomplished three goals. It

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decided what powers the states would cede to the central government, it allocated these powers among the three branches of the federal government, and it imposed specific limitations upon federal power.

A few limitations imposed on the powers of the central government are found in the original articles of the Constitution. For example, following the powers expressly conferred on the Congress in Section 8 of Article I, several express prohibitions are set forth in Section 9. The Congress is forbidden to suspend the privilege of the writ of *habeas corpus* except in case of rebellion or invasion, to pass a bill of attainder or *ex post facto* law, to impose a capitation or direct tax except in proportion to population, to tax articles exported from any state or to prefer the commerce of one state over another or to grant titles of nobility. Also forbidden was the power to prohibit the importation of slaves before 1808, but again the provision carefully avoided the use of the word "slavery" in the national charter.

These limitations for the most part did not affect individual civil liberties and were augmented by the several provisions of the Bill of Rights which forbade the Congress to establish a religion, to prohibit the free exercise thereof, to abridge the freedom of speech or of the press, or to deny the right of the people peaceably to assemble and to petition the government for a redress of grievances. It also prohibited infringement on the right to keep and bear arms, forbade the quartering of soldiers in homes in peacetime, and guaranteed freedom from unreasonable searches and seizures; it mandated grand jury indictment before prosecution for capital crimes; it forbade double jeopardy and self-incrimination; it forbade the deprivation of life, liberty, or property without due process of law and prohibited the taxing of private property for public use without just compensation. It guaranteed a speedy and public trial by jury in criminal cases, mandated the right to confront adverse witnesses, forbade excessive bail and the infliction of cruel and unusual punishment, and, in civil trials, ensured the right to a jury except in petty controversies.

The Constitution amended by the Bill of Rights was clearly an instrument designed to protect minorities, whether political, religious, economic, or ethnic, from possible tyranny at the hands of any majority that might control the central government. After the Supreme Court took on the role of interpreter of the Constitution, the history of civil rights became inseparable from the history of the Court. Viewed as an anti-majoritarian document, the charter served well the development of the fledgling heterogeneous nation.

The Civil War dramatically marked the beginning of a shift in the locus of power from the states to the central government. The Thirteenth, Fourteenth, and Fifteenth amendments (the Civil War amendments) banning slavery, conferring national citizenship, forbidding the denial of due process, guaranteeing equal protection of the law, ensuring the privileges and immunities of national citizenship, and providing the right to vote regardless of

race or previous condition of servitude were all limitations on the power of the states.

Although clearly intended to accord full citizenship to former slaves, the Fourteenth Amendment was not so limited in its language; and its guarantees of equal protection and due process were asserted by the emerging entrepreneurial class that was leading the Industrial Revolution in America. So thoroughly was the Fourteenth Amendment preempted by the business community that its original purpose was lost sight of, and in 1896 the states were told in *Plessy v. Ferguson* that black people might be consigned to separate conveyances and other public or regulated activities so long as the separate facilities were equal to those reserved for the enjoyment of white people. *Plessy* deferred the original promises of the Civil War amendments for more than a half century during which the Supreme Court applied the Fourteenth Amendment's due process clause to invalidate the legislative efforts of the states to regulate the businesses whose growth and potential for harm alarmed many communities.

This period was known as the era of substantive due process because the courts, instead of regarding due process as mandating only fair *procedures* in regulating rights, regarded certain business activities as insulated from all regulation even though there was no explicit substantive position forbidding legislative efforts to control abuses. The Court would invalidate a statute considered to be arbitrary or unreasonable, and particular attention was paid to legislation that sought to regulate working conditions. One of the leading cases illustrative of substantive due process is *Lochner v. New York* (1905) in which a New York statute limiting the working hours of bakers to ten a day and sixty a week was held to infringe the right of an employer to contract with employees, and thus to deprive the employer of due process.

Similar decisions followed *Lochner*, but the Court was not consistent. For example, in *Mueller v. Oregon*, a statute limiting the workday of women factory employees to ten hours was upheld.

Nevertheless, this period of substantive due process was consistent with the fear of popularly controlled state legislatures. It is quite certain, however, that the anti-majoritarian Framers of the Constitution never contemplated that a business minority would invoke its protections.

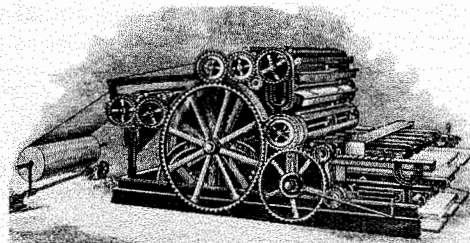
Substantive due process was abruptly abandoned in 1938 when the Supreme Court, upholding a minimum wage statute in *West Coast Hotel v. Parrish*, said, ". . . the community may direct its law-making power to correct the abuses which spring from [the] selfish disregard of the public interest"

Since the abandonment of substantive due process, the Constitution still functions to protect minorities from majoritarian excesses, but only when there are explicit limitations on the states or federal government. This protection has become more significant in recent years because many of the express limitations in the Bill of Rights have been held to restrict the states in the same way in which they do the federal government. These limitations are held to be fundamental and part of

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A. E. Dick Howard

The Constitution and Free Expression



In fifteenth-century England, it was treason to call the king a fool or to suggest that his horse might stumble and break the king's neck. In the sixteenth and seventeenth centuries, trials for political libel were common. John Milton, protesting the licensing of books, wrote in his *Areopagitica* (1644),

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worst, in a free and open encounter?

England's Licensing Act was repealed in 1695, yet the end of censorship brought with it no general freedom of expression. The law of seditious libel remained in full force and effect. As William Blackstone observed,

Every freeman has an undoubted right to lay what sentiments he pleases before the public, but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.

Conviction in such cases—such as John Wilkes's conviction for publishing No. 45 of the *North Briton* (attacking the king's speech in Parliament)—was made easier by the fact that the truth of the allegedly libelous statement was no defense. Indeed, as the saying went, "The greater the truth, the greater the libel."

In the American colonies, the glimmerings of a less restrictive application of the law of libel appeared in the famous trial of John Peter Zenger, a newspaper publisher. New York's governor, William Cosby, was incensed by Zenger's scathing attacks on his policies and had Zenger arrested. At Zenger's trial for libel, his attorney, Andrew Hamilton, offered to prove the truth of the statements in Zenger's paper, but, following English law, the judge maintained that the jury could decide only whether Zenger had in fact printed the statements; whether they were libelous was for the judge to decide. In an eloquent plea to the jury, however, Hamilton urged them "to see with their own eyes, to hear with their own ears" in returning their verdict. The jury's verdict was one of not guilty.

Libertarian notions of freedom of expression, as they developed in England and America, were closely related to emerging tenets of freedom of conscience. Rooted in the impulses of the Protestant reformation, libertarian ideas flowered more fully in the Enlightenment, the Age of Reason, a time in which thinking about natural law took the form of natural rights of the individual.

Even so, American arguments for freedom of expression at the time of the break with the mother country did not reach the bounds marked by twentieth-century jurisprudence but were shaped within eighteenth-century understandings.

When Virginia's convention, meeting at Williamsburg in May, 1776, instructed its delegates at Philadelphia to introduce the resolution for independence, they also formed a committee to write the first American state constitution. Largely the work of George Mason, that constitution's declaration of rights declared that "any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right . . ." In form, at least, this statement—abjuring prior restraint but preserving limits upon the "abuse" of expression—was not far from the principle stated by Blackstone.

A little more than a decade later, the Convention which had assembled at Philadelphia to revise the Articles of Confederation instead produced a new Constitution. When that document went to the country for approval or rejection, the lack of a bill of rights, as much as any other issue, became the stumbling block to ratification. Many of the ratifying states followed the example of the Massachusetts convention and drew up lists of specific amendments. On Virginia's list, for example, was an amendment which declared:

That the people have a right to freedom of speech, and of writing, and of publishing their sentiments; that the freedom of the press is one of the great bulwarks of liberty, and ought not to be violated.

At the first session of the Congress in 1789, James Madison moved to add a bill of rights to the new Constitution. Tutored in the precepts of the Scottish Enlightenment, Madison offered a free speech amendment which clearly seems to have been intended to give protection far beyond that given by the common law as expounded by Blackstone. His draft stated that "no

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State shall violate the equal rights of conscience, or the freedom of the press." After debate, however, Congress agreed upon the language now found in the First Amendment:

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

Such language—a few words couched in general terms—was hardly self-defining. It is clear that the First Amendment was aimed explicitly at the federal government, not at the states; it was only in the twentieth century, using the Fourteenth Amendment as a vehicle, that the Supreme Court would hold the states to the prohibitions of the First Amendment. The breadth of the protection for expression conferred by the amendment was less than clear.

Zechariah Chafee, Jr. has argued that the framers of the First Amendment intended not only to prevent censorship, but also to wipe out the common law of sedition and make it impossible to punish criticism of the government where speech was not brigaded with direct incitement of lawbreaking. Leonard Levy, however, doubts the framers intended to go so far. In his view, a broad, libertarian theory of freedom of speech and press—a view of the kind articulated by Madison—did not begin to take hold in the United States until Thomas Jefferson and his party fought against the Sedition Act of 1798, an act which led to the prosecution and jailing of a number of newspaper editors for views hostile to policies of the ruling Federalist party.

In the nearly 200 years since the First Amendment's adoption, it is remarkable that virtually all of the judicial gloss on the amendment has come in the past sixty or so years. The Supreme Court's first significant occasion to decide just what protection the Constitution gives to expression came in cases arising out of prosecutions under antismob statutes enacted around the time of the First World War.

The early cases produced Justice Oliver Wendell Holmes's thesis that speech could be curtailed only if it created a "clear and present danger" of a substantive evil within the power of Congress to prohibit. Holmes argued in a 1919 case (*Abrams v. United States*) that "the best test of truth is the power of the thought to get itself accepted in the competition of the market" By and large, the Court in the subversion cases was deferential to legislative power. Hence, in a series of cases the Court upheld convictions under the Espionage Act for expression, some of which (such as publishing leaflets denouncing production of war materiel which could be used against the Bolsheviks in Russia) struck Holmes and Justice Louis Brandeis, dissenting, as not presenting the requisite "clear and present danger." In the cold war years following World War II, the Court upheld (in *Dennis v. United States*, 1951) Smith Act convictions of persons charged with conspiring to advocate and teach the overthrow of the United States government.

The subversion cases involved the Court's interpretation of statutes directed at the *content* of expression.

Much of the Court's First Amendment jurisprudence, by contrast, turns on the regulation of the time, place, and manner of speech—how, where, to whom, or in what way something is being said. Frequently, these cases have arisen because an unpopular group has taken to the streets to express unpopular views. Thus, when a Jehovah's Witness played anti-Catholic records on the streets of New Haven, Connecticut, and was charged with breach of the peace, the Court found no "clear and present danger" to the public peace and order and hence reversed his conviction (*Cantwell v. Connecticut*, 1940). Nevertheless, in another Jehovah's Witness case (*Cox v. New Hampshire*, 1941), the justices made it clear that a locality, in regulating its streets, may require permits for parades or otherwise regulate the time, place, and manner of speech so long as it does so in a nondiscriminatory fashion.

The "public forum" cases became more complex when civil rights activists in the early 1960s were arrested for marching or demonstrating in southern cities and towns. A majority of the justices found various grounds for overturning those convictions, some of which involved protests in traditional places such as streets and public parks, others of which were mounted in less obvious "forums" such as the reading room of a public library. The Court's patience reached its limit, however, in a 1966 decision (*Adderley v. Florida*) in which, five to four, the justices held that there was no First Amendment protection for a demonstration on the grounds of a local jail.

In both the subversion cases and the "public forum" decisions, there was no question that expression of some kind was going on; indeed, the expression concerned such issues as war and civil rights—surely the kind of subjects of debate which should trigger First Amendment scrutiny. The typical question in these cases is whether the expression sufficiently threatens a substantial state interest, such as public order or the public's use of the streets.

Analytically more elusive, however, are those cases in which the Court has been asked to decide whether a particular kind of expression even presumptively falls within the First Amendment. Put another way, what is meant by "speech" or "the freedom of speech" in the First Amendment?

Frequently the Court has taken a kind of "defining indefining out" approach to speech cases. In *Chaplinsky v. New Hampshire* (1942), Justice Frank Murphy commented that punishment for certain classes of speech has "never been thought to raise any Constitutional problem." As examples, Murphy cited "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words" Murphy reasoned that such utterances "are of such slight social value that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

This "Murphy's law" has an appealing simplicity about it. In practice, however, as forty years' litigation has revealed, the effort to create neat categories of protected and unprotected speech has proven maddeningly difficult, if not impossible. For example, in *Cohen v. California* (1971), an opponent of the Vietnam War

was arrested for wearing, in a courthouse corridor, a jacket attacking the draft with a less-than-polite, four-letter word. The state argued that it had the power to punish for the use of "offensive" speech, but Justice John Marshall Harlan could not concede the state the power to "cleanse public debate"; as he put it, "One man's vulgarity is another's lyric."

State efforts to ban traffic in pornography present another judicial quagmire. In *Roth v. California* (1957), Justice William Brennan stated that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance"—pornography is hence unprotected by the Constitution. Yet in case after case, the justices have struggled with first one approach, then another, trying to draw a manageable line between that which is protected and that which is not. For a time, beginning in 1967, the Court simply avoided the issue by deciding a number of obscenity cases per curiam, without full opinions. Only in 1973 did a majority of five justices finally agree on one approach to obscenity cases; Chief Justice Warren E. Burger stated that, among other things, to be declared obscene the material in question must lack "serious literary, artistic, political, or scientific value." But the last word in obscenity cases has by no means been written. Obscenity is to be judged by "contemporary community standards," and the Court has held that the relevant standards need not be those of the Nation or even a state; they may reflect the tastes and opinions of local communities. Hence the actual application of the Supreme Court's guidelines continues to require case-by-case adjudication, with local prosecutors and local juries playing a major role.

Libel cases have presented similar problems of definition. Whatever the First Amendment may have done to throttle the power of government to punish seditious libel, it was long assumed that conventional libel actions—one person's claiming that another had defamed the former's reputation—fell outside the ambit of constitutional adjudication. But in 1964, in *New York Times v. Sullivan*, the Court held that, in the interest of "robust and wide-open" debate on public issues, when a "public official" brings a libel action against critics of his official conduct, he must prove "actual malice"—that is, that a statement was made with knowledge that it was false or with reckless disregard of whether it was false. The *New York Times* rule was subsequently extended to "public figures," and in a series of sequel cases the Court has attempted definition of just who is a "public figure."

First Amendment decisions such as those arising out of obscenity prosecutions or libel actions thus present the question of whether a verbal communication, which might be speech in a layman's eyes, is nonetheless not considered "speech" in terms of the First Amendment. In contrast, other cases present the question whether nonverbal activity—symbolic expression—may be protected "speech" under the First Amendment. For example, in 1969 (*Tinker v. Des Moines School District*), the Court found First Amendment protection for high school students' wearing of black armbands in school as a form of protest against the Vietnam War.

Attempts to regulate how money may be spent in

political campaigns also raise First Amendment issues. In *Buckley v. Valeo* (1976), the Court struck down several provisions of the Federal Election Campaign Act of 1971, as amended. An appellate court had upheld the act's provisions by viewing them as restricting "conduct" rather than "speech." But the Supreme Court stressed the link between the amount of money spent on a campaign and the ability to communicate political issues. In the Court's words: "This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money." The Court's *Buckley* opinion gives new meaning to the old notion that "money talks."

Those who read the Supreme Court's First Amendment opinions may find themselves overwhelmed, ironically enough, by words—by tests, by standards, by slogans. An opinion by the latter Justice Harlan or Justice Felix Frankfurter teaches that in First Amendment cases there are no "absolutes," that claims of protection for expression must be "balanced" against governmental interests involved. An opinion by Justice Hugo L. Black retorts that the framers of the First Amendment did all the "balancing" that was required, that the words "no law" in the amendment literally mean "no law." Justice Holmes tutors us on "clear and present danger," but later opinions grope for ways to apply that phrase—or even to decide whether it is helpful at all as a guide.

It is simply not possible to reduce the First Amendment's meaning to a single bromide. One reason is that the ambit of constitutionally protected expression has spread far beyond the area that most concerned many of those who voted to adopt the amendment. The amendment's protection for speech reaches above all to expression related to the political process, to dissemination of ideas about self-government by a free people. But the cases of recent decades make clear that, whatever the framers' intentions, the First Amendment today reaches far beyond purely "political" speech. For example, until the 1970s it was widely assumed that "commercial" speech (such as commercial advertising) fell altogether outside the protection of the First

“. . . in case after case, the justices have struggled with first one approach, then another”

Amendment. That assumption proved in error when the Court in 1976 (*Virginia Board of Pharmacy v. Virginia Consumer Council*) struck down a state law forbidding the advertising of the prices of prescription drugs. The state defended the statute as helping to maintain high professional standards among pharmacists. The Court, however, found a strong public interest in the free flow of information regarding commercial decisions. The state would have to shore up professional standards through some means other than a "paternalistic" one which operated to keep consumers ignorant of prices among competing pharmacists.

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A Publisher Reflects on Freedom of the Press

Tom Johnson

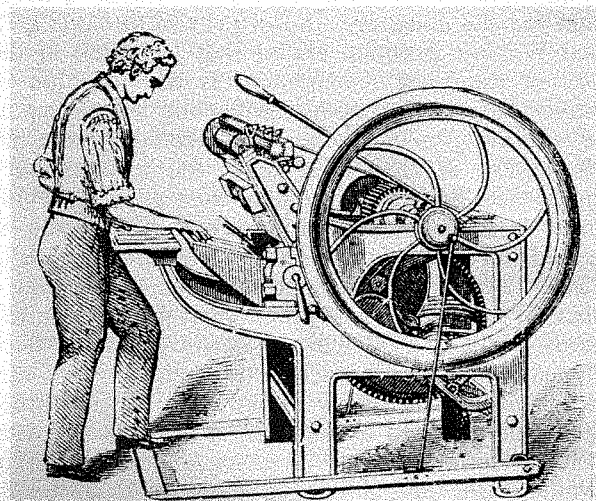
The Constitution is explicit about its guarantees of the right of free expression: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." That is it: no more, no less. The brevity of the principle was intentional. Our Founders' opposition to a restricted press—the press of broadsheets and pamphlets, of defiant handbills and seditious journals—helped to make us free; the Framers believed an unfettered press would help to keep us free.

The Constitution protects the press from capricious law, but our independence has its price: the press must be its own policeman. On the whole range of issues vital to the integrity of journalism—accuracy, fairness, responsibility, accountability—we fundamentally make the rules, and we decide how (and whether) they are enforced.

As a publisher, I am acutely aware of the many disputes between the media and their critics. Some of this criticism is deserved; some is not. Criticism of the press is as old as the press itself. A free press that does its job is bound to irritate segments of society. The peril we face is that some of these critics attempt to translate their irritation into action that would limit our rights. We see this threat in ever-increasing libel judgments around the country and in continuing efforts to restrict press access to judicial proceedings and to government information.

We have earned some of this response through occasional lapses in editorial judgment, and our occasional failure to meet reasonable standards of accuracy and fairness has led many to suspect the press's own ethical commitments. Not long ago the *Los Angeles Times* conducted a national poll on the public's perception of the press. Nearly 40 percent of the respondents said they think that the mass communications industry misuses its great power by acting irresponsibly. Nearly 20 percent said that abuses by the media should be dealt with more sternly by government regulators. Only one in four thought the media to be essentially ethical; one in three said we are fair in our handling of the news.

Such perceptions suggest that a considerable segment of the public sees the press as an artful dodger—darting out from the sanctuary of shield laws and the First Amendment, using our powers over public opinion to do mischief, and then darting back to shelter to escape retaliation. Such a characterization is unfair and inaccurate, and it misrepresents the reasons for the Constitution's protection. But it is not entirely unexpected: the argument that people resent the bearer of bad news has considerable merit, and the news is by no means always good. The press is the institution we love to hate, and its



role as public watchdog and advocate is not likely to make it consistently popular.

The press has its weaknesses, and these must be acknowledged. We seek excellence, but no institution can rid itself of all imperfection. There indeed have been violations of journalistic ethics. Because the transgressions of one reflect poorly on all, each violation sounds an alarm throughout the profession. Instead of offering excuses or retreating behind the well-worn rhetoric of the people's right to know, we must always have the courage to recognize our errors and the wisdom to seek ways to correct them. Increasingly, I think, some newspapers are beginning to do that. Newspapers operate in an ethical climate wholly different from—and more demanding than—the climate of just a generation ago, and I find that encouraging.

Our critics seem to forget that it is from the press itself that they learn about our transgressions. When *Washington Post* reporter Janet Cooke was found to have fabricated a story about an eight-year-old heroin addict, it was *The Washington Post* that carried the most detailed story on what had happened. When the Securities and Exchange Commission began investigating charges that a *Wall Street Journal* reporter who wrote a market column had leaked information to Wall Street brokers before publication, it was *The Wall Street Journal* that published a long, detailed story about the case on its front page. Nor are such remedial

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actions confined to the press. In response to criticism that network vote projections have unfairly influenced elections, ABC News recently decided to refrain from predicting the outcome of races until the polls have closed in each state being analyzed.

We need no new laws, executive orders, or restrictive court decisions to regulate the press. That would be odious, unconstitutional, and inimical to the best interests of our democratic way of life. Nor do I think such mechanisms as ombudsmen or news councils can or should replace the judgment of publishers, editors, and reporters.

The fact remains that some members of our profession have been guilty of conflicts of interest or of presenting fact as fiction or of irresponsible or prejudicial reporting or of other kinds of improper or unethical behavior. There are fewer of these incidents today than in the past, but their repercussions are felt throughout our profession. These are serious violations of the trust vested in our free press by the public and by our constitutional system.

The press can do little to allay the suspicions and hostilities of those in government, business, or elsewhere in our society who have an ax to grind against it. But we should—we must—try to ameliorate the legitimate resentments that many others have toward us. Those resentments will persist until we are consistently willing to apply to ourselves the same standards we demand of others. We cannot demand access to the councils of government, to the courts, and to corporate boardrooms, and then turn away critical writers who come to our own doors with potentially embarrassing questions. Nor can we demand answers of those we interview and then say “no comment” or “we stand by our story” when we ourselves are challenged. In short, we cannot insist on accountability from other powerful institutions in our society while simultaneously rejecting accountability for ourselves.

Newspapers are among the strongest influences in the communities they serve, and the growing number of one-newspaper towns requires a stronger commitment to public accountability than we have displayed in the past.

The changing nature of the newspaper industry continually challenges our policies. In the more than 1500 cities in the United States with daily newspapers, only 27 have two or more under truly competing, indepen-

dent ownership. The ten largest newspaper chains (including Times Mirror, which owns the *Los Angeles Times*) have one-third of the Nation's readership: 20 million out of 60 million. The influence of the three major television networks is even more pervasive, which is particularly apparent during a presidential election year.

We are entirely correct, and we fulfill our constitutional obligation, when we expose folly, untruthfulness, and conflicts of interest in government or when we challenge secrecy in the judicial system. The press can demonstrate how corporate decisions may spawn new problems or have unforeseen (and sometimes destructive) consequences. That is the role the Constitution guaranteed to a free press.

Unfortunately, good intentions and practices do not guarantee success. Even if we are consistently candid about our shortcomings, and as forthright as we expect others to be, a skeptical segment of the public is likely to continue to consider us just another powerful institution, enjoying the unfair advantage that comes with our unique constitutional protection.

But a responsible press will serve the public interest, not private privilege; as long as our ethical principles place primary emphasis on that end, we will annoy as regularly as we will satisfy, and assaults on our rights and credibility will assuredly continue.

I believe that most of the people—the ultimate beneficiaries of a free press—continue to look to us as a guarantor of their liberty. This support demonstrates a fundamental public confidence in our ability and determination to do our job, and do it well, within our constitutional framework. This is a source of satisfaction. It should not be an invitation to complacency.

If Congress shall make no law abridging the freedom of the press, the public must expect us to maintain standards worthy of that freedom. I believe that, by the measures on which we judge any institution in our society, the press has done so. Because we are exposed to public scrutiny every day, we have a particular responsibility to meet those ethical standards we have set for ourselves. Freedom is hard won and easily lost. Truth and fairness are the values to which a free society must demand devotion. We know what those standards ought to be, and it is the continuing responsibility of the press to strengthen our collective resolve to adhere to them. **NF**

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the concept of due process that the states must observe in obedience to the Fourteenth Amendment. Among them are the rights of freedom of speech and the press, of association and worship, and of freedom from an established religion guaranteed by the First Amendment. Also binding on the states are those rights contained in the Fourth, Fifth, Sixth, and Eighth amendments which comprise a constitutional minimum code of criminal procedure.

In recent years, there has occurred what some observers regard as the revival of substantive due process—the discovery of a right to privacy found in the penumbra or shadows cast by the several amendments of the Bill of Rights and in their emanations. *Griswold v. Connecticut* (1965) invalidated a state statute making it

a crime to aid in the use of a contraceptive drug or device. This case was followed a decade later in *Roe v. Wade*, which invalidated a Texas criminal statute outlawing abortions.

Thus the Court, by interpreting the Constitution as a living charter requiring frequent interpretation to enable it to address new problems, uniquely permits an equilibrium to be maintained between liberty and constraint in the context of tradition and precedent. There is still the unfinished national agenda of extirpating the residual impact of the heritage of slavery, but the Court has announced the new rules, and their implementation lies in the other two branches. The formula has proven itself for two centuries, and it has made the American Revolution secure. **NF**

“We the People” *David Mathews*

“We the People . . . do ordain and establish” That is how our Constitution begins. The opening phrase of our Constitution is no mere rhetorical flourish. The quintessential issue for a democratic government is the relation of the people to the government—and of the government to the public’s rights and interests. It is a relationship more fundamental than that between branches, more fundamental than any question of procedure, more telling than any division of power among levels of government.

No reflections on the Constitution would be complete without revisiting the central doctrine of popular sovereignty, examining its application to our modern, special-interest state, and asking what is now required to inform the public’s discretion—that being the corollary to the principle of popular sovereignty. Our constitutional system requires the sovereign to be a reasonable and reasoning public, not an undiscerning crowd. The current state of the relation of the people to the government is a cause for both alarm and cheer.

The principle itself is straightforward and, as an ideal, presents few problems. The people are the ultimate authority for government; they are sovereign. And theirs is not merely power in the abstract; they participate—they are the electors, the jurors, the final judges. The problems are more in the application of the principle.

This principle’s greatest test in recent history came when Americans saw the German people, while exercising their sovereign rights, vote away their rights to Adolf Hitler. The harsh lesson of that tragic era was that the majority could be terribly wrong. Our response was to emphasize that the Constitution established a representative republic, not a direct, Athenian democracy. We became cautious about equating the public interest with the majority’s opinion. But with all our reservations about popular sovereignty in practice, we have seen that practice increase. It began almost as soon as the ink on the Constitution was dry. We eventually moved to the direct election of senators, to the recall of mayors, to ballots that now put every conceivable issue before the public. We do more than vote these days: thousands of us serve on commissions and committees, and the force of public opinion shapes national policy as never before. “We the People” does not merely echo a revolutionary sentiment; it reflects a common practice. Of course, it is not a practice which engages as effectively as it should all of the people all of the time. But more universally, more directly, and, to our amazement, more successfully than we ever thought possible, we exercise the rights of a sovereign people.

The problems today in the practice of popular sovereignty go beyond the question of whether the principle

ought to be applied at all or whether it should be applied directly. Whatever our intentions, we are a democratic state. The difficulty is that we are more than that. We are also a bureaucratic state, a welfare state, an information state, a scientific-technological state, a special-interest state. Each of those characterizations poses its own difficulties for the intelligent exercise of the public’s rights.

What does it mean for the public to participate in setting policy when that policy is made not only in open legislative halls but also in closed bureaucratic suites? What does it mean for the public to be informed when it is engulfed by a flood of issues, pushed forward on a tidal wave of news? Does the public even exist when atomized into single-issue groups? Is an ancient ideal made obsolete by modern circumstance? And if that is the case, what is the first principle now? Will a collection of practices and rules of procedure suffice to make government legitimate? Will the sum of special interests substitute for the public interest? What is to be our theory of government and how are we to understand ourselves these days? These basic questions send us back to the basic issues of democratic government.

It would seem impossible to have a theory of public administration without a theory of the public; but that is what we have. Democratic practice gives way to administrative order every day—not maliciously or systematically, but willy-nilly. We have thought little about democratic remedies for bureaucratic ills.

The real problem with the bureaucratic state is that it obscures the very idea of the public, so much so that the words “public” and “government” are used interchangeably. We have forgotten that the public and the government are not the same. What is a “public” official? To most people, a public official is a mayor or a governor or a legislator—that is, a “government” official, elected or appointed. This confusion is unfortunate as it robs us of a useful perspective.

The implication of the doctrine of popular sovereignty is that the legitimate authority for government rests somewhere other than in government itself. Put another way, our government is not the authority for itself, it cannot create itself. There is something prior to, more basic than, government. In the beginning was the *public*, not the government.

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One is not being anti-government to recognize that the public came first. While the public and the government are not synonymous, there is a very important relationship between them, somewhat like the relationship between the Pilgrims and Puritans. All Pilgrims were Puritans, but not all Puritans were Pilgrims. All governments are public (or have their origins in publics), but not all publics are governments. The public is pre-governmental, even pre-political; it is the environment out of which governments grow. Civic organizations and voluntary associations, the church's softball league and the college students' voter registration drive, the town meeting and the fund drive for a day care center—all of these are expressions of our public life. The public life is our shared life in all its forms.

We may forget what a letter of marque is (see Article I, Section 8 of the Constitution), but we cannot afford to forget what the public is. What we participate in first, where we exercise our sovereignty most directly, is in shaping our public life. Participation in our nation's life, therefore, does not mean merely responding to the government. As a matter of fact, participation is best an initiative, not a reaction. No matter how large the bureaucracy and the government become, we cannot let them obscure that central truth—for their sakes as much as ours.

A second dilemma for modern democratic practice is that, even with as much information as we have, we are not sure that the public discretion can be sufficiently informed to deal with the plethora of issues, technicalities, and interrelations that are part of any policy decision in the modern world. The American people, de Tocqueville recognized, genuinely love their country. Yet, because the task of being sufficiently informed to act in its best interest posed such difficulties, he feared that the people would be prone to "hasty judgments." This fear persists. The principal difficulty, however, is not the inadequacy of the press or the unavailability of news; it centers, rather, on the question of what it means to be "informed." Because experts, scientists in particular, are so involved with policy questions, the assumption often is that what they know is what the public needs to know if it is to make sensible judgments. That may not be so, given the changes in the way the public involves itself in policymaking these days. The contrary assumption—that the public has to be spooned a pabulum of information—is equally questionable.

The public, in ways not always easy to understand, comes to form national attitudes that set the parameters within which successful policy can be made and sustained. As former Secretary of State Dean Rusk said recently,

At the end of the day, the American people are going to have to decide. No president can pursue a policy for very long without the support and the understanding of the Congress and the American people. That's been demonstrated over and over again . . .

How the public learns about its business and moves from its first opinions and myriad heterogeneous interests to form a common judgment—a broad and sustainable national attitude—is as universally consequential as it is almost uniformly obscure.

The first and last stages of policymaking are easy to identify. In the first, issues are raised and, with heavy media involvement, the message gets out that something is wrong. A problem becomes an issue: our productivity is declining, our Social Security system is not secure, our schools are failing us. In the last stage, public issues are taken up by the political system. Bills are introduced and debated. Laws are passed—the Job Training Partnership Act of 1982, the Social Security Reform Act of 1983, the National Defense Education Act of 1958. This is what the textbooks tell us, but we know that this is not the whole story. Between the first and last stages, the public listens, learns what it can, discusses amongst itself, changes its mind freely, tests what the experts say against both personal experience and community values, digests information, and finally makes a judgment. It is this second, public stage that sometimes assumes central importance; we saw it, for example, in the public reversal of government policy in Vietnam. But on some issues the public does *not* debate, does not listen, does not learn.

"Our heritage is a useful reminder, a string tied on our collective finger, to help us remember ways of thinking about politics that enrich impoverished practices."

The models we use for informing the public rely largely on providing more information. But more information alone does not necessarily result in public understanding or a change in attitudes. Good information is essential to good policymaking, but the character of the information is also important. Pouring out expert, technical information can even make matters worse because the language and points of reference for experts and policymakers may not be the same as those for the public. The public is no less "expert" but uses a different frame of reference which tends to be expressed in terms of personal experience and values. For instance, to assess the significance of the federal deficit, the public "translates" the issue from the mega-million language of Washington to the everyday language of home mortgage costs.

Information—just the facts—is also inadequate because it does not tell the public what it needs to know most—the range of choices or options. In fact, the political process can prematurely reduce the number of options to the number of major party positions—just two. The public response may be "none of the above" or "all of the above." Neither will do. The public has to face up to unhappy truths and hard policy choices. People have to know the interrelation of issues and the trade-offs involved in alternative approaches. In fact, only when the public knows how the whole system works, how the parts must fit together, do people have the basis for making sound choices.

Compartmentalizing information, as we do issues,

exacerbates the problem. To govern ourselves democratically, we must be able to see the larger context and make sense of what would otherwise be meaningless bits and pieces of information. The "facts" alone can lead to a feeling that the whole world is in a mess. In that frame of mind, people are more likely to react with the passion the Framers of the Constitution feared than with the reason they demanded. Frustrated, the people come to doubt the competence and good intentions of the country's leaders and its institutions. The effects of such a reaction are not likely to be confined to the leaders and institutions of government.

Even though the way the public learns about its own business and involves itself in policymaking is difficult to describe precisely, one thing is certain—informing the public's discretion involves more than informing individual discretion. The education of a public—whether of a community or an entire nation—is not the same as the education of individuals, although the latter helps considerably. The reason is that what a public must know goes beyond what we can give people by instruction. People will understand the personal consequences of a public policy decision with good information; they can be told what the available policy choices are. But there are certain things that people can only learn from one another. To make policy that is truly public, that is in the larger public interest, people must not only have the facts, but they must know what those facts mean to other people, people different from them. Beyond an understanding of differences, an educated public has to find out what is common to all of the different perspectives on an issue, so it can find a basis for action. It is knowing what interests are shared that educates a public.

We need better ways of fostering public learning, ones that translate policy jargon into everyday language, that make the range of choices apparent, that help people put bits of information into coherent frames of reference and that rely on the public debate rather than passive education.

The historic problem in democratic practice has come from what James Madison termed "... a minority or majority, actuated by interest adverse to the rights of others or to the permanent and aggregate interests of the community." We still worry about this problem, as we witness political interest increasingly atomized into special- and even single-issue camps. Factions are natural to a free, diverse people. It has been their untoward effects that have worried us. Madison dismissed these minority factions as merely troublesome. He was more concerned about special interests that were majority interests—prompted by a "zeal for different opinions concerning religion, concerning government . . . (or) the unequal distribution of property." As special interests have deadlocked our political machinery, we have learned that even small factions can be more than merely troublesome.

In its final stages, the process of policymaking fails most often because of special-interest logjams. The recent host of presidential commissions—on subjects as disparate as Social Security and the MX Missile—

exemplify a widespread conviction that the political system is often too immobilized to address the tough issues. Democracies must have broad-based coalitions to balance the influence of factions and to give legitimacy and direction to government. These coalitions are possible only when the shared interests, the permanent interests of the public, are identified.

The theory of public participation, which stems from the principle of popular sovereignty, speaks directly to

"It is knowing what interests are shared that educates a public."

this problem of factions and the need to identify the shared interests that lead to broad coalitions of the public. The public is often thought to be unimportant, present only to be manipulated, because the public is seen as having nothing substantive to contribute by its participation. Nothing could be further from the truth. Public participation is essential in all forms of political life because it contributes what the public alone can contribute—a larger view of how different interests are affected, and thereby a unique sense of the common stake in the business of the day. It is unique because it is nowhere else available.

The crucial step in realizing the public's contribution is to get past "hasty judgments." Initial impressions, personal biases, and special interests have to be worked through in the caldron of serious, disciplined public discussion and melded into second opinions more likely to be shared by others than are personal preferences. It is from these second opinions that people identify commonalities, fashion choices consistent with them, and lay the basis for successful, long-term coalitions—the basis for stable public policy.

Effective participation can unblock logjammed political machinery because it results in coalitions and solutions different from the expedient artifices of special-interest bargaining. The reason is not that participation makes the public mellow: democracies naturally produce a certain disharmony. What is required is not agreement but agreement to act—that is, a common mind to follow a certain course of action while still admitting differences of opinion. Participation, in which the public works through issues and moves from first to second opinions, is effective because it can redefine and accommodate conflicting interests rather than adjudicate or further divide them. Effective participation should produce a basis for action, public or governmental, even when the strongest differences of opinion exist. Not an unrealizable ideal, new problem-solving strategies with a premium on negotiation and participation are now doing just that for state and local governments.

There may be cause for alarm in looking at what has happened to the practice of democratic principles in a country that is dependent on bureaucracies, divided by new forms of factions, and struggling to find better ways of informing the public's

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Betty Southard Murphy

The Commercial Republic

And the Dignity of Work

The Bicentennial of the Constitution gives us a wonderful opportunity to examine our roots and to see whether the greatest experiment in all the world—designed to “secure the Blessings of Liberty to ourselves and our Posterity”—is alive and well as we enter the twenty-first century.

James Madison, the Father of the Constitution, was a patriot and a first-class economic thinker. He was the son of a prominent Virginia landowner. Alexander Hamilton, who insisted that our country start out on a firm financial footing, was born in the British West Indies, the illegitimate son of a drifting trader. Together these two men did more than any others to secure the ratification of the Constitution. Intelligent, energetic, they shared a burning desire to establish a republic such as the world had never seen, one that would benefit all mankind.

Like other intellectuals of their day, the two had studied the works of David Hume and his student and friend, Adam Smith. Idealistic, yet practical, Hamilton and Madison dreamed of creating a new form of government that would guarantee religious and political freedom. But they knew they had to find a way to avoid factional infighting which they feared would spawn civic unrest and perhaps destroy the new government. Madison was convinced, as Smith had been, that in order for society to attain its highest degree of freedom and power, the people's interests in their own well-being—not just spiritual but material—had to be fostered and encouraged.

In other words, if all had an economic stake in the Republic or the opportunity to get one, all would fight to preserve the Republic. As Smith had said—and as Hamilton and Madison believed—by creating a government in which its citizens could in freedom and security pursue their own self-interests, they would provide the framework where people would be “led by an invisible hand to promote an end” beneficial to all of society. John Locke, whose views were also known to virtually every American involved in the forming of the new country, had taught that ownership of property was a natural right.

Aware that the most common ground for unrest in the world had always been the unequal distribution of property, Madison conceived of a new government which through free enterprise would provide all with the opportunity to work, to achieve, and to amass capital.

In order to sell the Constitution to the populace, Hamilton and Madison, assisted by John Jay, wrote eighty-five essays known as *The Federalist* which were

published in newspapers in New York City, one at a time, from October 27, 1787 to August 16, 1788. Recognized as one of the most important political works ever written, *The Federalist's* discussion of the principles of freedom and government, like the Constitution itself, is just as relevant today as it was in 1787.

In *The Federalist* No. 10, Madison warned that the zeal that people have for different opinions leads them to seek reasons to divide into political factions—and if no reasons exist, they invent them. Madison wrote:

So strong is this propensity of mankind to fall into mutual animosities that where no substantial occasion presents itself the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts.

This could be avoided, Madison reasoned, by directing the people's energy into commerce.

Hamilton, who wrote two-thirds of *The Federalist* essays, agreed. “The prosperity of commerce,” Hamilton said in *The Federalist* No. 12, “is now perceived and acknowledged by all enlightened statesmen to be the most useful as well as the most productive source of national wealth, and has accordingly become a primary object of their political cares.”

Both Madison and Hamilton knew that national prosperity would not just happen: it had to be fostered by a constitution which encouraged it and protected it and by legislators who, deep in their souls, believed in it.

Speaking at the Constitutional Convention in 1787, Madison stated that the security of property was among the “primary objects of civil society.” The right of property did not stand alone; it was among the first and perhaps the foremost of personal liberties. It meant then—and still means—that people could work hard and, except for taxes, retain the fruits of their labor for themselves, their families, and their descendants. The government—indeed, no one—could take their property without paying for it.

Secure in their ownership of property, the people would not have to kowtow to political authority, nor

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subjugate themselves in fear of the government. Instead, they could speak their minds and vote their choices without having their property confiscated.

Conversely, the citizens of the colonies now united would support—and fight to defend—a government that allowed them to acquire property and that could not take their property without due process of law.

Hamilton had still another reason for advocating a commercial republic: he believed that if private property were sacred, a strong central government would develop. People would pledge their loyalty to the Nation and not to any particular state. Hamilton's entire philosophy—economic, political, military, and diplomatic—was directed toward making the Nation strong. Madison, in turn, also stressed that the success of the Nation required that the economy be subject to regulation by the political world—the legislative and executive branches—subject to judicial review.

In 1787 when Madison, Hamilton, and the other Founders were developing a political philosophy which would change the course of the entire world, the United States had a population of less than four million people, 90 percent of whom worked and lived on small farms. Nonfarm businesses were truly small businesses, with shopkeepers often having one or two assistants at most. Manufacturing was the work of craftsmen served by perhaps an apprentice or two. In seaports, small shipyards and ship chandlers operated. Even turnpikes and canals were built by small contractors who at first were local farmers and businessmen.

These people had come to America—or stayed in America—because here they could have something unattainable for them elsewhere in the world: the freedom to work and, by the dignity of their own labor, the opportunity to achieve their desires, whatever these might be.

As Hamilton said in *The Federalist* No. 12, the Constitution envisioned the creation of “one great American system”—a large commercial republic. The Framers of the Constitution were wise enough to let the role of government in regulating commercial enterprise evolve with social and economic change. It was not by accident that Article I, Section 8 of the Constitution gave Congress the authority to “regulate commerce with foreign nations, and among the several States. . . .”

When in 1824 the question arose as to what the clause meant, Chief Justice John Marshall, in *Gibbons v. Ogden*, defined commerce to include “every species of commercial intercourse” and laid down the plenary power of Congress over interstate commerce. In other words, if a state law in this area collides with a law validly enacted by Congress, the state law must yield to the law of Congress. Only federal regulation of interstate and foreign commerce could guarantee uniformity. The doctrine stimulated an already growing national economy.

Madison and Hamilton both recognized that there were many special interest groups in America: rich and poor, commercial and noncommercial, large states and small states, manufacturing and farming. They felt the more special business interests there were, the better

because it would result in citizens enjoying a higher degree of personal liberty. But they agreed that it was the role of government to regulate those interests for the common good.



Meanwhile, another type of revolution was taking place—the Industrial Revolution. Although the process of change from an agrarian, handicraft-type of economy to one dominated by industry and machine manufacture actually began in England around 1750, it was slow crossing the ocean.

While Hamilton in *The Federalist* wanted to turn the United States into a great industrial nation, in 1808 there were only eighteen cotton mills in the whole country. The Embargo Act and the War of 1812 stimulated American manufacturing by cutting off or seriously reducing imports. For example, mills in Lowell, Massachusetts, began competing successfully with British textiles.

The invention of the sewing machine, new power looms, improvements in transport, and the opening of new frontiers began to transform the lives of the people. As the country grew, so did commerce and industry. And it became readily apparent even then that the Constitution was indeed capable of being interpreted and reinterpreted in the face of these social and economic changes.

Soon the United States was a land of bigger factories, faster transportation, new machinery, more immigrants, land-hungry pioneers, vast power, and increasing markets. The economy moved from small craftsmen or guilds and home industry to capital investment and free enterprise on a scale hardly dreamed of by Madison and Hamilton.

Corporations also began to flourish with the coming of the Industrial Revolution. They proved to be ideal for economic development since they could raise large amounts of capital from numerous investors and yet retain centralized control over their business affairs.

It was a period of intense social and economic change. Middlemen developed and flourished. Entrepreneurs and would-be entrepreneurs wanted as much freedom as possible to increase their profits. Employ-

ees, farmers, and other groups had opposing interests. They wanted to control the damaging aspects of change.

After the Civil War, various segments of society began to push for regulation: farmers and shippers wanted protection against unfair railroad rates; workers, against unfair employers; and purchasers, against fraudulent claims. Monopolies, combines, and trusts made competition difficult. The Robber Barons, many people felt, were trying to take it all. During the 1880s a host of special interest groups banded together and demanded that Congress institute controls.

Madison had written in 1792 that it "is not a just government, nor is property secure under it where . . . monopolies deny to part of its citizens that free use of their faculties and free choice of their occupations which not only constitute their property in the general sense of the word; but are [their] means of acquiring property . . ."

Although discriminating in favor of small business because it was small was not the answer, Congress saw its obligation to try to provide equality of opportunity to compete. Thus, the Sherman Antitrust Act of 1890 declared illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . ."

Passage of this statute was really in keeping with the original philosophy of Madison and Hamilton—to give every person the opportunity to develop an economic stake in the country. While the Sherman Act provided an adequate remedy for the economic order of the late nineteenth century, world competition has now replaced domestic competition, and the time may have come to revise our antitrust laws to reflect the economic and technological realities of the twenty-first century.

It is clear that competition has always been fundamental to the American system because it encourages economic and material progress and also because it advances beneficial political objectives. Congress, therefore, has tried to protect competition and prevent monopolies.

Initially reluctant to uphold federal and state economic regulations under the commerce clause and due process clause of the Constitution, the Supreme Court little by little began to assume a more realistic role in evaluating economic regulations.

But freedom of economic opportunity meant one thing to the entrepreneurs and another to their employees. Although the seeds for the rights of workers to have a say about their economic stake in the country had been planted in the Constitution, these rights were not realized in the early years of the Republic.

When organizations were formed to protect workers as well as to advance their economic interests, the courts were simply not sympathetic. In 1806 in *Commonwealth v. Pullis*—better known as the *Philadelphia Cordwainers* case—the Court declared that "a combination of workmen to raise their wages may be considered from a twofold point of view; one is to benefit themselves, the other to injure those who do not join their society. The rule of law condemns both."

The first stirrings of the American labor movement as we know it occurred in the late 1820s, at a time of vast economic and social change. By 1836, Philadelphia had 58 trade unions; New York, 52; Newark, 16; Pittsburgh, 13; Cincinnati, 14; and Louisville, 7.

It was not until 1842 that Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court declared in *Commonwealth v. Hunt* that the trade union was not in itself an unlawful conspiracy. Subsequent cases began to hold that "combinations" of workers seeking to gain higher wages, shorter hours, or better and safer working conditions were not by themselves unlawful. From today's vantage point, the determination and dedication of those early trade unionists reflected their desire to give their members the opportunity to become part of the emerging middle class.

Women and children as well as men were employed in the cotton and woolen mills of New England. Actually, mill owners said they preferred women and children because their hands were smaller and they could weave faster. They were also paid less than men. But the early attempts of workers to strike over low wages and harsh working conditions were largely unsuccessful.

On November 15, 1881, the Federation of Organized Trades and Labor Unions—the predecessor of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)—was established in Pittsburgh. Item I of the federation's platform called upon state legislatures and Congress to give workers "the right to the protection of their property in like manner as the property of all other persons and societies." While including demands for social legislation, the new federation also sought adoption of laws to give "every American industry full protection from the cheap labor of foreign countries." The federation pledged "to use all honorable measures" to achieve its goals.

In 1893, Samuel Gompers, president of the American Federation of Labor, succinctly stated:

What does labor want? We want more schoolhouses and less jails; more books and less arsenals; more learning and less vice; more constant work and less crime; more leisure and less greed; more justice and less revenge.

Despite the hostility of the courts to the labor movement, the 1914 Clayton Amendment to the Antitrust Act limited the use of the labor injunction which had curtailed strikes. The impact of the stock market crash of 1929 and the helplessness of wage earners and employers alike during the Great Depression had profound, even revolutionary, effects on both labor and management. The social legislation of the New Deal era was put into place. And in 1937, the Supreme Court upheld the National Labor Relations Act (NLRA) which guaranteed the rights of workers to organize and to bargain collectively with their employers. Thus, the NLRA provided the recognition that, indeed, workers have a voice in the disposition of their economic stake through collective bargaining. The Taft-Hartley Act of 1947 was intended to balance rights of employees, employers, and unions in the workplace, thereby promoting industrial peace.

In 1959, George Meany, president of the AFL-CIO,



stated that unions seek economic and political power in order

to make life better for the worker, to obtain for him a larger share of the wealth he helped to produce, to give him greater purchasing power so that American industry and American agriculture could find a ready market for their rapidly growing productive capacity.

And labor's expanded interest in foreign affairs has the same purpose. The goal there, he said, is "to obtain justice and fair play for oppressed peoples everywhere" and to help foreign workers raise their wages so they could also share in their country's economic progress. George Meany was a realist. He said many times over that free trade unions can only exist in a free society. Indeed, each is indispensable to the other.

The tension between labor and management still exists, and probably always will, in matters of union organizing and contract negotiation. But once that contract is negotiated, labor and management are learning more and more that it is in the best interest of each to cooperate fully with the other. After all, the whole idea is to make a product or perform a service that someone wants to buy and can afford to buy.

The labor force in America is changing. By 1984, over 70 percent of the work force was employed in service-producing jobs, not in manufacturing or agriculture as in years gone by. In addition, foreign products and the protectionist tactics of certain foreign countries have cost us jobs.

Some of the old industries in America can no longer compete, and their employees find themselves without jobs and without the training to get new ones. Opportunities must be developed by business and labor so that Americans who want to work and are able to work can work. One of the great philosophical differences between the United States and other countries is the belief here in the dignity of work—all work.

In *The Federalist* No. 33, Hamilton wisely stated that our country had to develop a "capacity to provide for future contingencies as they may happen." And indeed we must.

The Industrial Revolution helped create our vast middle class—carrying out the concept of the Founders by giving every person a stake in the economy. Now the technical or information revolution is underway. Telecommunications and telematics are increasing in importance every day. There is a continued movement toward automated and decentralized manufacturing plants, robotics, molecular computers, electro-optical devices, space exploration, orbital commerce, and artificial intelligence. Agriculture is already being changed by aeroponics and hydroponics.

The spirit of competition has found new frontiers!

But the problems of maintaining our liberty in the twenty-first century are going to be just as difficult as they were when Hamilton and Madison dreamed their dream.

So far the Constitution and the commercial republic have met all challenges involving the safety and prosperity of the country. The Founders believed in freedom of political and religious thought, freedom of economic opportunity, patriotism, due process, family and more. These values of the past—which made our country great—must be preserved in the years ahead.

But as we enter this wondrous new age of economic opportunities, a dangerous anchor is dragging us downward. Recent studies show an estimated 23 million adult Americans—one in five adults—are functionally illiterate. They cannot read, cipher out instructions, or even vote knowledgeably. We must reverse this trend if they are to get their feet on the economic ladder. In addition, even many college graduates today have really at best only a feeble understanding of the Constitution's vital role in the Republic.

Our Founders knew full well the importance of education and training in a free society. In 1822, Madison said that "a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."

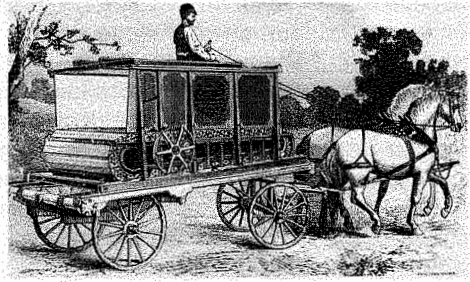
What higher tribute could we pay to the Founders of this great country than to make this a decade devoted to constitutional literacy! It would honor our past and guarantee our future. For our society cannot remain free unless its citizens understand the document which guarantees our freedom.

Hamilton and Madison dreamed of far more for this nation than just economic success. They wanted a populace nurtured on the principles of freedom and sound government. The Constitution they championed has endured.

And so, as we move more and more into high technology in the changing workplace, we must ensure that all citizens of this great land still have the opportunity to get their economic stake, that the climate enables business to grow and to create new jobs, and that opportunities abound.

The commercial republic is still—just as it was 200 years ago—the best system by which men and women, of whatever skills and abilities, can live in peace, better prosper, and work to find their own American Dream. **MF**

Don K. Price Science, Technology, and the Constitution



Through the formal institutions and legal procedures that it set up, the Constitution of the United States provided an indispensable basis for the limitation of arbitrary power and the guarantee of basic freedoms. But the laws alone were not enough. Other countries that rebelled against hereditary power during the next century, especially those in Western Europe and Latin America, had a mixed experience. Their move toward the popular election of their executives generally substituted a more tightly organized bureaucratic establishment for the old feudal or ecclesiastic authority.

The United States, by contrast, was the only major country that did not move toward greater centralization of administrative power. This difference can be explained by recalling what the people and their leaders believed. The American colonies had been dominated intellectually by religious dissenters who were eager to escape the authority of the Anglican church. During the eighteenth-century Enlightenment, this opposition to established authority in church or state was inherited by scientific leaders, and their attitudes were pervasive in shaping the political system of the new Constitution.

Two successive presidents of the United States were active presidents of the two principal scientific societies of the country—John Adams of the American Academy of Arts and Sciences and Thomas Jefferson of the American Philosophical Society. The Declaration of Independence had appealed against the authority of the King in Parliament to the “Laws of Nature and of Nature’s God”—giving clearer priority to the Laws of Nature than would have been conceivable in either the seventeenth or the nineteenth century.

In the Constitution itself, the provisions for a role in society for science and technology were of great significance for the future. The provisions most obviously related to the status of science were those guaranteeing its independence and support. The First Amendment enshrined the principles of freedom of speech and of the press, both essential for the free exchange of scientific ideas and discoveries. The question of the financial support of science was almost equally important, since the new Constitution, by forbidding monarchy and titles of nobility, cut off the royal or aristocratic patronage to which science had traditionally appealed. The solution, of course, was the authorization of a system of patents and copyrights, to guarantee to inventors and authors the right to the profits from their creations.

While the support of science by the political system

was important, even more significant for the future was the support of the new political system by science. The American Revolution was the first enduring challenge to the authority of hereditary royalty, as supported by an established church. The source of authority for the new Constitution, as its Preamble stated, was “We the People of the United States. . . .” But how was that new authority to be organized and distributed? The answer, of course, was to distribute the numbers of representatives in Congress and the presidential electors, on the basis of a regular decennial census, the first in the world. The very basis of sovereignty changed when hereditary authority was replaced by the quantitative approach of what came to be called social science. As time went on, the requirement for a simple enumeration of voters was expanded into the collection of great masses of data for the social sciences of the country—data needed for agriculture, industry, state and local government, and a vast range of welfare programs.

Two issues then arose. First, if the people were to be the source of power, how would they learn how to make the policy decisions that were required in the work of government? Second, if science was to provide the new knowledge on which policies were determined, how could the independence and objectivity of science itself be protected from political interference or corruption?

The first question called most obviously for a system of public education, maintained independently of any ecclesiastical control. The response to this need was the gradual expansion by the states and municipalities of their school systems, encouraged in one area by the Land Ordinance of 1785, with its provision of a share of public lands in the new Northwest Territory for the support of public education. At the higher educational level, Thomas Jefferson set up the University of Virginia, with heavy emphasis on the development of agriculture and other useful arts. President George Washington and others proposed a new national university, but

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they were defeated by the jealousies of the older private colleges. These were early examples of the new interest in secular higher education, which increased dramatically when the land-grant college system was founded during the Civil War era.

The people, however, could obviously not be expected to make most governmental decisions themselves, no matter how well educated they might become. Most specific questions would have to be answered by their public officials or their elected representatives. The American answer to this question was to refuse to permit the development of a strong civil service and to insist on giving control to legislative committees over the types of decisions that in most of Europe were dominated, even after successive revolutions, by established bureaucracies.

The American answer was obviously dictated in part by the social conditions of the frontier, but it was also based on an intellectual principle. The settlers in most of the colonies had been rebels against the Church of England; the New England colonies, intellectually the most influential, were dominated by dissenters whose split with the home country had been led by the Puritans and Independents who were strongly opposed to the Episcopal Establishment. After the collapse of Cromwell's Puritan Commonwealth and the restoration of the Stuart Monarchy in 1660, the dissenters in religion dominated the American political movements that led toward the Revolution. In the eighteenth century, the intellectual leaders of the dissenting religions were more identified with the newly developing science than they were in later years; more American colonists were members of the Royal Society, the dominant scientific organization of the United Kingdom, in the eighteenth than in the nineteenth century, and many of them (like Cotton Mather, better remembered for his share in the persecution of the Massachusetts witches) were leading churchmen.

As for the second question—the issue of protecting science from political corruption—Western Europe in the era of the Enlightenment, as well as America after the Revolution, generally respected the institutional independence of the sciences. As revolutionary movements moved eastward in Europe, however, science and ideology were linked differently. While the revolutionaries in these countries nominally based their doctrines on a scientific theory, it was ironically one that in practice destroyed that independence. Marxist doctrine, according to Lenin, held that dialectical materialism could overcome the crisis in physics. That doctrine taught that political problems should be solved on a scientific basis, and the party that professes the proper scientific doctrine should not have to contend with other competitors for power. This theory, while professing to give power to science, requires scientific institutions to conform to Communist theory and surrender their freedom of inquiry on issues that touch on social or economic power. The famous case of Lysenko, who ruined agricultural science for years in the USSR by influencing Stalin who liquidated those scientists who did not subordinate their biological theory to the Marxist dialectic, shows how weak the indepen-

dence of the scientific academy was when confronting Marxist doctrine. If that doctrine never seemed persuasive in the United States even to most radicals, some credit must be given to the way of thinking that was embodied in the status of science under the Constitution.

The relationship of science to government was carefully examined in the early years of the Republic. The measure of unity that President Washington was able to maintain was soon split by regional and class differences, and the partisan spirit that the authors of "The Federalist Papers" feared came to dominate political controversy. The most obvious split was between Jefferson (with his agrarian and democratic ideals), who hoped that the sciences would provide the basis for a more prosperous agriculture within a system of states' rights, and Alexander Hamilton, whose "Report on Manufactures" emphasized the development of industrial technology under the leadership of a stronger national government.

In a country that was for the first half of the nineteenth century heavily rural, the Jeffersonian ideal dominated the development of science, and the rudimentary research and educational efforts of the period were carried out mainly by voluntary societies and local institutions. During the Civil War, however, the Congress enacted the Morrill Act, which endowed in each state a college for the cultivation of the agricultural and mechanic arts and set up the federal Department of Agriculture to give them scientific leadership. Later in the century, cash subsidies supported the creation of the experiment stations at the state colleges and the extension services to help educate farmers in the application of the new agricultural techniques.

All this amounted to an extensive program of government support. The agricultural sector of society was willing to accept such support, in spite of its generally conservative principles, as long as the support came through an administrative system that remained substantially decentralized.

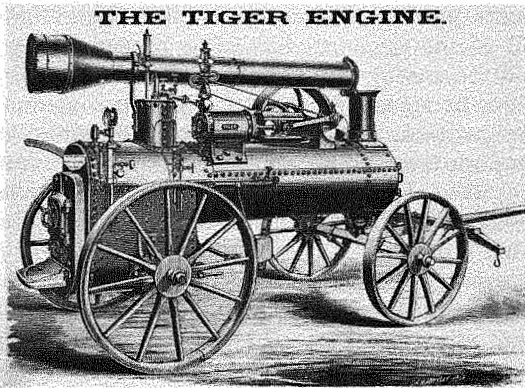
The extension of Hamilton's approach made the national policy for science in industry very different. The new industries that developed, with the aid of the patent system, after the Civil War were not eager to have the federal government meddle in their business, and the attitudes of the private universities and scientific organizations with the highest prestige—notably the National Academy of Sciences—were generally in harmony with their views. While those leaders were of course glad to accept the help of the federal government for many programs that were necessary for scientific research—those, for example, of the National Bureau of Standards, the Coast and Geodetic Survey, and the Census Bureau—they were not eager to be directly involved in programs requiring government direct grants to private institutions. When President Franklin D. Roosevelt, in 1934, asked a Science Advisory Board to develop a program in which scientific institutions could help combat the Depression, the leaders of the National Academy of Sciences vigorously opposed its proposals.

The Nation thus had, a half century ago, two compet-

ing patterns for the relation of government to science. In the world of agriculture, the system of federal grants to the state "A & M" colleges was based on fixed formulas, leaving freedom of discretion largely to the local institutions. In the world of industry, the great corporations supported applied research on a competitive basis, and the philanthropic foundations created by their profits did the same for basic research in the elite private universities.

All this changed dramatically under the pressure of the Second World War. Leading scientists had long recognized that neither the agricultural nor industrial support of science had given adequate support to fundamental and theoretical science, for which we were heavily dependent on European research institutions. But, under the threat of Nazi aggression backed by German science, American scientific leaders saw that radical advances in military weapons required nationally organized work on basic science, supported by massive federal funds. Nuclear fission and atomic weapons were only the most conspicuous examples of this cooperation.

The shift during the war to a national policy of direct federal support of most of the basic research in the country could not be reversed during the next four decades. The new programs of direct grants to scientists and their institutions were quite different from anything that prevailed in either the Jeffersonian or Hamiltonian tradition over the past century and a half. And they raised again in new and frightening form the two issues that had been involved from the early years of the Constitution: first, If the people were to be the new source of power, how could science help them understand how to make the policy decisions that would be made under their authority? and second, If science could provide such knowledge, how could its independence and objectivity be protected from political interference?



Even the most summary glance at some of the recent developments in science and technology and their impact on government and politics will suggest how deep a challenge the sciences are now making to the basic assumptions of our Constitution.

To provide for the common defense requires competition with our rivals in the development of weapons systems and the cultivation of "entangling alliances" that the Founding Fathers feared. New weapons cannot be developed within the two-year limit that the Consti-

tution imposed on appropriations for the army, and the competition for their control among the military services imposes great strains on the civilian supremacy that the president's role as commander in chief was expected to reinforce.

The new system of electronic communications makes our relationship with a potential enemy, in this era of guided missiles, one in which action may have to be taken within minutes, leaving the exclusive power of the Congress to declare war an empty formality. It now extends, with the help of the new aeronautics, into outer space, requiring our political leaders to think in broader terms than their local constituencies. And the popularity of television, which depends for its influence and profits on federally licensed channels, imposes on the government a regulatory responsibility that makes complete freedom of the press an impossible ideal.

The new advances in biomedical science lead to equally fundamental challenges to old ways of constitutional thinking. The new genetic sciences, leading to proposals to patent new forms of life, not only raise disturbing legal issues, but also upset the Enlightenment ideal of maintaining a separation between politics and religion that was dominant when the Constitution was drafted. Who could have guessed a generation ago that among the hot political issues of the 1970s and 1980s would be abortion, euthanasia, and birth control? On the more positive side of the medical sciences, the great advances in health that have come from new discoveries raise issues of personal freedom. (In which cases should vaccination or inoculation be compulsory? How great does the public risk have to be to justify interference with individual liberty?) Also, we want to know to what extent we should attempt to regulate and subsidize hospitals and medical care (including those leading institutions formerly operated entirely by the private sector independent of government regulation).

Such changes challenge not only the ways in which our constitutional system works in specialized fields of interest, but also our assumptions regarding the relation of the government to the public. How much secrecy or confidentiality should be permitted in the internal workings of either the executive or the Congress? In an era of limited government, this question was of little concern; today it dominates much of the thinking of the Congress and of the press, rivals in the job of guarding our liberties against the executive.

As such problems make it harder today to apply the basic principles of the Constitution in a simplistic and literal way, the sciences may be useful in reinterpreting and applying them, if we can answer in modern terms the two perennial questions about their relation to the constitutional system.

First, how may the sciences help the people and their representatives in both the Congress and the executive understand the complex new problems that society now faces? Since the sciences and their related technologies are the source of the most striking changes in our society, their help is essential for political leaders who try to adjust to such changes. Most of the major political issues of the day have some aspects that are affected by

technological change and that require scientific sophistication to deal with them.

On the other hand, no major political issue can be dealt with by any single science. Scientific progress has been accomplished by the continuous specialization of the disciplines. Each professional field that builds on science, as do engineering and medicine, must combine its command of physics or chemistry or biology, for example, with an understanding of the social problems with which it undertakes to deal.

Leading scientists are, of course, fully aware of this limitation—more so than many enthusiasts in the political world who seek to enlist their support for their favorite causes. The calculus of economic or technological costs and benefits is not designed to handle such issues as fundamental civil rights or equitable distribution of costs and benefits among various regions and groups of the Nation. Neither can its designers calculate the value of freedom from political authority, or how to make sure that such authority is shared acceptably among the various classes and interest groups within the Nation.

One may speculate whether the Constitution (by dividing power in such a way that it is hard to unify the policies of the Congress or to distinguish its role clearly from that of the executive) does not set up unnecessary obstacles to the development of more coherent and responsible policies, with a more effective use of science. The executive might be more accountable to the people, largely through the Congress, if the political parties were more unified and disciplined and if the departments were staffed by a more highly qualified corps of generalists able to make use of science but to transcend its limitations. But it would be a mistake to blame such shortcomings too much on the formal Constitution; they would be greatly mitigated if our contemporary society, and especially our political leaders, had the breadth of view and the dedication to public service of the Founding Fathers.

Our second question is equally important. While science may not have all the answers to all of our problems, its critical spirit and disinterested approach are essential to protection against arbitrary political power. How can we make sure that its independence and objectivity are protected from political interference?

The greatest safeguard is the way people think about the problem. Much as the eighteenth-century leaders were so deeply committed to the diversity of the dissenting churches that they could take freedom of religion for granted in the Constitution proper (before the Bill of Rights was added), so America's faith in free science today is strong enough that we need not worry very much about the possibility of making it the basis for an authoritarian ideology, as in Marxism. Indeed, the advice of scientists who are working with independent scientific institutions and who are willing to testify on several sides of almost any substantive issue is one of the factors that let congressional committees refuse to subordinate their specialized interests to any unified party leadership. From the point of view of consistent party responsibility, this practice is a handi-

cap, but it does make it easier to defend the varied interests of different regions and classes; in this respect, scientific institutions help prevent the dominance of any single ruling interest in society, as the several states were expected to do under the original Constitution.

“The new advances in biomedical science lead to equally fundamental challenges to old ways of constitutional thinking.”

Indeed, as the sciences and technology have helped produce a more tightly unified society, they have come under pressure from national interests in much the same way as did the states after the Civil War. Unlike the churches, from which they inherited much of the intellectual leadership of the Nation, there was one severe limitation on their ability to maintain their independence from the federal government. It is not necessary to have money in order to worship, but it is necessary to have a lot of it to conduct modern scientific research. So scientific institutions are faced with the problem that confronted the states in the twentieth century when large-scale programs of grants-in-aid were inaugurated. These programs broke down the old attitudes of the states' righters, but they did not prevent the states from working out bargains with the federal government by which they could get the money but still retain substantial measures of administrative discretion and independence in spending it. The key to the bargain was that the grants were to be distributed not through a single federal treasury to a central authority in each state, but through a less-disciplined variety of channels, with each specialized department in Washington (dominated by specialized congressional committees) negotiating with its counterpart in each state capital. The “independence” of the sciences has been preserved by open competition among universities for funding.

Science needs more than the administrative tactics of free competition, however, if it is to maintain its essential freedom from political control within our constitutional system. It needs a consensus of the intellectual leadership of the Nation as a whole that it is a source of truth that must not be degraded by subjection to political manipulation.

That consensus may even have been strengthened as the most advanced basic science has lost some of its earlier confidence in its ability to discover and prove the most ultimate truth and become more willing to acknowledge that its scope and methods and those of religion are different modes of thought not necessarily in conflict with each other. We are by no means back to the easy confidence of the Enlightenment that the “Laws of Nature and of Nature's God” are in harmony, but the several branches of organized knowledge seem to be working in enough of an alliance to maintain the separation of their kind of power from that of politics—one of the most significant types of checks and balances that is left under our contemporary Constitution. **NE**

Rita E. Hauser

The Constitution and National Security

Putting Parchment Into Practice



Among the dominant motivations for revising the Articles of Confederation at the Constitutional Convention in Philadelphia in May 1787 was the need to assure the national security of a young and threatened nation. George Washington, in particular, had lived through eight years as commander in chief of the Continental Army. He was faced with the task of leading thirteen allied armies, often unresponsive to the imminent danger of foreign invasion and unwilling to respond to central direction.

After intensive debate and deliberation, a nation, one single nation, was established by the Constitution. The conduct of business with other nations was deemed, without question, to be a matter of national concern. Thus, the power to conduct foreign affairs was generally denied to each state and given to the new federal government, with some explicit allocation of power between the executive and the Congress. Yet, in general, the Constitution is strangely silent in delineating the foreign affairs power of the United States. Congress can regulate commerce with foreign nations and declare war; the president can make treaties and send and receive ambassadors. But the power to recognize other governments, break diplomatic relations, establish guiding doctrines of policies, terminate treaties, declare neutrality, make peace, and so much more that is the daily substance of the conduct of foreign affairs is not spelled out in the Constitution. These additional powers have been extracted from the "necessary and proper" clause of Article I, Section 8 or from the "Executive Power" granted in Article II, Section 1 of the Constitution.

Some scholars argue that the foreign affairs power derives from sources beyond the Constitution itself, in that the very fact of nationhood results in the recognition of powers which inherently belong to any sovereign. Thus in *The Chinese Exclusion Case*, the Supreme Court found that Congress could legislate to exclude aliens because control over its territory is "an incident of every independent nation." Almost 150 years after the adoption of the Constitution, the Court, in *United States v. Curtiss-Wright Export Corp.*, sustained a Joint Resolution of Congress which authorized the president to embargo arms to countries at war in South America on the theory that this power, too, is inherent to nationhood. While theorists still debate the source of the foreign affairs power, it is certain that virtually

everything related to foreign affairs is deemed to be within the power of the federal government to regulate.

Not only is the Constitution relatively silent as to the specific conduct of foreign affairs, it is ambiguous as to the division of foreign affairs power between the executive and the Congress. This has given rise to continuing political battles on the most basic of foreign policy questions. For example, right up to current times, the issue remains whether Congress can compel the neutrality of the Nation in another country's conflict, based on its powers to declare war, to appropriate for national defense, and to raise an army. Some still argue this prerogative belongs to the president by virtue of his executive power and his status as commander in chief of the armed forces. Can the president, acting alone and in the absence of a congressional declaration, send troops to a war zone? The War Powers resolution, adopted over the president's veto in 1973 in the aftermath of the Vietnam War, remains intensely controversial: the executive branch continues to refuse to accept congressional limitations on the commitment of troops into zones of armed conflict in support of American foreign policy.

The power to declare war, the paramount decision in the foreign policy of any nation, was given to the Congress by the Constitutional Convention in the belief that it was too important to give to the president alone, or even to the president and the Senate as is the case of treaty making. War is an extraordinary undertaking in the history of a nation, to be entered into only after the greatest deliberation. In time of war, certain provisions of the Bill of Rights can possibly be suspended; most rights and duties under international law relating to the enemy are abrogated; and treaty obligations are suspended or terminated.

It was originally proposed that Congress be given the power "to make war." This language was changed to "to declare war" in order to allow the president to

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respond to an invasion or sudden attack and to deny any implication that Congress would have any role in the actual commanding of the armed forces. While it is clear from the Constitutional Convention's decision and subsequent determination by our courts that Congress has the ultimate power to decide formally if the Nation shall go to war, it seems equally evident that the president can commit forces in hostile situations without congressional approval. The War of 1812 is the one time in our history when Congress debated and declared war on its own initiative. In every other case, Congress followed the president's lead by declaring war at the president's request or by supporting undeclared wars such as the war against France in 1800 and the United States Civil War. Congress, in fact, has never refused an executive request for a declaration of war or for the support of a war.

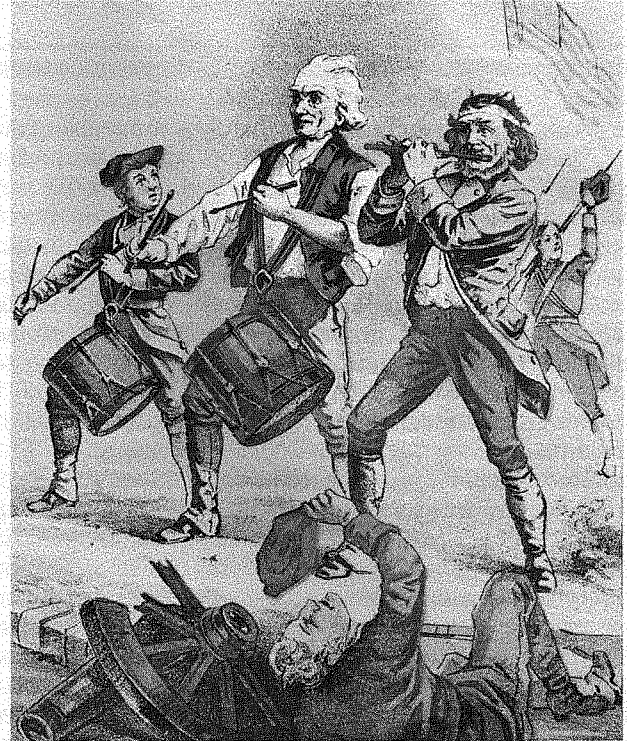
The debate over which branch controls the issue of taking the Nation into war remains unresolved to this day. But the growing power of the president in the broad range of foreign policy activities, especially since World War I, has effectively moved the fulcrum of decision making to the executive, with an occasional and sometimes passionate challenge to that authority when the war-making activities of any president prove unsuccessful. The Vietnam War was initially supported overwhelmingly by both houses of Congress in 1964 by passage of the Gulf of Tonkin Joint Resolution. The resolution permitted the use of armed force to assist any member of the Southeast Asia Collective Defense Treaty who requested aid in defense of its freedom. Thereafter Congress appropriated funds for the war on multiple occasions. But by the early 1970s, the country had turned against what it perceived to be an unsuccessful war.

“... in general, the Constitution is strangely silent in delineating the foreign affairs power of the United States.”

In the aftermath of this unfortunate war, Congress tried to restrain the president from committing troops abroad unless pursuant to a declaration of war, statutory authorization, or a national emergency created by an attack on the United States. Section 5(b) of the War Powers resolution requires the president to terminate the use of armed forces within sixty days of his initial report to the Congress unless the period is otherwise extended by Congress. President Richard M. Nixon objected to this on the grounds that if Congress failed to act to extend the period, then the president's power would automatically terminate at the end of sixty days—a fact which when known in advance by the parties involved would invite delay in resolving the conflict. Section 5(c) of the resolution allows Congress by concurrent resolution to direct the president to remove forces from a hostile area. Such a resolution needs only a simple majority of each house to become

effective. These two key sections may well be unconstitutional limitations on the president's authority—a position President Ronald W. Reagan took in signing, on October 12, 1983, the Joint Resolution which authorized a continued United States participation in the peacekeeping force in Lebanon.

Whatever the ultimate determination of this issue by the Supreme Court, our history has been marked by consultation between the branches of government on whether to engage in hostilities short of a declaration of war—as in the Lebanese peacekeeping effort. Because



a formal declaration of war has not been sought by any president since World War II, it is likely that future military engagements will be the result of a more limited request by the president, preferably after full consultation with Congress. Power sharing in such important decisions as the use of American troops and materiel abroad is desirable and in all likelihood will continue—albeit subject to the political views of the Nation as expressed at any given moment in its history.

Power sharing does lead to some conflicts, however, that are not resolved by the Constitution. Indeed, many of these conflicts—conflicts between individual rights and the national interest—are contained in the Constitution itself. One of the major arguments perennially offered for congressional participation in matters of national security is the inherent openness of Congress. It is, after all, a forum for debate and political compromise, whereas the president can act in relative secrecy. In matters of national security, do the people of the United States have an inherent “right to know,” as the press has phrased it; indeed, does Congress have the right to know all that the president has acquired via intelligence sources which may be covert?

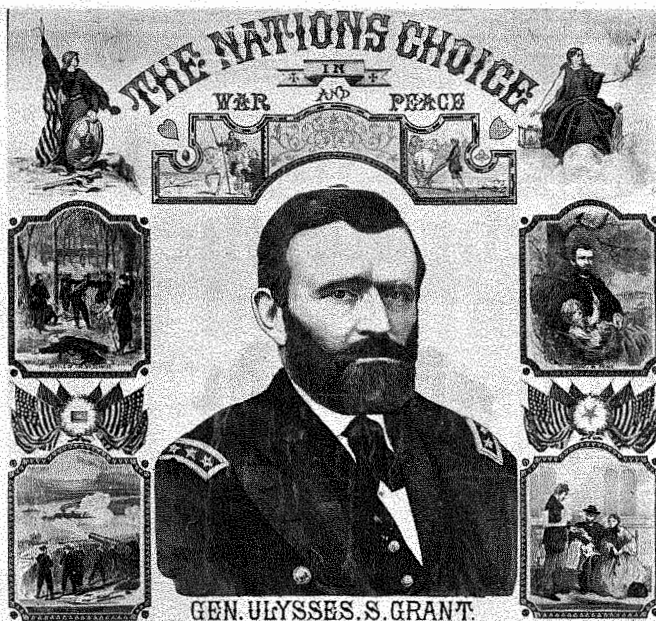
The conduct of the Constitutional Convention provides some indication as to how the Founders might have answered these questions. The Convention itself adopted a very controversial rule of secrecy, forbidding printing or publication of anything spoken during the debates. As late as 1830, James Madison stated that the Constitution never would have been adopted if the convention debates had been held in public. The official *Journal of the Federal Convention*, printed in 1819, is formal and does not reveal the true arguments. Private records of the delegates provide us with most of our information, especially the notes taken by Madison and published in 1840. Can anyone imagine the adoption of such a rule of secrecy by Congress today on a great national issue? Few modern commentators would urge Congress to adopt such a rule in a democratic and open society which prides itself on its right to judge the decisions of its elected officials, even on the most sensitive matters of national security.

The issue of secrecy, even in war, remains difficult, however. The power of the president and Congress in foreign affairs, as in the domestic sphere, is limited by the constraints of the Bill of Rights. In the *Pentagon Papers* case, the Supreme Court held that the executive branch had failed to meet its burden of overcoming a strong presumption against the constitutionality of "prior restraints of expression." Although the opinions of the justices were diverse, and some thought the executive had the duty to protect confidentiality in carrying out matters of foreign policy and national defense, the majority held that the First Amendment bars an injunction of the press when it is not shown that disclosure "will surely result in direct, immediate and irreparable damage to our nation or its people." It would seem, then, even in the conduct of war, that the right of the people to know must be balanced against the duty of the executive to withhold information to save lives or

"... the Constitution, as applied, has proven to be a flexible instrument which permits the government, especially in war and international crisis, to protect the national interest."

protect major national interests. In the past, the great American newspapers have exercised self-censorship, often at the request of the government, to avoid risk to human life during wartime. It is clear, however, that this practice has been abandoned when the war effort is controversial, if not unpopular, and the press believes it has a duty to expose facts or decisions not made available to the public.

The issue of secrecy exists also in the desire of the executive to withhold information sought by the Congress. In recent years, the Secretary of State or Defense has frequently invoked "foreign affairs advice privilege," which is premised on the notion that some degree



of confidentiality is a requisite of effective government, particularly as to advice given by cabinet officers to the president, or as to information garnered by diplomats which might be embarrassing to foreign leaders, or which might affect intelligence operations. Foreign Service regulations prohibit response to any subpoena except on the authorization of the secretary or his deputy. The executive, by orders and regulations, has established classification categories and procedures as to the secrecy of documents, and this has been premised simply upon the president's general constitutional authority to conduct foreign affairs and upon his power as commander in chief.

John Jay, an experienced diplomat as a result of negotiating the 1783 Treaty of Paris with Great Britain, wrote in *The Federalist* of the necessity for secrecy, particularly to help garner intelligence needed by the executive. The Continental Congress itself in 1775 set up a special committee of five to deal on a secret basis with potential allies in Europe. The Congress directed the Secretary of Foreign Affairs to use all means to gain political information about other countries which might be helpful and to send reports to the president which were not open to the Congress itself.

In 1792-93, Gouverneur Morris, serving as the United States Minister to France, wrote to President Washington and to the Secretary of State in a very frank manner. When the Senate was disturbed by the behavior of the French revolutionary government, it requested the president to submit Morris's correspondence to it. Washington submitted documents after deleting those he felt should not be transmitted for reasons of confidentiality. The Senate did not protest. Two years later, however, the House of Representatives objected vigorously when Washington declined to provide copies of John Jay's correspondence relating to the Jay Treaty with Great Britain. Opposition to the treaty and to Jay by the Jeffersonians in Congress was intense. An exten-

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William J. Bennett

How Should Americans Celebrate the Bicentennial of the Constitution?

To readers of this volume, the question—How should Americans celebrate the Bicentennial of the Constitution?—should now seem rather presumptuous. Our question is a curious one. The answer to that question may resemble the punch line of the old joke I have heard children tell. The joke begins with the question, “Where does a 400 pound cat sleep?” The answer is, “Any place it wants to!” And “any way it wants to” is the answer to our question. Because we are a free people, we must be given free reign in the conduct of our own celebration.

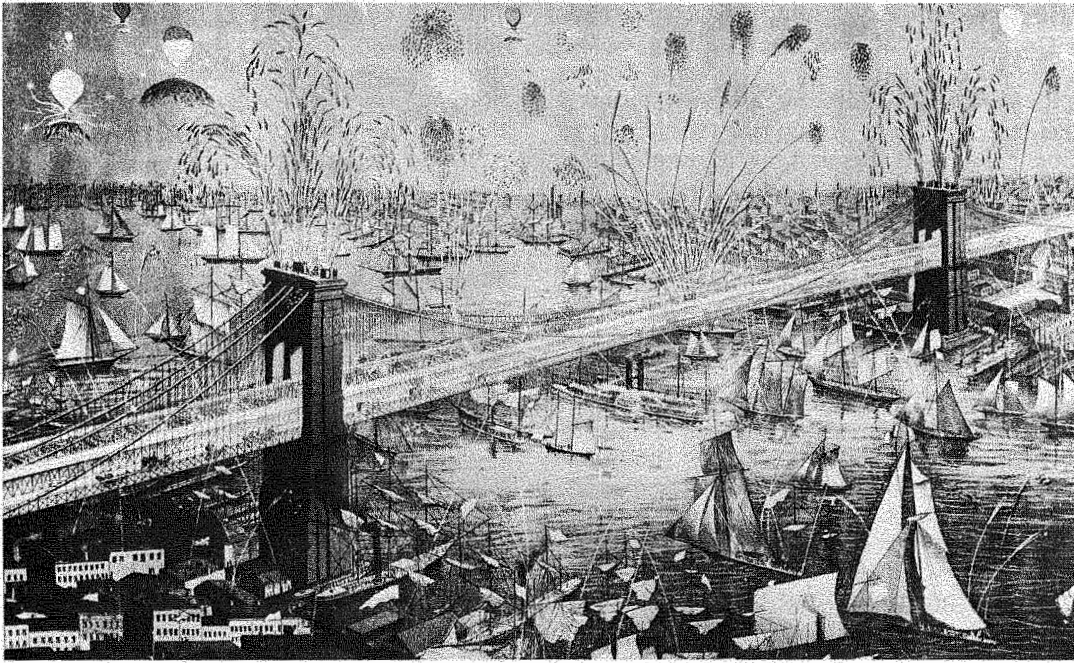
We have all heard it said that the great success of the Bicentennial celebration in 1976 was marred by some freely self-propelled activities that did not fit with the importance of the occasion. Obviously some silly and crass occurrences, even a few frivolous ones, took place. The most common criticism of '76 is that it was overly “commercial.” I do not share that assessment. No one wishes to salute low-minded activities, but commerce itself is not a low thing and has no small place here. It was not undignified and certainly not unnatural that the '76 celebration had a commercial element. There was nothing wrong, I would say, in the Declaration of Independence ashtrays and portraits of Abigail Adams on sea shells. Such souvenirs were neither a heresy nor a civic sin.

It would not trouble me a bit were we to witness a buying spree of small statuary of the Founding Fathers or framed and embossed copies of the Preamble to the Constitution; I would be disappointed if this were the sum of our remembrances. A commercial republic like ours is not so limited. Indeed, the secret of American commerce, our oft-criticized “bourgeois values,” is that it makes possible a broad range of activities—low, high, and middlebrow—that invite both schlock and profundity. The secret of a free, bourgeois society is that although it is often attacked for its emphasis on commerce, it also makes possible much of what we value. We must remember two facts: first, commerce had a central place in the ideas of the Founders, and second, commerce itself has been a major contributor to our prosperity and strength as a nation and to the genesis of unparalleled and unprecedented opportunities for the wealth of the spirit. Witness the health and multitude of churches, educational institutions, books,

and cultural resources in America. It is perhaps an irony that a nation conceived so much in the spirit of commerce and freedom has given rise not only to the greatest commercial enterprise in the world, but to its greatest intellectual enterprise as well. Scientific and intellectual inquiry, the arts and letters, have flourished in this free, commercial republic. The issue was not then and is not now whether to choose one manifestation of our riches over another, but to expect, welcome, and celebrate many such manifestations.

But the point of this essay is to argue for one particular way in which a proper celebration of the Bicentennial of our Constitution might take place. For the remainder of this article, my theme is straightforward. The creation of this Republic was an act of mind, or, more properly, a series of such acts. We should use this upcoming opportunity to engage in our own act of mind as a way of recalling, appreciating, and celebrating this constitutional Republic. A nation that has lived longer under a single document than any nation on earth, and whose Constitution is perhaps the most imitated political document in the world, deserves contemplation. Why is it so strong? How is it so strong? How can we make it better? To answer these questions, many things—books, articles, histories—can be recommended as worthy of study. But rather than propose a long list here, let me recommend only two works: the Constitution itself and *The Federalist*. If every American could read a little of these two works—the Constitution and its defense—in the next five years, we would have enough “celebratory cerebation” to satisfy this

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author. I shall mention other things, but let me be more specific as to what we are looking for in these two.

First, let us steal the document, at least for a time in the next few years, from the lawyers. Too often, too many of us think of the Constitution as only a lawyer's document. In this popular view, the Constitution is primarily a statement of law and of rights. Now there is support for this view. Some lawyers make a career of combing the Constitution trying to find in it another right not yet discovered. Discussions of the Constitution often occur in "lawyers only" language and are obscure and inaccessible to the layman. But the Constitution is not principally a lawyer's document; it is a civic document. And if it is, as I contend, a philosophic statement, then it is a statement of practical political *philosophy* grounded in the thoughts and language of citizens. In *The Federalist* No. 1, we are reminded that it was by an act of reflection that *the American people* were uniquely blessed in setting up their scheme of government. It is their document, their contemplation that matters most:

It has been frequently remarked that it seems to have been reserved to *the people of this country* by their conduct and example to decide the important question, whether societies of men are really capable or not of establishing good government from *reflection and choice* or whether they are forever destined to depend for their political constitutions on accident and force. (Emphasis added.) [*The Federalist*, No. 1]

And decide it in this way they did! As Alexis de Tocqueville said some fifty years later:

It is new in the history of society to see a great people turn a calm and scrutinizing eye upon itself when apprised by the legislature that the wheels of its government are stopped, to see it carefully examine the extent of the evil, and patiently await two whole years until a remedy is discovered to which it voluntarily submitted without its costing a tear or a drop of blood from mankind. [*Democracy in America*, Vol. I]

The men who wrote the Constitution were both practical and thoughtful. So we remain. They had read the works of the great philosophers; they had studied the history of confederations and states before them; and, on the basis of what they read, they drafted this document. The same exercise can be fruitfully repeated. Going beyond the document and its defense, we might read what they read.

If one person had to be identified as the Constitution's principal author, it would be James Madison. He was not a lawyer, but a student of the humanities—a student of languages and philosophy, of Hebrew and religion, of the history of ancient states. Study and his own genius enabled him to draft the Constitution. The same sort of study can help many of us to appreciate it. This is intended to diminish neither the legal significance of the document nor the significance of law itself, but rather to say that law—our constitutional law—drew on notions of higher law and on the great ecclesiastical, theological, and philosophical debates of the centuries. Study of, or at least some exposure to, the debates of the intellectual precursors of our Constitution can form part of a fitting celebration. In such a study, one does not come upon legal niceties and the splitting of hairs, but notions of human nature, of power, of conflict, of property, of the rule of God, of the rule of nature. This exciting and engaging material—the history of man and ideas—is a crucial part of our constitutional legacy.

Second, we must consider the Constitution a political document, an argument by one group of active citizens, the Founders, against the views of others. If we are not now otherwise weary of the stuff of politics, *The Federalist* can be read in this way, as a straightforward political argument. One scholar has referred to the Federal Convention as a reform caucus. The men who wrote the Constitution were active and vigorous; they were engaged in a political campaign for the adoption and ratification of their scheme. We should look at our

Constitution in this light, as issuing from, as it addressed, the world of events and the passions of the times. This was no philosophers' symposium far removed from the world of action and "fighting faiths." We can consider our drive to constitutionalism as exciting, political drama. It was and is still running. We may ask of it now: Can this set of ideas prevail? We, like the Founders, might pause in our various businesses to contemplate the large political issues of that "old" Constitutional Convention. We might study and discuss the thoughts and arguments of that Convention in classrooms and community forums. These can be pretty dramatic occasions themselves.

It has been said that one of the appropriate things we could do at this time would be to raise the Founding Fathers from immortality to mortality! Rather than view the Founders as stiff, quasi-godlike creatures, we should see them as they were: energetic and ambitious people with a serious and thoughtful agenda, busy young men who wanted to return to their lives as farmers, merchants, husbands, and fathers, but who took leave from their other responsibilities to forge this Republic.

Third, we might wish to see the ways in which the Constitution both carried on a tradition and set forth something new. In *The Federalist* No. 14, Madison wrote:

Is it not the glory of the people of America that, whilst they have paid a decent regard to the opinions of former times . . . they have not suffered a blind veneration for antiquity . . . to overrule the suggestions of their own good sense . . . ? [*The Federalist*, No.14]

Today we might ask: What is the mix of both? What was old? What was new? What was borrowed? And again, what is still true?

Fourth, one might look at the Constitution as a constellation of our deepest values and convictions as one people. In it we see exhortations, reminders, and cautions, all hinged on deep-seated values. When we look at it and the Declaration of Independence, we see the celebration of the ideas of equality and liberty—the greatest political ideas, perhaps simply the greatest ideas, ever conceived by mankind. But underlying this document is also the celebration of self-improvement, of experimentation, and of personal virtue. And, of course, corollaries of all the more familiar values—freedom of religion and the press, due process, and equal protection, etc.—also support the document. We should dig even deeper to see the underlying constellation of values this Constitution had and still has. *The Federalist's* argument too is based on shared convictions and values. A good exercise would be to identify them and determine their current vitality.

I have a special reason for recommending this last exercise, and it is suggested less by an issue before the Founders of 1787 than by an issue palpably before us today. It is this: much has been said about America as a pluralistic society. Lately the term "melting pot" has been downplayed in favor of the term "tapestry quilt." Indeed, America is a tapestry quilt.

This is a country of different colors, races, and ethnic and religious backgrounds. But in the last fifteen to twenty years we have been in a fit of pluralism, "celebrating" our idiosyncrasies and differences. Some of this is quite appropriate, but we need a balance: more needs to be said about the ways in which we are still bound to our fate together, as one people. This Constitution literally "constitutes" us as a people—one people. We are the same not in some dull, colorless, shapeless form, but rather in respect to the fact that constitutionally each of us is regarded as equal—equally capable of nobility and virtue, equally protected by the law, each possessing as much human nature as the next. In our time there might be no greater task than to regard the Constitution as a reminder not of how we differ, but of how we are the same. Our Founders saw a deep and true consensus on values, a consensus that in recent times has become harder for us to recognize. But what Abraham Lincoln said so well in his Chicago address of July 10, 1858 on the Declaration still holds true. It carries forward from the Declaration and the Constitution to our own day:

We hold this annual celebration to remind ourselves of all the good done in this process of time, of how it was done and who did it, and how we are historically connected with it, and we go from these meetings in better humor with ourselves—we feel more attached the one to the other, and more firmly bound to the country we inhabit. In every way we are better men in the age, and race, and country in which we live for these celebrations. But . . . there is something else connected with it. We have besides these men—descended by blood from our ancestors—among us perhaps half our people who are not descendants at all of these men . . . When they look through that old Declaration of Independence they find that those old men say that "We hold these truths to be self-evident, that all men are created equal," and then they feel that that moral sentiment taught in that day evidences their relation to those men, that it is the father of all moral principle in them, and that they have a right to claim it as though they were blood of the blood, and flesh of the flesh of the men who wrote that Declaration, and so they are. This is the electric cord in that Declaration that links the hearts of patriotic and liberty-loving men together, that will link those patriotic hearts as long as the love of freedom exists in the minds of men throughout the world. [Basler, *The Collected Works of Abraham Lincoln*]

I end where I began. Any celebration of the Constitution will be a celebration not only of the people who made it, but of the people for whom it was made. It was meant to serve us all, and it has served us well. For most of us, our faith in it is whole, as that faith has been justified by experience. A close examination of the Constitution's principles, not its rules but its founding principles, principles accessible by a broader intellectual approach such as I have recommended, may be what is needed most. This approach, if done well, will help us rediscover what it is that unites us as a people and justifies the statement of faith and principle on our coins: "*E Pluribus Unum.*" That phrase is worth contemplating today, 200 years after the charter of our collective birth as one free people. On the occasion of this celebration, let us both reflect and enjoy. MF

Ultimately, decisions about the ambit of First Amendment protection turn on judgments about the underlying values to be served. One perspective of the First Amendment views its central meaning as the protection of expression connected with the political process. Such an approach would give at least a lower level of protection to "private" speech. A broader reading of the First Amendment emphasizes freedom of expression as enhancing individual self-fulfillment. So understood, the amendment performs a function not unlike that of using the due process clause or other constitutional provisions to create zones of personal "autonomy." Such zones might include decisions about using contraception or having an abortion.

The First Amendment protects a whole matrix of rights. Protection for free expression has come to include the right to speak as well as the right to remain silent in the face of government demands for information (such as a state law requiring teachers to list every organization to which they belong) which may "chill" one's freedom to associate with others of like views. Another example of a protected First Amendment right arises when individuals associate to promote their causes in court; litigation by such groups as the Nation-

al Association for the Advancement of Colored People (NAACP) has been held to be a protected form of expression.

Beyond expression as such, it is no accident that alongside the First Amendment's protection of speech stand the amendment's guarantees of religious liberty and of a free press. Historically, claims to rights of conscience were powerful forces in giving rise to claims of rights of free expression in secular matters as well. Likewise, effective expression, certainly in the American experience, requires that editors and journalists be unfettered in airing the issues of the day.

It is an accident of history that the First Amendment is in fact the first of the amendments making up the Bill of Rights (two amendments that appeared ahead of it on the list submitted to the several states in 1789 were not adopted). But the "firstness" of the First Amendment has great symbolic force all the same. Perhaps James Madison's contemporaries saw less in the First Amendment than that great son of the Enlightenment hoped would take root there. But later generations have found in the First Amendment a potent force for creating the conditions of a genuinely open and free society. **NE**

MATHEWS—continued from page 48

discretion. Yet there is cause for some cheer in recalling the rich heritage from which our first principles were drawn. "We the People . . ." is a phrase that distills centuries of political experience and wisdom.

Democratic theory was already 2000 years old when the Constitution was written. The Framers, schooled in the classics, were closer to that classical heritage than most of us are. They drew on that legacy even as they added to it. The same legacy is available to us, and it is our responsibility to see that what the people ordained is maintained. In fact, if we were cut off from the roots of our political culture, politics would become largely a matter of elections, and public administration largely a matter of mechanics. Bereft of purpose, we would be left only with issues. We may have trouble now with the practice of popular sovereignty because we are too far removed from the origins of that principle.

Our heritage is a useful reminder, a string tied on our collective finger, to help us remember ways of thinking about politics that enrich impoverished practices. For example, we all talk about popular sovereignty and public participation today in terms of power and rights. Yet there is a better understanding available in recalling that "participation" in the original sense did not mean participation as in a football game or a contest in which someone must lose in order for someone else to win. Participation meant "sharing in," as we use it when we talk about participating in a communion service or a potluck supper or a family reunion. Without denying the legitimacy of competition, as when we debate political issues and select candidates, it is nonetheless the sharing kind of participation that a doctrine of popular sovereignty envisions—because that is what creates a public—and a democratic nation!

Participation, then, is not just a means of choosing officials for the government or a clever form of public

relations. *Participation provides the essential ingredient for a democratic society.*

Participation is important, first of all, because it develops the public side of human nature. Democracies, in order to flourish, require people with a certain level of civic intelligence. Public rather than just private skills have to be developed. There are a number of things we cannot do until we can think about them, but being a good citizen is probably something that we cannot think about until we do it. The most basic lessons in civic education come from all forms of "publicing," from the experience of "sharing in."

Furthermore, the classical understanding of the public, of participation, and of what it meant to be a public citizen, carried with it a prescription for formal education. The original definitions of a public-minded person and of an educated one were very similar. The word "public" itself derives from the word for maturity. It suggests that the public-minded must be able to see beyond themselves, must be able to imagine the consequences of their personal actions on others, must therefore comprehend the interrelation of concerns in the state and be able to fit particulars into a coherent whole. The other source of the word "public" is in a phrase that meant "caring with." It implies that a public citizen—an educated person—has certain traits of character, certain values, as well as certain traits of mind.

When we seek to develop civic intelligence, we must attempt to teach something more than the functions of government. Civics is not a subject to be taught; rather, it sets a standard for teaching every subject.

As the first function of participation is to define and create the public person, so its second function is to create the public itself. The public is not just a group of people—the crowd at the shopping mall—but people bound together by more permanent, shared interests

and common values. We identify these interests and values through participation. We can discover where we and our neighbors have a common stake only by talking to them. The public begins in conversation, the most elemental form of participation. Town meetings and community forums, even the once-common discussions in the post office, are not just "nice." They are indispensable. They are the occasions in which the public is created—and re-created.

The prescription for maintaining a healthy public life and a democratic society is still available to us in a description of one of our earliest constitutions:

Our constitution . . . favors the many instead of the few; this

is why it is called a democracy Our public men have, besides politics, their private affairs to attend to, and our ordinary citizens, though occupied with pursuits of industry, are still fair judges of public matters; for unlike any other nation, we regard him who takes no part in these duties not as unambitious but as useless . . . and instead of evoking discussion as a stumbling block in the way of action, we think it an indispensable preliminary to any action at all.

Those lines are not from James Madison or Alexander Hamilton or John Jay in 1787. They are from Pericles in 430 B.C. But the Framers surely had read them when they wrote, "We the People . . ." **NF**

HAUSER—continued from page 59

sive debate occurred, but in the end the majority apparently accepted Washington's argument that certain disclosures would harm the Nation. All presidents have since maintained that the papers and recordings of advice from subordinates are personal, not public, and not subject to congressional demand. In *United States v. Nixon*, the Supreme Court in 1974 affirmed this principle but ruled that it was not an absolute, unqualified privilege. Rather, the Court struck a balance between the need to know by Congress or a private plaintiff or defendant and the executive's requirement of confidentiality; the latter, in particular, is to be given great weight if the matter sought involves military, diplomatic, or sensitive material, the revelation of which would likely injure an important national interest.

The authority of the president to gather secret intelligence was long ago recognized by the Supreme Court in a suit involving a contract for clandestine information made between President Abraham Lincoln and a secret agent. The Court stressed that in all matters affecting our foreign policy, not just in wartime, secrecy by the executive might be essential and would be respected even to the extent of denying a plaintiff the right to sue if the confidence would thereby be breached.

Our courts are particularly deferential to claims involving secret agents, the Central Intelligence Agency (CIA), and other intelligence services and have even upheld prior censorship of writings by former agents where revelations might injure operatives or reveal significant state secrets. The United States has not legislated a state secrets act as have other democratic nations. The courts are thus left with the delicate task of balancing individual rights enshrined in the Bill of Rights against the obligation of the state to assure its own security and protect its secret services.

Finally, the Constitution is silent upon certain issues that were simply nonexistent in 1787. The Founders could not have foreseen some of today's pressing national security issues. For instance, in recent years legislation has been enacted to give the president through a system of export licenses some control over the export of advanced technology to communist- or terrorist-dominated countries. The established procedures have been sustained by the federal courts over objections that they impede commerce or violate private contracts. Sometimes the president has

imposed a boycott in response to the hostile acts of a foreign government, such as the Cuban trade embargo and the recent short-lived Soviet wheat embargo.

“. . . many of these conflicts—conflicts between individual rights and the national interest—are contained in the Constitution itself.”

Both Congress and the president have attempted to protect American technology from theft and American industry from penetration of its trade secrets by foreign powers. Here, too, the power to regulate is ample, but in a free and competitive economy objectives are often difficult to meet effectively. The need to protect our skill and knowledge must be balanced against our desire for a free and open business climate, regulated by the government only to the degree required by the threat to national security.

The Constitution offers little guidance as to the conduct of foreign affairs. It is even ambiguous as to where these foreign affairs powers lie. Public policy disputes continue to arise because of conflicting requirements of the Constitution. These conflicts have been resolved, however, because the Constitution, as applied, has proven to be a flexible instrument which permits the government, especially in war and international crisis, to protect the national interest. Individual rights and liberties have been restrained only in cases of a true threat to national security. Where a wrong has occurred, as in the internment of Japanese-Americans during World War II, the Nation has admitted error and has sought to remedy, to the degree possible, the damage done to the individuals involved. Panic, if not hysteria, accompanies war and national emergencies; the Constitution affords an exemplary brake on these forces which might otherwise jeopardize the rights of a free people. The contemporary world is a complex composite of often-opposing forces and ideologies in which America bears the burden of defending liberty for its people and for other free nations. The power of the executive to act, therefore, must be clear and intelligible. Yet, it must never overreach its intended boundaries, lest our own liberties be placed in jeopardy. **NF**



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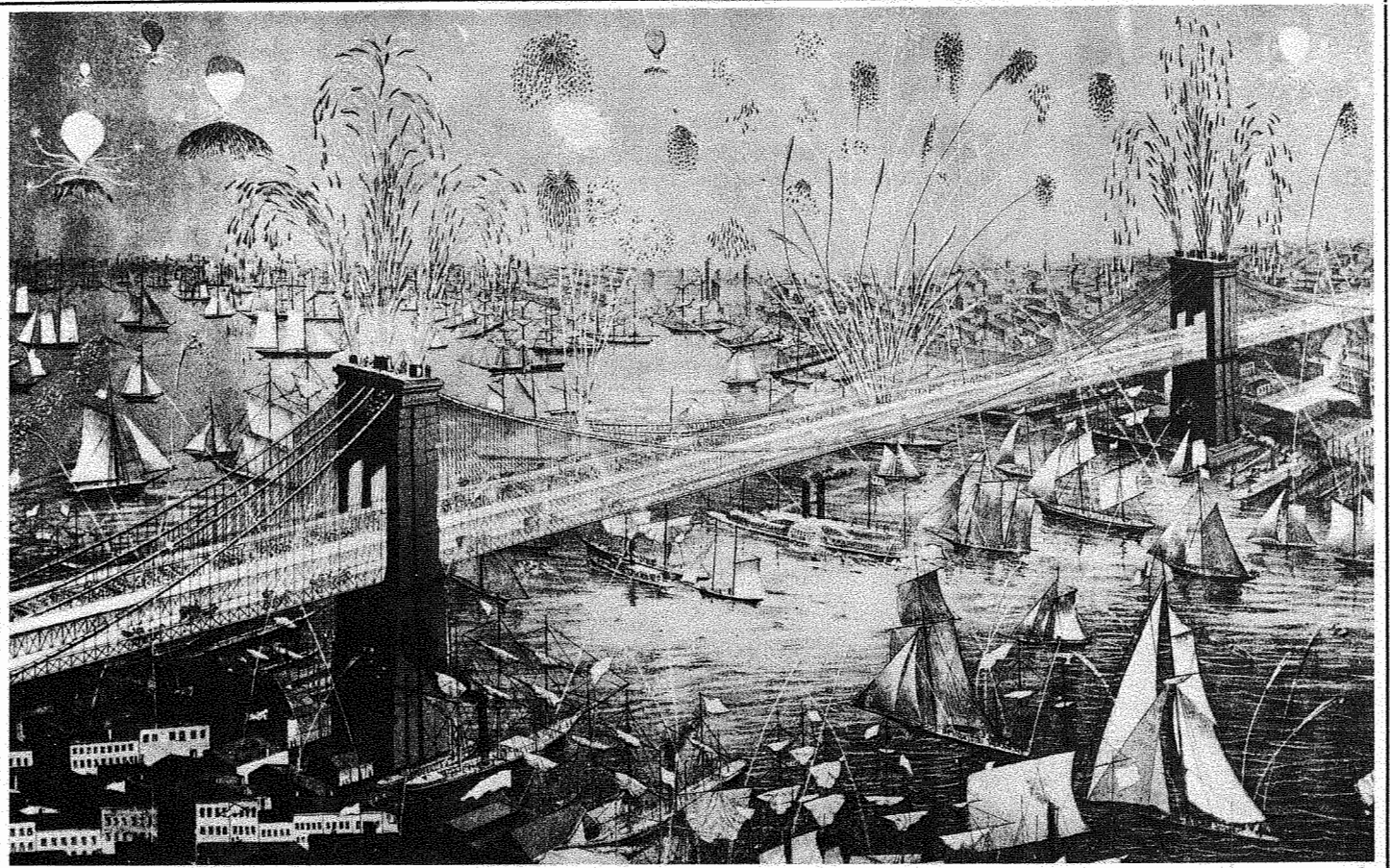
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October 23, 1984

The President
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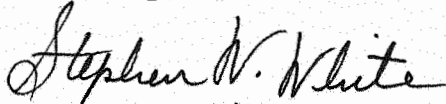
Dear Mr. President:

We would like to take this opportunity to express our appreciation for your contribution to the Fall 1984 issue of National Forum: The Phi Kappa Phi Journal. The special issue entitled "Toward the Bicentennial of the Constitution" will have a total distribution of more than 550,000 copies. The issue will be distributed to the entire membership of The Honor Society of Phi Kappa Phi and of the American Bar Association. Selected members of the following organizations will be receiving a copy of the issue: American Historical Association, American Political Science Association, Council for the Advancement of Citizenship, National Council for the Social Studies, Presidential Classroom for Young Americans, Phi Alpha Delta, Project '87, Supreme Court Historical Society, and many others. In addition, the United States Information Agency will distribute the issue widely to foreign leaders and scholars. The generous contributions of various foundations and the efforts of our guest editor, Dr. Mark W. Cannon, have made possible this extensive distribution.

We wish to thank you for playing a significant role in making this project a success. We feel that your article, "The Presidency: Roles and Responsibilities," was an essential component in this superb collection of readings on the United States Constitution. Your participation has enabled us to stimulate an early interest in the upcoming Bicentennial of the Constitution and make a notable contribution to the education of many citizens. We wish to commend you for making this project a top priority in your busy schedule.

Again, thank you for your support of this project.

Sincerely,


Stephen W. White

SWW/ems



NATIONAL Forum

THE PHI KAPPA PHI JOURNAL

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December 10, 1984

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Thank you for your interest in our publication.

Sincerely,

Elaine Smoot
Managing Editor

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cc: Dr. Mark W. Cannon
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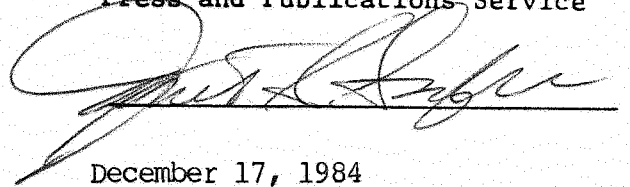
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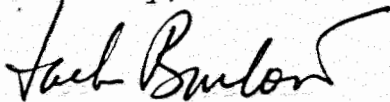
I write at the suggestion of Dr. Brad Wilson, of the Administrative Assistant's office at the Supreme Court, to request permission to take excerpts from articles in the Fall, 1984 issue of National Forum for The New Federalist Papers.

The New Federalist Papers is a project to commemorate the bicentennial of the Constitution in the nation's press. PRS has received major support from the National Endowment for the Humanities for this project; since January we have been syndicating six articles a month. Some of the best-known and most knowledgeable historians, political scientists, and lawyers have contributed articles to the series, as well as such public figures as Attorney General William French Smith and Chief Justice Burger.

We would like to take brief (800 word) excerpts from some of the articles in your Fall, 1984 issue, which has the Constitution's bicentennial as its theme. We would take no more than one excerpt from each article, and will of course give full acknowledgment to National Forum. We will use any brief form of acknowledgment you prefer. Once we have received your permission, we will contact individual authors to secure their approval, and they will then be allowed to approve final copy before it is syndicated. We will send you copies of any and all articles excerpted from National Forum.

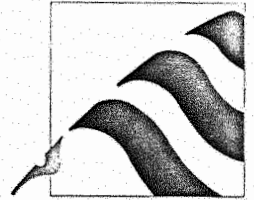
I enclose a brochure which explains the project more fully. If you have any questions, please do not hesitate to call me.

Sincerely,



Jack Barlow
Editor

JB:zr



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NATIONAL Forum

THE PHI KAPPA PHI JOURNAL

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January 17, 1985

Mr. Jack Barlow
Editor
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Dear Mr. Barlow:

Thank you for your letter of December 3, 1984. We, hereby, grant permission for the reprinting of 800-word excerpts from any of the articles in the 1984 Fall issue entitled "Toward the Bicentennial of the Constitution." We understand that these excerpts will be printed in The New Federalist Papers and that we will receive copies of the excerpts for our files. Please use the following credit line when reprinting material from this issue.

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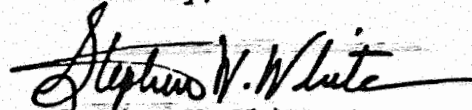
Please note that Dr. David Mathews holds the copyright on his article.

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Also, we did not find a brochure (which was to explain your project) enclosed with your letter of December 3. We would like to have a copy of your brochure for our files.

Thank you for your interest in our publication. Please let us know if we can be of further help.

Sincerely,


Stephen W. White

Enclosure: Address List

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December 3, 1984

"Toward the Bicentennial of the Constitution"

It is once again time for an American festival--time to celebrate what has been described as a work of political genius. The time has come to honor our Constitution on the occasion of its two-hundredth birthday.

It was on September 17, 1787, that 39 delegates to the Constitutional Convention in Philadelphia reached agreement on a system of government so flexible that it has sustained our Republic for almost 200 years. In 1987, we mark the Bicentennial of the writing of the United States Constitution--the celebration of which can begin none too soon.

To stimulate interest in this upcoming celebration, National Forum: The Phi Kappa Phi Journal has produced a special issue entitled "Toward the Bicentennial of the Constitution." This 64-page issue, cosponsored by the American Bar Association's Commission on Public Understanding About the Law, is the culmination of a project undertaken by The Honor Society of Phi Kappa Phi in 1982.

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Contact:

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National Forum, a quarterly publication of The Honor Society of Phi Kappa Phi, one of the oldest and largest interdisciplinary honor societies in the United States, was awarded some \$172,000 to produce and distribute this special issue. Mead Data Central made a major contribution to the project. Additional support was provided by: The Brown Foundation, Inc., The General Electric Foundation, The George Gund Foundation, the Kettering Foundation, The Mead Corporation Foundation, The Pfizer Foundation, and Phi Kappa Phi.

Guest edited by Dr. Mark W. Cannon, administrative assistant to the chief justice of the United States, this special symposium issue features 17 articles by a distinguished group of authors including prominent scholars and government officials. The issue focuses on three areas: The American Constitution in History; Perspectives on the Three Branches; and Constitutional Issues and Contemporary America. The contributing authors are: William J. Bennett, Walter Berns, Albert P. Blaustein, Warren E. Burger, Mark W. Cannon, Orrin G. Hatch, Rita E. Hauser, A. E. Dick Howard, Tom Johnson, David Mathews, Wade H. McCree, Jr., Richard B. Morris, Betty Southard Murphy, Thomas P. O'Neill, Jr., Don K. Price, Ronald W. Reagan, and Gordon S. Wood.

(For a sample of what some of these distinguished authors have to say, see the enclosed excerpts.)

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NATIONAL Forum

THE PHI KAPPA PHI JOURNAL

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MEMORANDUM

TO: Bicentennial Issue Authors
FROM: Stephen W. White, Editor *swwhite*
SUBJECT: News Release on "Toward the Bicentennial of the Constitution"
DATE: December 20, 1984

For your information please find enclosed a news release and a supplement that were recently mailed from the offices of National Forum to news media throughout the nation. More than 750 news release packages and Bicentennial journals were distributed.

Thank you again for your contribution to this project.

Over one-half million copies of this issue will be distributed to lawyers, educators, American and foreign government officials, community leaders, other civic-minded individuals, and libraries likely to influence the planning of Bicentennial programs. In addition to the membership of Phi Kappa Phi, some recipients of the special issue include members of the following organizations: American Bar Association, American Political Science Association, American Historical Association, Project '87, National Council for the Social Studies, United States Information Agency, Freedom's Foundation at Valley Forge, Center for Civic Education, and Presidential Classroom for Young Americans.

NEWS RELEASE

FOR IMMEDIATE RELEASE

December 3, 1984

SUPPLEMENT:

The guest editor of National Forum's special issue "Toward the Bicentennial of the Constitution" is Mark W. Cannon. Dr. Cannon is the first person to hold the position of administrative assistant to the chief justice of the United States, an office he has occupied since 1972 when Congress created the position.

Dr. Cannon was uniquely qualified to select for consideration the variety of perspectives on our constitutional heritage represented in the Bicentennial issue. He has extensive experience in teaching, research, and writing and has worked with all three branches of the federal government as well as with state and local governments.

Dr. Cannon's exceptional background includes travel in more than 60 countries, only a tiny minority of which have constitutions that predate the Second World War. "My travels, together with my interest in political history and comparative government, have convinced me of the uniqueness, the absolute novelty, of the 200-year American commitment to self-government under a single Constitution," Dr. Cannon says.

In his introductory essay in "Toward the Bicentennial of the Constitution," Dr. Cannon addresses the question of why Americans should celebrate the Constitution. As he puts it, "Why celebrate a yellowed,

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200-year-old piece of parchment with faded print? Why bother?" His answer: "We should celebrate the Constitution not only for its role in American history, but for its significance to modern government, its pivotal place in the American psyche, and its role in the continuation of our personal freedom." The significance of this last point is driven home by Dr. Cannon's contrast of the ongoing vitality of the American Constitution in protecting personal liberty and fostering individual creativity with the dismal record of the world's repressive totalitarian regimes.

Dr. Cannon discusses the work of the Framers of the Constitution of 1787 and explains why the Constitution continues to occupy the elevated station it does in American life. He argues, however, that the great success constitutional democracy has enjoyed in this country is not self-perpetuating. He writes: "Today, many Americans are appallingly ignorant of the workings of law and government. They are unfamiliar with the Constitution and the rights, duties, and powers it confers." In a democracy such as ours, there is a need "for civic education, wisdom, and virtue; for the willingness to sacrifice immediate personal gain for greater long-term personal and societal benefit; for commitment to our constitutional system of ordered liberty which must at times assume heroic proportions; for the ingenuity to solve complicated new problems, as we have done so many times in the past."

In light of these needs, Dr. Cannon calls on Americans to seize the "appropriate historical moment" offered by the Bicentennial of the Constitution to engage in earnest reflection on the role played by the Constitution in creating and preserving a way of life now virtually taken for granted and on the role it should play in addressing the problems of the future.