AMERICA'S FEDERAL CONSTITUTION: NOTES ON ITS ORIGINS AND DEVELOPMENT

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> Men are qualified for civil liberty in exact proportion to their disposition to put moral chains on their own appetites; in proportion as their love of justice is above their rapacity; in proportion as their soundness and sobriety of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the counsels of the wise and good, in preference to the flattery of knaves. 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.
>
> Edmund Burke[1]

INTRODUCTION: REPRESENTATION AND CONSENT

The English colonies on the Atlantic coast of America were part of a great experiment in constitution-making, civil liberty, and self-government that culminated in America's federal Constitution of 1787. From 1620 with the Mayflower Compact to 1648 with the Lawes and Liberties of Massachusetts and the Cambridge Platform of Church Discipline, colonial New England witnessed the development of forms of government – covenants, town meetings,

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[1] Quoted from *A Letter to a Member of the National Assembly* (1791), p. 69, in Wilhelm Roepke, *A Humane Economy: The Social Framework of the Free Market* (Chicago: Henry Regnery Company, 1960), xiii.

local self-government, oaths, representation, federalism, constitutionalism, codification of laws, bills of rights, separation of church and state – that gave rise to the American constitutional tradition[2]. (Samson, 1994, pp. 26-38; Riemer, 1967, pp. 30-90, 217). These practical developments were part of a larger theo-political debate that culminated in the English Civil War, the Protectorate, and the Commonwealth (1642-1660).[3] (Haivry, Hazony, 2017, pp. 219-246; Strehle, 2009; Nelson, 2010; Ferdon, 2013).

The Pilgrims and Puritans of Massachusetts[4] established a pattern of local self-government that was a natural extension of their congregational church polities, a pattern that was imitated throughout New England even by those who – like Roger Williams in Rhode Island – objected to the prominent religious role played by civil officers. One of these critics, the Rev. Thomas Hooker, helped found a new colony at Hartford, then assisted in the drafting and adoption of the Fundamental Orders of Connecticut in 1639. According to John Fiske, who wrote in 1889:

> It was the first written constitution known to history, that created a government, and it marked the beginnings of American democracy, of which Thomas Hooker deserves more than any other man to be called the father. The government of the United States to-day is in lineal descent more nearly related to that of Connecticut than to that of any of the other thirteen colonies. The most noteworthy feature of the Connecticut republic was that it was a federation of independent towns,

[2] The laws and covenants of the Bible were the original inspiration of this political tradition and were often cited in official documents.

[3] The period of the Civil War, the Protectorate, and the Commonwealth (1642-1660) in England was also a time of intense political debate and experimentation marked by Bible scholarship on both sides of the Atlantic.

[4] The Pilgrims of Plymouth Plantation under Gov. William Bradford were dissenters or separatists who had broken from the Church of England, taken refuge in Leyden, and joined other settlers aboard the Mayflower in 1620. The Puritans sought to reform the Church of England from within. The main body of them arrived as part of a major expedition in 1630. John Winthrop served as the first governor.

> and that all attributes of sovereignty not expressly granted to the General Court remained, as of original right, in the towns. (Fiske, 1930 [1889], pp. 137, 140).

Thus the State of Connecticut began as a true federal union more than two decades before this new form was confirmed and given official sanction by the British crown in the charter of 1662.[5] Following the Declaration of Independence of 1776, Connecticut was one of three states – Massachusetts and Rhode Island were the other two – that continued to operate for a time under their colonial charters. Donald Lutz summarizes the full scope of this literature:

> With independence, Americans did not so much reject the British constitution as affirm their own constitutional tradition. They tested that tradition between 1776 and 1787 by writing two dozen state constitutions and the national Articles of Confederation. Then, in the summer of 1787, Americans brought to completion the tradition of constitutional design they had begun more than a century and a half earlier… [E]ven a quick reading of the document shows that the states are mentioned ubiquitously. We cannot understand much of what we find in the national document [the Constitution of 1787] without also reading the state constitutions in effect at that time. It would not be putting the matter too strongly to say that the United States Constitution, as a *complete* foundation document, includes the state constitutions as well. (Lutz, 1988, p. 5)[6].

Col. Daniel L. Waters detects in this history "*the enduring principles and elements that framed America's first grand strategy*" and contends that they "*must also frame America's Grand Strategy in the 21st century.*" (Waters, 2016, 4)

> *Popular sovereignty* is the political idea that the *community* and its *government* originate in the *consent* of the *people*. Popular *sovereignty* created and sustained *civil liberty* through the symbiotic consensual relationship created between the people, the community, and the government, which balanced

[5] It remained as the state constitution following independence until 1818.

[6] For a detailed discussion of the Declaration as a similar covenant-type document, see chapter nine.

> individual freedom with obedience, and civil rights with civil responsibilities. *Civil liberty* represented the balance between *liberty and order* that resulted from this symbiotic consensual relationship. (Waters, 2016, p. 7)

This constitutional tradition is eminently practical rather than a product of mere abstract theorizing. It is nomocratic rather than telocratic, to use Michael Oakeshott's distinction (2011, p. 471). It is here at the intersection of these two political tendencies that the present contest is joined. What has come to pass for "a higher morality," according to Oakeshott, "is merely morality reduced to a technique, to be acquired by training in an ideology rather than an education in behavior." (2011, p. 410)

> For the Rationalist, all that matters is that he has at last separated the ore of the ideal from the dross of the habit of behavior; and, for us, the deplorable consequences of his success. Moral ideals are a sediment: they have significance only so long as they are suspended a religious or social tradition, so long as they belong to a religious or a social life. The predicament of our time is that the Rationalists have been at work so long on their project of drawing off the liquid in which our moral ideals were suspended (and pouring it away as worthless) that we are left only with the dry and gritty residue which chokes us as we try to take it down. First, we do our best to destroy parental authority (because of its alleged abuse), then we sentimentally deplore the scarcity of 'good homes', and we end by creating substitutes which complete the work of destruction. (1991, 12); (Mahoney, 2004)[7]

Nearly four centuries after its first seeds were planted on American soil, this constitutional tradition has come under greater scrutiny and more intense debate than ever. The custodians of our traditions of civility and self-government seem to have left the field. The culture wars of late have brought issues of consent to a high pitch of intensity. If the political process degenerates into a mere

[7] The Rationalist disparages practical knowledge (prudence) in favor of the narrower realm of technical reason. In politics, it stakes its claim to rule on the good reputation of science.

clash of interest group politics – guided by rent-seeking, clientelism, dependency, slander, and libel – what power will bind society in the future? This is the role historically played by memory and religion – from the Latin, *religare*, which means to tie or bind, like a ligament (Oakeshott, 2011, p. 484); (Girard, 2001, p. 64)[8].

As the modern administrative state extends its operations into all areas of social life, it breaches the constitutional safeguards that had traditionally kept society and its various institutions free from intrusive regulation by civil authorities. Constitutionally limited power – as expressed in such ideas as Abraham Kuyper's "sphere sovereignty" and Leo XIII's "subsidiarity (Samson, 2014, pp. 19-23); (Evans, 2012)[9] – is the essence of the original system. The journalist Felix Morley represented this earlier tradition when he wrote: "A person who maintains that the State should solve, by necessarily coercive methods, any problem that individuals are capable of solving voluntarily, is, of course, the very opposite of a liberal. The essence of tyranny is reliance on external, as opposed to internal, compulsion." (Morley, 1972, p. 141) Restoring a sense of self-governance, representation, and consent in an age of concentrated, centralized power is a challenge that demands a clear and sophisticated response. (Minogue, 2000, p. 51)[10] Can a revival of America's constitutional patriotism help guide the way?

[8] Michael Oakeshott's "The Tower of Babel" is a meditation on the way Christian morality was conscripted at a critical junction into shoring up and partially replacing the Greco-Roman morality "in which the selfconscious pursuit of moral ideals was preeminent." The unintended consequences of subordinating practical moral conduct and habits to abstract moral ideals or ideologies may help account for the unrelenting character of the cultural conflict: resembling what Rene Girard has called a mimetic contagion, in which the means give way to the extremes.

[9] Evans compares and contrasts Australia, the United States, and the European Union.

[10] Kenneth Minogue expressed the dynamic that is at work: "Self-interest is the duty an individualist society upon its members to be self-motivated." The dilemma is whether an expectation of self-motivation or even James Madison's conviction that "conscience is the most sacred property" can coexist with a reality of dependency and identity politics? The old philosophical problem of the One and the Many – the tension between unity and diversity – continues to intensify.

THE FIRST CONFEDERATION OF AMERICAN STATES

Taxation without Representation A decade of colonial resistance (1764-1775) against unprecedented revenues (as opposed to the normal regulation of trade) imposed by Parliament culminated in a War for Independence. (Evans, 1994, p. 218)[11] A year after the Battles of Lexington and Concord on April 19, 1775, which signaled the new phase, a formal confederation of American states was proposed during the Second Continental Congress on June 7, 1776 by Richard Henry Lee, along with a formal Declaration of Independence. (Morris, 1953; Eliot Morison, 1965) Archie Jones contends that it takes the form of a covenant lawsuit:

In form, the Declaration is *a plea at law against the king in Parliament*, charging him with failure to uphold his contractual obligations as feudal lord over the colonies. As such, it is a powerful assertion that *rulers are under the law*, that their powers, even though they be a popular or quasi-popular assembly, are limited by fundamental law, and that both George III and Parliament are unjustified in attempting to assert their supposed right to absolute rule (Jones, 1976, p. 43).

Then, after more than a year of debate, the Articles of Confederation were formally adopted by Congress on November 15, 1777 and sent to the states, where the document took more than three years to win the required unanimous approval. Even so, the new government – called a "firm league of friendship" and a "perpetual union" – was little more than a military alliance. Full ratification was delayed until Maryland ratified on March 1, 1781, a mere seven months before the decisive Battle of Yorktown.

Congressional Powers Congress was charged with the following responsibilities: foreign affairs, making war and peace, the appointment of military officers, settling interstate disputes, governing western territories, handling Indian affairs, and running a postal system. Between sessions of Congress, a Committee of the States handled routine matters.

[11] The colonists distinguished "between imposts levied for purposes of *trade regulation* and those intended to *raise a revenue*."

The powers of Congress were strictly limited. Congress could ratify treaties, borrow money, and coin money – a power it shared with the states – only with the consent of nine states. These might have yielded long-term benefits, but the new government was saddled from the start by several deficiencies. Altogether absent were an executive and judicial authority, a power to tax the people or impose tariffs, and a power to regulate commerce. Few remedies were provided. Amendments could be made only with approval by all states.

TRIAL RUN OF THE CONFEDERATION

Interstate Rivalries The largest state, Virginia, was eventually prevailed upon to cede to the United States her territorial claims to Kentucky and the Ohio River Valley. Indeed, Maryland's refusal to ratify the Articles hinged on this issue of western territorial claims. Even so, rivalries occasionally erupted into armed conflict. In 1784 the Pennsylvania militia forcibly removed Connecticut settlers from the Wyoming Valley with the approval of the state assembly. Nevertheless, the Pennsylvania Council of Censors intervened late in the summer and compelled the state assembly to pass laws restoring these lands (Morris, p. 112).

In addition to quarrels over western lands, the boundaries between states sometimes bred bitter wrangling from the colonial period onwards. The eastern shore of Virginia on the Delmarva peninsula, which was annexed in 1663, was disputed until 1894. Fisher's Island off the coast of Connecticut, which was granted to New York in 1676, was reaffirmed in 1879.

In addition, various intrigues threatened to disrupt the new union from the beginning. Ethan and Levi Allen sought a treaty with England that might have brought Vermont into association with Canada (Morris, p. 287). In 1784 Spain cut off American commerce on the Mississippi. The weakness of the central government made it difficult to negotiate favorable trade concessions

from other countries. Americans were excluded from many British imperial markets. Moreover, attempts by Congress to gain power to regulate commerce were stymied because constitutional amendments required ratification by all thirteen states.

Territorial Ordinances The greatest achievement of the period was the development of a new land policy for the territories. Three land ordinances set the precedents for the following century of westward expansion. The first was Thomas Jefferson's territorial ordinance of 1784. It provided for common ownership over all territories, their division into prospective states, the assignment of names, the organization of territorial governments, and full statehood once a territory achieved the population of the smallest existing state and upon the approval of two-thirds of the existing states. New states would be admitted on an equal footing with the original states. But the most remarkable passage in the proposal, which was deleted due to the absence of a member from New Jersey, dealt with slavery: "That after the year 1800 of the Christian Era, there shall be neither slavery nor involuntary servitude in any of the said States" (Rosenstock-Huessy, 1938, pp. 649-650).

Before the Jeffersonian ordinance could be put into operation, however, it was superseded by two others. The Basic Land Ordinance of 1785 provided for rectangular surveys dividing the Ohio Valley into townships of six miles square composed of 36 square mile lots. This was the original of the grid system that has become fixed into the landscape. The system as a rule, however, favored large speculators rather than small farmers. One lot in each township was set aside for the purpose of providing support for a public school. A similar proposal to set aside another lot for the support of the majority religion in each township narrowly missed passage.

The Northwest Ordinance of 1787 provided for a territorial government, freedom of worship and public support of education, abolition of slavery, eventual division of the Northwest into 3-5 states, and the admission of new states on an equal footing with the old.

Demands for Economic Relief The postwar economic depression reached its low point in the summer of 1786. Several states issued new paper money. In September, however, the supreme court of Rhode Island ruled in *Trevett* v. *Weeden* that the state's new legal tender law – forcing creditors to accept fiat paper currency – was unconstitutional. This case helped set a precedent for judicial review (Morris, p. 115).

During that same summer, Congress debated several proposals to amend the Articles of Confederation, but these were never submitted to the states. In order to get action on problems relating to commerce, the State of Virginia called for a convention which met for four days in September. Delegates from five states attended. Alexander Hamilton of New York succeeded in getting delegates to this Annapolis Convention to agree to another convention to revise the Articles. They agreed to a meeting in Philadelphia the following May for "the sole and express purpose of revising the Articles of Confederation."

Shays' Rebellion Even as Hamilton was appealing for constitutional revisions, debt-ridden farmers in Massachusetts were clamoring for paper money and laws to stem the foreclosures that had been dogging them. Mob violence began to break out in August 1786 and soon several hundred insurgents rallied around Daniel Shays, a captain during the Revolutionary War. The rebellion finally collapsed in February following several skirmishes and some bloodshed. Shays was later pardoned. Nevertheless, the incident left leaders throughout the country worried about what might lie ahead unless the country's economic and political troubles could be resolved. George Washington now threw his support behind the call for a new convention.

THE PHILADELPHIA CONVENTION

Leadership The Convention convened late in May 1787. George Washington was unanimously appointed as president. His silent presence during the proceedings had a restraining effect. If anyone

could be considered indispensable to the American experiment, it would be the man whose public service extended from the beginning of the French and Indian War through all three branches of government and a lifetime of military service. Samuel Eliot Morison has characterized him in the loftiest terms:

> He was more than a general: the embodiment of everything fine in the American character. With no illusions about his own grandeur, no thought of the future except an intense longing to return to Mount Vernon, he assumed every responsibility thrust upon him, and fulfilled it. He not only had to lead an army but constantly to write letters to Congress, state leaders, and state governments, begging them for the wherewithal to maintain his army. He had to compose quarrels among his officers and placate cold, hungry, unpaid troops. Intrigues against his authority he ignored, and the intriguers came to grief. In his relations with French officers he proved to be a diplomat second only to Franklin. Refusing to accept a salary, he dipped into his modest fortune to buy comforts for the soldiers and to help destitute families of his companions in battle. Thus Washington brought something more important to the cause than military ability and statesmanship: the priceless gift of character (Morison, pp. 237-238)[12].

William Jackson was elected secretary. James Madison kept a detailed personal diary. Leaders in the floor debates included James Madison and George Mason of Virginia, Gouverneur Morris and James Wilson of Pennsylvania, Roger Sherman of Connecticut, and Elbridge Gerry of Massachusetts. Many of the delegates were members of a new generation of leaders who began to emerge alongside the still young radicals of an older generation who had begun the struggle only two decades earlier.

John Adams and Thomas Jefferson were out of the country on diplomatic assignments. Patrick Henry, who said he "smelt a rat," and a few other leaders who were suspicious of the proceedings

[12] His closest historical counterpart, perhaps, was William the Silent, as Francis Lieber maintained.

stayed away. Rhode Island, which was so often out of step with the other states, did not even send a delegation.

The Delegates It was a distinguished assembly. Most of the fifty-five delegates were college educated and over half were lawyers. The rest were planters, merchants, physicians, and college professors. They were generally young, representing the new generation of leaders that had emerged during the War for Independence. Two-thirds of them had sat in the Continental Congress. Nine of them, including James Madison, had studied with John Witherspoon at Princeton. Thomas Jefferson, who was then in France, referred to the Convention as "an assembly of demi-gods."

The delegates were pledged to secrecy, which permitted free debate, but Robert Yates and John Lansing of New York left on July 10 and publicly denounced the Convention for exceeding its authority.

Virginia Plan Edmund Randolph and his fellow Virginians arrived early and stole a march on the other delegations by preparing the Virginia Plan, which was introduced on May 29, four days after the convention opened.

The plan called for scrapping the old Articles in favor of a new Constitution. Its purpose was to strengthen the national government, which under the Articles had the power to borrow money but not to tax or to otherwise secure the cooperation of the states. It proposed a bicameral national legislature that would represent the states proportionally. The lower house would be elected by the people. The upper house would be elected by the lower house from nominees proposed by the state legislatures. A chief executive with the power to veto legislation was to be chosen – along with a supreme court – by the legislature. (McClellan, 2000, pp. 257-259, pp. 275-277).

Debates The Virginia Plan set the agenda and became the focus of the debates. Recent experience with Shays' Rebellion caused Roger Sherman and Elbridge Gerry to oppose popular elections at the national level, but George Mason argued for popular election of the larger branch of Congress, which was adopted.

James Wilson argued for a single executive but Edmund Randolph opposed it as "the foetus of Monarchy," calling to mind the man on horseback. Wilson's view finally prevailed.

James Madison saw the upper house, now named the Senate, as the more deliberative of the two branches of Congress and wanted it to be popularly elected. But Gerry and Mason wished to have it reflect the will of the state legislatures, making the states, according to Mason, a "constituent part of the national establishment." The vote was unanimous in favor of a bicameral Congress comprised of a national legislature (The House of Representatives) and a federal legislature (The Senate). (Madison, no. 39)[13]

The New Jersey Plan The Virginia Plan aroused some opposition because it was perceived as favoring the interests of the large states and because it favored a centralized government. William Paterson introduced a counterproposal known as the New Jersey Plan on June 15. It proposed a revision of the existing Articles by keeping equal representation of the states in Congress, but giving Congress the powers to levy direct taxes and regulate commerce. The plan was simplicity itself: one state, one vote. Congress would also name a plural executive without a veto power, and a supreme court. Treaties and acts of Congress were to be the supreme law of the land (McClellan, pp. 262-263, pp. 278-280) However, an alliance of the larger states and the Carolinas defeated the plan four days later and returned to Virginia's national plan.

Late in June, the Convention began to meet as a Committee of the Whole to consider the Virginia Plan. The debate centered on the issue of proportional vs. equal representation.

Facing a stalemate, Benjamin Franklin proposed on June 28 that sessions be opened with a prayer, declaring to chairman Washington: "I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth, that God governs in the affairs of men. And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without

[13] http://avalon.law.yale.edu/ 18th_century/fed39.asp.

his aid?"[14] Franklin's motion was lost due to a lack of funds with which to pay a chaplain.

Compromises Earlier, Roger Sherman had introduced a plan that was initially rejected but was revived in July. Sherman proposed a bicameral Congress with proportional representation in the lower house and equal representation in the upper house. The Connecticut Compromise or Great Compromise as it has come to be known was accepted on July 16. It joined the earlier three-fifths compromise which counted 3/5 of the slave population in figuring representation in the House. The electoral college was created as another compromise between state power and popular rule in order to better represent the country's great expanse and diversity. Yet another was the commerce compromise, which permitted import duties (tariffs) but outlawed export taxes and prohibited interference with the slave trade for twenty years. This proved to be too much for George Mason.

> The apparent deal appalled Mason. Although Mason owned dozens of slaves himself, he had repeatedly condemned the institution. He saw no easy way to abolish slavery where it was already well entrenched, but felt that few vested interests would be disturbed by ending the foreign slave trade. On August 31, Mason proclaimed he "would sooner chop off his right hand than put it to the Constitution as it now stands."[15]

With various obstacles removed, Congress proceeded to draw up a series of twenty-three fundamental resolutions late in July. After they were put into proper legal form, the articles were submitted to the Convention on August 6.

The Great Debate The particulars were debated and resolved over the course of a month. Specific provisions regarding terms of office, the commerce clause, and the prohibition of bills of attainder and ex post facto laws were worked out. Attempts to

[14] https://www.beliefnet.com/resourcelib/docs/21/Benjamin_Franklins_Request_for_Prayers_at_the_Constitutional__1.html

[15] Jeff Broadwater, "George Mason (1725-1792)," Encyclopedia Virginia https://www.encyclopediavirginia.org/Mason_George_1725-1792.

abolish slavery were thwarted when the Carolinas and Georgia threatened to secede. Efforts to set property qualifications for federal office holders were rejected.

Benjamin Franklin favored a liberal immigration policy, while Pierce Butler of Georgia and Gouverneur Morris opposed. The controversy has persisted to the present day. Elbridge Gerry and Luther Martin of Maryland sought strict limits on the army in peacetime, but without success.

The Constitution also gave Congress the power to assume the national debt but did not require it to do so as Gerry wanted. Nevertheless, it did so later despite Gerry's truculent opposition to the final document.

The results of the debates were then handed over to the Committee on Style and Arrangement composed of William Johnson, Hamilton, Madison, Rufus King, and Gouverneur Morris, who hammered out the last details from the 8th to the 17th of September.

Final approval also took place on September 17. Three of the 42 delegates who still remained refused to sign: Elbridge Gerry, Edmund Randolph, and George Mason. On the 28th, Congress resolved to transmit the Constitution to the state legislatures for ratification despite attempts to have it censure the Convention for violating its original instructions.

On the last day of the Convention, Benjamin Franklin called for unanimous consent:

> In these sentiments, Sir, I agree to this Constitution with all its faults, if they are such; because I think a general government necessary for us, and there is no form of Government but what may be a blessing to the people if well administered, and believe further that this is likely to be well administered for a period of years, and can only 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.[16]

[16] https://www.usconstitution.net/franklin.html

Critiques Thomas Jefferson later recalled that George Washington was pessimistic about the result because of the rejection of a proposed rule to require a two-thirds majority in matters that affected the economic interests of the different sections. In a later essay, "The Civil War in America," the British historian Lord Acton noted: "This provision, which would have given protection to minorities, was repealed in consequence of a coalition between Southern and Eastern States, for the benefit of the slave-owners in the South, and of the commercial and manufacturing interests in the East. But this coalition proved to be short-lived and both sections would later regret the omission.[17] George Washington also "did not like throwing too much into democratic hands; that if they would not do what the Constitution called on them to do, the government would be at an end, and must then assume another form." (Emerich Edward Dalberg-Acton, 1986, pp. 267-268)

Among those advocating a strong central government, Alexander Hamilton believed the compromises so weakened the document that it would not last. Daniel Carroll pointed out its continuity with the Articles. But Madison saw this as a factor in its favor. On the other side, the Antifederalists feared that the new constitution would become an instrument of tyranny. As Samuel Eliot Morison put it: "Luther Martin regarded it as a stab in the back to the goddess of Liberty." (Morison, p. 311)

Recent historians, like Gordon Wood and Robert Bellah, believe the founders attempted to reconcile liberal constitutionalism with a system of civic-minded republican virtue. Forrest McDonald contends that the framers of the Constitution made personal ambition rather than virtue the system's "activating principle." (McDonald, 1979 [1965], pp. 315-316). For the Antifederalists this was a problem. As Samuel Eliot Morison summarized:

[17] Among other examples, New England's Hartford Convention of 1814 sought to restore the 2/3 rule. South Carolina nullified the Tariff of 1832 and threatened succession if the Jackson Administration sent military forces to enforce it.

> Antifederalists appealed to Tom Paine's sentiment, "That government is best which governs least." They viewed with alarm the omission of annual elections and rotation in office. And there is little doubt that the Antifederalists would have won a Gallup poll. Elderly radicals such as General James Winthrop and his gifted wife Mercy [Otis Warren], who believed that the states were the true guardians of "Republican Virtue," predicted that the new Constitution would encourage vice and speculation, and that under it America would soon go the way of imperial Rome. This prediction is repeated every four years. (Morison, p. 313)

Americans today take the Constitution's longevity for granted. But even the most optimistic delegates like James Madison did not expect it to last more than a generation.

THE RATIFICATION DEBATES

Alexander Hamilton, who was unhappy with the new Constitution, which he later called a "frail and worthless fabric,"[18] now faced the problem of selling it to the hostile New York Assembly. In collaboration with James Madison and John Jay, he wrote the bulk of a series of eighty-five newspaper articles signed under the pseudonym "Publius" and published in New York newspapers between October 27, 1787 and April 2, 1788. These Federalist Papers have come to be regarded as the classic interpretation of the intent of the Framers of the Constitution.

Prestigious men like Washington and Franklin upheld the Federalist position, but there were also prominent Antifederalists, including George Mason, Elbridge Gerry, Richard Henry Lee, and Patrick Henry. Among these opponents were some of the wealthiest men in the country. Unlike the Federalists, most Antifederalists used the term "democracy" approvingly and feared the growth of a centralized tyranny. Robert Yates, who wrote

[18] http://www.alexanderhamiltonexhibition.org/letters/01_27.html.

under the pseudonym "Brutus," argued that the judiciary was left unchecked by the new Constitution.

It was the younger men, the natural democrats, who rallied to the Constitution. Although Edmund Randolph and John Hancock hesitated, they finally threw their support behind the new Constitution. Samuel Adams was also won over.

Delaware, Pennsylvania, and New Jersey ratified in December, all except Pennsylvania unanimously. The Anti-Federalist dissent presented at the Pennsylvania convention criticized the lack of a bill of rights and the notion of "two co-ordinate sovereignties," which would necessarily result in the destruction of state governments. It warned against direction taxation of the people and the tendency of the new constitution to mix the powers of government: for example, in tying the presidency too closely to the Senate in the appointment power. Its recommendations were typical of the amendments that several conventions proposed.

Georgia and Connecticut ratified in January. In February, Massachusetts ratified by a close vote and only with the addition of some recommended amendments. Rhode Island rejected it in March. Then came another string of ratifications: Maryland in April, South Carolina in May, and New Hampshire brought the vote to the necessary 2/3 majority in June of 1788.

Virginia finally ratified on June 25 despite Patrick Henry's opposition. Henry supported a strong national defense, but he was also suspicious that Northern politicians were more interested in perpetuating "the influence of their region at the expense of settlers who hoped to build for themselves and their children a new life along the frontier." (Bradford, 1991, 14) Still, the Virginia Assembly stipulated that amendments be made and a bill of rights included. It also asserted in its ratification declaration "that Powers granted under the Constitution, being derived from the people of the United States, may be resumed by them whensoever the same shall be perverted to their injury or oppression."[19] New York and Rhode Island later followed this precedent.

[19] http://avalon.law.yale.edu/18th_century/ratva.asp

Hamilton delayed a final vote in New York until it was clear that the new Constitution had been ratified by New Hampshire and Virginia. Even then, it just barely passed late in July. North Carolina did not ratify until late in 1789, months after the new government had taken office, and Rhode Island, which was controlled by a debtor faction, waited until May 1790.

The leaders of the opposition reconciled themselves to the inevitable and made no attempt to sabotage the new government. In Virginia, Patrick Henry remarked: "I will be a peaceable citizen. My head, and my heart, shall be at liberty to retrieve the loss of liberty, and remove the defects of the system in a constitutional way." (Morison, p. 315)

In October of 1788 with all but two states having ratified, the Continental Congress dissolved itself in New York. Afterwards elections for the new Congress were held.

CONSTITUTIONALISM

Purpose The great accomplishment of the Philadelphia Convention was producing a design for a free government. Let us examine the development of the Constitution of 1787 in some detail.

The standard textbook approach characterizes a constitution as “a set of rules about rule making” whose purpose is to describe the structure and decision making processes of government and to allocate political power. It is not so much a definition as a description. No consideration is given to its origins, its scope, or the nature of its authority. It is important to understand that the American tradition of written constitutions dates back to the earliest colonies and is rooted in an even earlier covenant tradition. (J. Elazar, 1980, pp. 3-30) As Donald S. Lutz notes: “Political covenants were derived in form and content from religious covenants used to found religious communities.” (S. Lutz,

1998, xxxv)[20] For example, the preamble, which takes the form of an oath that normally invokes God and states a few abstract principles, has become an expected part of any such document. As Daniel J. Elazar, who helped found Temple University's Center for the Study of Federalism, summarizes:

> The first political principles systematically enunciated in America were extensions and adaptations of the Puritans' federal theology which saw all society as an outgrowth of the basic biblical covenants between God and His people. [Gov. John] Winthrop referred to the good commonwealth as one committed to "federal liberty," or the freedom to freely harken to the law of the covenant. The Puritans sought to place all relationships among people on a covenantal basis. Their congregations were covenant-formed partnerships of "saints" which came into existence only when potential members covenanted among each other, and survived only so long as the covenantal act remained valid (potentially but not necessarily forever).[21]

Thus the Constitution of 1787 may be regarded as the second part of an American covenant that begins with the Declaration of Independence as the founding charter for a "perpetual union" and that takes the place of the earlier Articles of Confederation for the sake of "a more perfect union." The first effectively founded the American nation and the second established the American polity (M. Ferdon, 2008, pp. 249-253). Like the earlier covenants, the polity is federal in structure – dividing power between the states and a new national government – with a system of checks and balances built into it to keep power divided, limited, and accountable to the people.

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[20] An understanding of the Constitution and the development of the modern written constitution from earlier charters and covenants is greatly aided by a careful study of the foundational documents of the various colonies along with practical experience of colonial self-government.

[21] Daniel J. Elazar, "Covenant and the American Founding," at http://www.jcpa.org/dje/articles/cov-amer.htm.

As the United States began to expand westward, the constitutions of the new states reflected an increasingly egalitarian outlook. Many state constitutions are largely composed of pickings from earlier examples in a chain that dates back to the first founding documents of the early American colonies.

Each state constitution contains a bill of rights, beginning with the Virginia Declaration of Rights of 1776. As with so many constitutional precedents, the early states set the example which our national constitution followed. Each state constitution also provides for the *separation of powers* between the three branches of government and for a system of *checks and balances*. Questions of constitutional interpretation are usually left for the courts to decide.

Numerous distinct *powers* have been subsequently abstracted from or interpolated into the Constitution by various jurists and scholars. Some powers are granted or delegated to the government (*expressed*, *delegated*, or *enumerated powers*); other powers, called civil liberties are withheld from it (*denied powers*); some are *concurrent powers* shared by the various levels of government, such as taxing and spending (*fiscal powers*), eminent domain (*takings*), and police powers for regulating public health and welfare; others are *exclusive powers* exercised only by the national government; still others are reserved to the states or to the people (*reserved powers*).

In the case of *McCulloch* v. *Maryland* (1819), the Supreme Court identified *implied powers* – those deemed "necessary and proper" to the exercise of the enumerated powers. These are derived from the so-called *elastic clause* (Art. I, sec. 8). The Court later identified *inherent powers* relating to foreign policy which are not derived from the Constitution but from the fact of national sovereignty; and *resulting powers*, which are extrapolated from a combination of enumerated powers.[22]

[22] The notion of resulting powers has been a subject considerable controversy and, sometimes, hilarity. In *Griswold* v. *Connecticut* (1965), Justice William O. Douglas asserted that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," among which he discerned a "right to privacy." This case lent support eight years later to *Roe*

Amendment Several major ways of changing a constitution are provided by the Constitution itself or generally accepted political custom. The Constitution itself provides two methods of proposing a change and two methods of ratifying it. First, a constitutional convention may be convened upon the vote of two-thirds of the members of both houses of congress or two-thirds of the state legislatures. This method has not yet been used, although nearly two-thirds of the states have called for a balanced-budget amendment. Alternatively, an individual amendment may be proposed by following the same procedure without the necessity of calling for a convention.

Ratification of a new constitution or an amendment may be achieved either by a vote of three-quarters of the state legislatures or by three-quarters of ratifying conventions held by the states. This last method was used in ratifying the Constitution and again in 1933 to repeal the Prohibition Amendment.

Second, the Constitution may be effectively changed either through custom or by executive, legislative, or judicial interpretation. The Supreme Court is now generally recognized as the authority of last resort through judicial review, although the president, Congress, and the states historically have claimed this power.

Third, at the state level, the popular initiative may be used in those states which permit the circulation of petitions in order to have a proposed law or amendment placed on the election ballot.

Fourth, also at the state level, an amendment may be proposed by a state legislature and ratified through a popular referendum.

Extraordinary Measures In addition to the generally accepted methods, more drastic measures have been taken from

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v. Wade (1973), the decision that overturned state laws which prohibited or restricted abortion. Probably the first use of this legal and political blank-check occurred in the third of a series of legal tender cases, *Julliard* v. *Greenman* (1884), which, ironically enough, upheld the imposition of unbacked paper currency. Justice Stephen Field wrote a blistering dissent. See George Bancroft, *A Plea for the Constitution of the United States, Wounded in the House of Its Guardians* (New York: Harpers, 1886).

time to time. Interposition occurs when a duly appointed or elected official resists what he considers unlawful orders by a superior or by another official or agency of the government. He thus interposes his authority to protect against tyranny or injustice. Several states once claimed the right of nullification, insisting that they could in effect veto unlawful laws passed by Congress (Morley, 1959, pp. 179-195). Their ultimate recourse was to secession, in which they voted to withdraw from the union.

In the case of the War Between the States (1861-1865), President Abraham Lincoln responded by assuming emergency powers and declaring martial law, which effectively – although only temporarily – suspended certain constitutional protections. Nevertheless, these actions set a precedent for the increasing centralization of power over more and more parts of the country during the postwar Reconstruction and subsequently. Emergency powers in the form of executive orders have proliferated since the First World War (W. Burgess, 1923); (Higgs, 1987).

ORGANIZING PRINCIPLES: DIVISIONS OF POWERS

Our constitution provides for a division of powers through four organizing principles.

Federalism The primary division is the vertical system of federalism in which power is divided into two main levels between a central (or national) government and individual states, each being limited by the other and by the Constitution. Modern federalism, which provides for unity as well as diversity, originated in the political covenants developed by Puritan communities in New England to preserve local self-government while entrusting certain functions, like defense, to larger units. It is perhaps the chief American contribution to political theory. Its apex of development was reached with the American Constitution of 1787. The prevailing norm among states before 1787 was either a unitary system with a strong central government, as in a monarchy or empire, or a confederated system of many small

regions or city-states that were only loosely united, as with feudalism.

Separation of Powers The second major division is the horizontal separation of powers, which Baron Montesquieu earlier attributed to the unwritten British constitution. Here the functions of government are divided between several units, which include three separate branches at the national level and three at the state level, as well. The three branches are: first, the two-chambered legislative or law-enacting branch, which in many respects is the central unit of government; second, the executive or law-implementing branch; and finally, the judicial or law-interpreting branch.

Each branch (as well as each of the two chambers of Congress) is characterized by different methods or modes of selecting their officers and by different terms of office. Representatives (or congressmen), who are members of the lower house of Congress, are elected to a two-year term by registered voters who reside within specific congressional districts within the states. Senators, who are members of the upper house of Congress, are elected to a six-year term by the electorate of the entire state. The President and Vice-President are elected to four-year terms through the electoral college. Justices of the Supreme Court and other courts of the federal judiciary are appointed for life or good behavior by the president and confirmed by the senate.

Bicameralism The third division is the bicameralism of the legislative branch in which Congress and the state legislatures are divided into two chambers, a Senate and a House of Representatives, with the exception of Nebraska, which has a unicameral legislature.

In Congress, the Senate or upper house was originally designed to represent the states themselves. Before 1913, Senators were elected by the state legislators. Today, they are directly elected by the people. At the national level, each state is represented by two Senators in Congress who are free to vote their conscience and who may act as a restraint on the presidency and Supreme Court. The lower house or House of Representatives was originally designed to represent the people. The number of representatives

in Congress is loosely based on population with each congressman representing approximately 750,000 people. All taxing and spending bills must originate in the lower house on the principle that the House is most directly accountable to the people and is supposed to reflect public opinion.

Republican Principle A final division of power may be found in the operation of the republican principle itself, which divides power between the people and their elected representatives. The indirect rule of the people through their representatives enhances stability by buffering elective officials from the momentary passions of the people, who may be unduly swayed by shifting political winds. The system is supposed to favor the election of wise and capable leaders rather than popular leaders whose only qualification is the ability to win votes.

The electoral college is best understood in the context of the republican principle. A slate of electors is fielded by each political party throughout the state. One set of electors is chosen during the general election, usually on a winner-take-all basis except in Maine, Nebraska, and the District of Columbia. The number of electors for each state is determined by the total number of its congressional and senatorial districts, which gives more of an advantage to less populous states than strict proportional representation. About a month after the general election the winning slate of electors meets at the state capital and casts its votes, which are then forwarded to the Senate to be counted when Congress begins its next session in January.

Election of the president requires a majority of electoral votes throughout the country. Otherwise the House of Representatives must decide on a one state, one vote basis. Although there are efforts from time to time to abolish the electoral college system, they have failed in part because it effectively gives the less populous states and regions, which rarely produce national leaders, a potential veto over the election. This complicated system designed to assure the election of people who have broad national appeal and are acceptable throughout the country.

CONSTITUTIONAL THEORY

This brings us to another topic: a look at the theoretical foundations of our political system.

The first point to be made is that the locus of sovereignty – the true source of power – under the Constitution has been disputed almost from the beginning. (Bradford, 1993) According to Forrest McDonald, Massachusetts and New Hampshire located the ultimate source of political power in the towns. This was reflected in the way those states ratified the Constitution. Rhode Island and Connecticut kept their colonial charters for decades after independence and held that the state itself was the source of power.

The prevailing belief is, as one delegate expressed it, that "power reverted to the people of the several states, severally" (McDonald, p. 311). In other words, the federal Constitution of 1787 created a stronger confederation with extensive general powers, a limited federal government rather than a consolidated national state. Some critics have maintained that the framers of the Constitution sought to impose a consolidated state and deliberately undercut the state constitutions (North, 1989, p. 456ff; P. Jones, 1996, pp. 271-286). This, in fact, was true of several of the delegates, notably James Madison and James Wilson. Yet Madison, who drafted the Virginia Plan, was forced to back down and acknowledge that the states must continue to play a strong and independent role in the federal system. The result was the Great Compromise, which gave the states representation in the Senate.

Checks and Balances A number of checks and balances have resulted from a combination of the four organizing principles: federalism, separation of powers, bicameralism, and the republican principle.

One of the results is a mixed government: one that combines the forms of monarchy, aristocracy, and democracy. John Adams and other framers regarded the mixed constitution as an obstacle to tyranny by any single branch or faction. A faction, by the way, is a political party or interest group.

System of Overlapping Powers If we took each division of powers by itself, the government would be rigidly compartmentalized. This would prevent outside supervision and restraint. Each branch or level would be answerable only to itself and its constituents. Instead, a fluid system of overlapping powers – known as checks and balances – was designed to give each branch some say in the affairs of the others.

The idea is to keep sovereignty – ultimate authority – from being vested in any person, agency, or faction. Early American jurists, following the lead of William Blackstone, believed that "no human laws are of any validity" if they contradict the Law of God or the Law of Nature (Zimmermann, 2018, p. 186). To avoid tyranny, human frailties must be restrained by the rule of law.

Supreme Law of the Law The Constitution itself is a covenant with the people of the united *states* rather than a body of statutory law. It is the supreme "law of the land" – a phrase that hearkens back to England's *Magna Carta* of 1215 – but in the restricted sense that it takes precedence over all other political structures, statutes, and obligations. It is designed to govern a people rather than to transform a society in the name of some higher ideological or bureaucratic purpose (R. Kesler, 2012); (Hamburger, 2017)[23].

The divisions of power restrain concentrations of power by representing separate constituencies, different publics that hold them accountable. Thus all power is limited by some countervailing power and placed under the rule of law. This means that substantive changes must be introduced gradually and deliberately.

In order to see how this system of restraints works, we must look at, first, the theory behind it; then the distinctive constitutional powers and characteristics of each branch of government, along with the specific areas of overlap which created the checks and balances. The theory is best stated by the authors of *the Federalist Papers* as a means of controlling factions.

[23] Rivals to this constitutional tradition include the Progressive movement and the related growth of the administrative state.

The *Federalist Papers* originated as a series of 85 newspaper articles written by Alexander Hamilton, James Madison, and John Jay under the pen name "Publius" to explain the new Constitution and persuade the voters of New York to ratify it. Gov. George Clinton of New York led the opposition to the Constitution there.

In *Federalist*, no. 10, Madison maintained that the purpose of dividing the powers of government was in order to break and control the violence of factions (that is, interest groups or political parties). Let us unpack his argument through a close reading of the text.[24]

FEDERALIST, NO. 10

Moving the Cause of Factions There are two methods by which the violence of factions may be broken and controlled. The first method is to remove the cause of factions. This may be done either by abolishing liberty, which is essential to political life, or by creating uniformity of opinions and interests, which work against diversity and division of labor in economy. Madison considered this to be as unworkable as the first was unwise.

Conditions for Liberty Yet is such enforced conformity unworkable? A comment is in order here. Looked at in one way, the twentieth century may be understood as the most systematic attempt ever made to prove Madison wrong.

What is modern totalitarianism if not a vast series of political experiments to standardize and homogenize humanity? Consider the role of genocide in the twentieth century? (J. Rummel, 1994) What was the purpose of the eugenics experiments of a century ago? (Sowell, 2013) Why do so many countries still have single-party dictatorships, centrally-controlled public education systems and communications media, and so forth? (Blumenfeld, 1981)

[24] The text is available on-line at several locations, including https://founders.archives.gov/documents/Madison/01-10-02-0178.

Does political liberty mean anything if people are not free to express their differences or if they are kept ignorant of their history?

The assumption behind the Constitution of the United States is that it will be secured by an alert, active, intelligent, and informed electorate. But we should consider the many ways people have been disconnected from their roles as citizens and family members by the emphasis on consumption over production, substituting entertainment for creative leisure, standardizing and downgrading education, permitting media oligopolies, and restricting access to information. Whether through malice or negligence, what James Burnham called the managerial revolution has contributed to narrowing the horizons of the citizenry and impoverishing their lives. Political liberty requires a high level of public intelligence, which in turn represents the interplay of information and memory. Liberty and intelligence must be exercised or they will slacken.

History represents the collective memory of a people. If this memory is not preserved and handed down from generation to generation, or if it is rewritten to order, people will never reach beyond political infancy to a mature capacity for self-government. And they will never be free. Only the truth can set us free.

Controlling the Effects of Factions The second method is to control the effects of factions. Here the republican principle is a key safeguard. If a faction is in the minority, a majority can defeat it through the regular electoral process. If faction is in the majority, the danger is greater. So the new Constitution provided for a division and overlapping of powers to control this.

This sounds undemocratic, but it is designed to prevent a tyranny of the majority, as well as a tyranny of small groups or dictators. In addition, Madison contended that a large republic is better than a small republic because it has a built-in diversity of interests: regional, religious, economic, even ethnic. Consequently, all groups must pull together or be torn apart.

Yet even with all these safeguards, Madison thought it wise to include auxiliary precautions, which is known as the checks and balances system.

CHECKS AND BALANCES IN PRACTICE

Let us now examine a few specific constitutional powers that reflect the distinct characteristics of each of the three branches, as well as the differences between the central and state governments. It is the areas of overlap – the system of checks and balances – that compel them to cooperate with and restrain each other.

Legislation First of all, legislation requires the cooperation of Congress and the presidency. Bills must pass both Houses of Congress before they may become laws.

The president may exercise any of several options at this point. He may sign the legislation, let it automatically pass without his signature, or veto it. It takes a 2/3 vote of both Houses to override a veto.

Congress has also delegated some law-making powers to the president and the administrative agencies. At least since 1916, executive orders of the president have enjoyed the full authority of law.

The president may call Congress into special session, or act on his own after Congress has adjourned. President Wilson made preparations to bring the United States into the First World War after Congress adjourned in March 1917. He then called Congress into special session the following month. President Lincoln called up troops, raised revenue, and suspended the right of habeas corpus at the outset of the Civil War before calling Congress into special session in July 1861.

Finally, the vice president of the United States also sits as the president of the Senate and may break tie votes.

Congressional Oversight Second, the administration of the executive and judicial branches is subject to the approval and oversight of Congress.

The president appoints federal judges, cabinet officers, and diplomats; the Senate confirms them. In other words, the president proposes; the Senate disposes.

Congress controls the salary of all federal officials. As for budgets, partisan gridlock in Congress has militated against economizing effects and budgets have been passed along via continuing resolutions.

Congress may also create or eliminate federal courts and executive agencies as well as expand or reduce their size or scope. The civil service, created by Congress in 1883, has considerably narrowed the scope of presidential appointments. This was intended to keep the bureaucracy, which is often called the fourth branch of government, sheltered from permanent partisan control. Yet this was subsequently undercut during a long period of intensive legislation and centralized administrative regulation known as the New Deal, which was rendered effectively permanent through the Executive Reorganization Act of 1939 and was later extended through Lyndon Johnson's Great Society program (1964-1968) and subsequent administrations. As a result of the 1939 Act,

> the administrative presidency was conceived with the expectation that it would be an ally of programmatic liberalism. It is not surprising, therefore, that when this expectation was violated with the rise of a conservative administrative presidency beginning in the 1970s, serious conflict developed between the presidency and bureaucracy. Nor is it surprising that this conflict influenced still another reform of administrative law with the objective of more effectively insulating reform programs from presidential influence. (M. Milkis, 1993, p. 146)

Jurisprudence Third, jurisprudence -- the science of law -- is to some extent a joint responsibility of Congress and the federal judiciary. The Supreme Court may rule that laws passed by Congress or actions taken by the president are unconstitutional. But in practice, judicial review, an interpretive function, has in recent years effectively become a law-making function.

The federal judiciary may be restrained if Congress places restrictions on the kinds of cases it may consider. An example occurred after the Civil War when Congress restricted the jurisdiction of federal courts, preventing them from hearing appeals from military tribunals set up in areas under military occupation during the Civil War and Reconstruction.

Supreme Court rulings may also be overturned through the passage of new laws or, if a constitutional power is at issue, by amending the Constitution.

Constituent Power Fourth, the constituent power has to do with the fundamental law. Constitutional amendments are usually proposed by a 2/3 vote of both houses of Congress and ratified by 3/4 of the state legislatures.

Foreign Affairs Fifth, in the field of foreign affairs the president negotiates treaties; the Senate ratifies them. They then become part of the supreme law of the land. Alternatively, the president may conclude executive agreements with foreign heads of state that will be given the weight of law in the courts.

National Security Finally, responsibility for national security is also divided. Congress may investigate the activities of public officials and private citizens. The House may bring impeachment charges against any federal official; the trial, if any, is held in the Senate. The president, as commander-in-chief, may grant pardons to civilian as well as military personnel. The president has also been given certain war powers by the Constitution as commander-in-chief, but only Congress may formally declare war. Even so, the president may call the state militia into national service or undertake police actions overseas without formal approval by Congress. Apart from calling up the militia, the president may also exercise certain unspecified emergency powers by way of executive order.

CONCLUSION

Many of the powers cited above are nowhere mentioned in the Constitution. Over the years, constitutional innovations during the Federalist period, the Civil War and Reconstruction (1861-1877), the Progressive Era (1900-1920), the New Deal (1933-1945), and more recent times have superseded earlier limitations and effectively extended the scope and power of the national government (E. Woods Jr., Gutzman, 2008). This result was anticipated by Lord Acton, who wrote over a century ago: "There is no appeal from the people to itself. After having been taught for years that its will ought to be law, it cannot learn the lesson of self-denial and renounce the exercise of the power it has enjoyed" (Acton, 272).

The security of what Edward Corwin called the Constitution of Limitations ultimately depends on preserving the republican system of restraints designed to protect the rights of all the people (S. Corwin, 1947, pp. 170-172)[25]. Limited liability privileges, rent-seeking, deficit-spending, cronyism and clientelism, all create a condition of moral hazard that raids the pocketbooks and hamstrings the liberties of ordinary citizens (R. T. Hughes, 1991); A. Twight, 2002). Additionally, what Corwin called the Constitution of Powers is the consequence of the periodic expansion of government to meet this or that emergency. The reach of the Commerce Clause became virtually unlimited following the Great Depression as a result of the Supreme Court's ruling in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), which upheld mandated restrictions imposed on farmers by the national crop support program even in absence of actual commerce. The pervasiveness of administrative power and its intrusions into ordinary life is such today that agencies created by Congress effectively wield extraconstitutional executive, legislative, and/or judicial power. (Hamburger, 23-25);

[25] Edward S. Corwin distinguishes between the original Constitution of Limitations and a Constitution of Powers that arises as a response to emergencies.

(McDonald, 236-37); (Richardson, 1978)[26]. Franz Kafka's century-old parable, "The Couriers," is apropos of our present condition:

> They were offered the choice between becoming kings or the couriers of kings. The way children would, they all wanted to be couriers. Therefore there are only couriers who hurry about the world, shouting to each other – since there are no kings – messages that have become meaningless. They would like to put an end to this miserable life of theirs but they dare not because of their oaths of service. (Kaufmann, 1956, p. 130)

Politics is still the art of the possible. Reform will test the imaginations, skill, and tenacity of all who address the need. The American states and communities remain great experimental laboratories where innovations can be put to the test before being more widely adopted. The federal form of the American Constitution provides a framework for devolving authority back to the states and reducing the size of the national footprint—but sufficient demand must be generated and focused to accomplish this. The tools are at hand. To illustrate: Some Western states periodically require agencies to justify their continued existence – a practice known as sunsetting that could be extended to the national government and also into so many other areas of public trust and service.

Of course, this is not just an American problem. MEP Daniel Hannan contends that the three irreducible "precepts that define Western civilization – the rule of law, democratic [or representative] government and personal liberty – are not equally valued across

[26] Noting the proliferation of "iron triangles" of lobbyists, administrative agencies, and congressional committees, Forrest McDonald concluded: "Congress steadily lost its capacity to fulfill its constitutional roles, those of setting broad national legislative policies and serving as a solemn forum wherein those policies could be fully and deliberately debated." Four results have followed: first, legislation so poorly drafted that members of Congress have only "the vaguest notion about what they had enacted;" second, laws that necessitate "bureaucratic rule making and judicial legislation;" third, "a staggering increase" in transfer payments: that is, "taking money from people who earn it and giving it to people who do not; and, fourth, an "astronomical increase in overall government spending and taxation."

Europe. When they act collectively, the member states of the EU are quite ready to subordinate all three to political imperatives." (Hannan, 2013, pp. 4-5). The much lamented "deficit of democracy" is becoming a universal condition.

The endless clash of shifting coalitions that swirl through the political class helps explain why government at all levels continues to grow – both in power and disarray – and why, once a program or agency is started, it is so difficult to keep it from growing or to cut it back (Codevilla, 2010)[27]. The political scientist C. Northcote Parkinson humorously styled this phenomenon Parkinson's Law (Parkinson, 1957, pp. 15-27)[28]. As ever, the system rests on what John Locke regarded as the (tacit) consent of the governed. May we who are complicit in the care and feeding of our gluttonous Leviathan yet be better advised (Lewis, 2000 [1946])[29].

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[27] The original essay may be found at https://spectator.org/39326_americas-ruling-class-and-perils-revolution/.

[28] On the expansion of the administrative apparatus, he makes two observations: "(1) 'An official wants to multiply subordinates, not rivals' and (2) 'Officials make work for each other'" (17).

[29] In a chapter, "Men Without Chests," C. S. Lewis gives some support to Shakespeare's remark that "The fault, dear Brutus, is not in our stars, But in ourselves, that we are underlings" (*Julius Caesar*). For an updated restatement of Lewis's thesis, see Nathanael Blake, "Rémi Brague's Bleak But Brilliant Analysis of the Modern Project," *Public Discourse*, January 22, 2019. https://www.thepublicdiscourse.com/2019/01/48024/

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