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ESSAYS: IS THE CONSTITUTION WORKING?

The following four essays were presented in a panel discussion as part of the University of Dayton's series of programs commemorating the bicentennial of the Constitution, Dayton, Ohio, October 15, 1986.

AN HISTORICAL PERSPECTIVE ON THE CONSTITUTION

*Roberta Sue Alexander**

Those who study and interpret the United States Constitution inevitably engage, at some point and to some extent, in historical analysis. A study of the past, we are often reminded, can provide useful lessons for the present. Recently, an historical approach has become even more important as many contend that the basis upon which the Constitution should be interpreted by the courts is the intent of that document's framers.¹ But trying to discern the lessons of history can be a tricky business. If one reads the debates at the Constitutional Convention, it becomes quite clear that those involved in formulating our Constitution held conflicting views based on different assumptions.² More-

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1. See, e.g., Meese, *The Battle for the Constitution: The Attorney General Replies to His Critics*, 35 POL'Y REV. 32 (1986); Meese, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455 (1986).

2. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (1966).

Innumerable works have been written on the Constitutional Convention and the delegates who played a leading role in its work. See generally C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913); L. BENSON, TURNER AND BEARD: AMERICAN HISTORICAL WRITING RECONSIDERED (1960); C. BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787 (1966); R. BROWN, CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION" (1956); R. BROWN, A REINTERPRETATION OF THE FORMATION OF THE AMERICAN CONSTITUTION (1963); P. EIDELBERG, THE PHILOSOPHY OF THE AMERICAN CONSTITUTION (1968); M. JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-1781 (1940); M. JENSEN, THE NEW NATION (1950); F. McDONALD, E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC 1776-1790 (1965); F. McDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958); R. MORRIS, THE AMERICAN REVOLUTION RECONSIDERED (1967); C. ROSSITER, 1787: THE GRAND CONVENTION (1966); D. SMITH, THE CONVENTION AND THE CONSTITUTION (1965); C. WARREN, THE MAKING OF THE CONSTITUTION (1937); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969); THE CONFEDERATION AND THE CONSTITUTION: THE CRITICAL ISSUES (G. Wood ed. 1973); Adair, *The Tenth Federalist Revisited*, 8 WM. & MARY Q. 48 (1951); Elkins & McKittrick, *The Founding Fathers: Young Men of the Revolution*, 76 POL. SCI. Q. 181 (1961); Hutson, *Creation of the Constitution: Scholarship at*

over, these delegates, even after they voted for various constitutional provisions, interpreted them differently.³ If the delegates themselves could not agree on what they meant, how can we ever hope to know what their intent was? Yet, if we are to explore whether the Constitution is working, we should at least try to ascertain, at least in a very general way, what the Founding Fathers⁴ attempted to achieve during that hot summer in Philadelphia in 1787. Such an analysis should provide us with some of the background material which is necessary to begin an analysis of the strengths and weaknesses of our current framework of government.

There are many aspects of the Constitution one can study. Most constitutional scholars today, it seems, tend to focus on key sections of the Bill of Rights, for that is what currently preoccupies the courts. But, of course, the Bill of Rights was not part of the work of the Constitutional Convention. While acknowledging that one of the primary objectives of government was the preservation of liberty, the Founding Fathers believed that a properly formulated government would be the best protection of minority rights. They, therefore, concentrated on the overall *structure* of government, and their concern for a proper balance of powers remained the nation's and the courts' chief focus until after

a Standstill, 12 REV. AM. HIST. 463 (1984) (reviews the historiography of the creation of the Constitution from its ratification to the present); Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799 (1961); Wolfe, *On Understanding the Constitutional Convention of 1787*, 39 J. POL. 97 (1977).

3. See, e.g., J. MADISON, *supra* note 2, at 320-22 (debate over the provision to guarantee each state a republican form of government). Gouverneur Morris and William Houston thought the provision would guarantee existing laws and state constitutions, thereby preventing states from altering these documents. Others thought it gave the central government the right to suppress rebellions which might occur in the states. If this latter interpretation was what was intended, John Rutledge argued that it was unnecessary, because he felt Congress already had the authority; others disagreed. This issue was never resolved; the intent of the provision remained unclear. The debate ended, and the delegates adopted the provision.

Another example concerns the subject of taxation. Delegate Rufus King "asked what was the precise meaning of *direct* taxation? [But n]o one answered." *Id.* at 494.

On yet another occasion, James McHenry proposed that "no State shall be restrained from laying duties of tonnage for the purpose of clearing harbours and erecting light-houses." *Id.* at 644. Gouverneur Morris replied that under the proposed Constitution, the states could already do so. *Id.* Therefore, such a provision was unnecessary. James Madison disagreed: "Whether the States are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce.' These terms are vague, but seem to exclude this power of the States. . . . He was more & more convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority." *Id.* at 644-45. Roger Sherman disagreed; he believed that concurrent jurisdiction was allowable. *Id.* at 645. This debate was not resolved in the Convention. Delegates voted Congress the power to regulate commerce, but there remained in their minds different interpretations of what the power encompassed. The delegates left the definition of commerce to the courts to decide. The courts were *not* to decide what the delegates intended, for they knew that was impossible, but what the courts felt was appropriate to the situation under review.

the Civil War. This issue has just recently reemerged as an area of interest as a result of both the Watergate scandal and the recent activities of some members of the executive branch of government in Iran and Central America. This paper, therefore, will examine the structure of government that the Founding Fathers created, using the debates at the Constitutional Convention as its major source. It will attempt to show how the Framers intended to provide the country with a government which could be both effective and yet limited so individual liberties would be preserved.

The Founding Fathers came to Philadelphia determined to remedy the vices that they saw permeating their government and their country. In attempting to find solutions, they turned to history as well as to the philosophies and theories of political science of their day. Their debates are filled with their analyses of past republics and past confederacies as well as their views on the strengths and weaknesses of the British Constitution. They hoped to learn from the mistakes of others.

The Founding Fathers quite wisely realized, however, that they could not merely duplicate what others had done; they were a different people, in a different age, with different needs and different problems. While they sought to learn from the past, they set about to create a government entirely unlike any other the world had known. This government was to be based on new theories and principles which they believed fit the temper of the American people and the conditions of their new nation.

On July 4, 1776, when Americans declared their independence from Great Britain, optimism pervaded the nation. England, they believed, had become a corrupt society with a corrupt government, threatening American liberties. Great Britain was succumbing to the fate of all previous empires—she was growing too fat with wealth and power and would decline just as Rome had declined. Americans were different. Their revolution would inaugurate a new era of republican government, dedicated to promoting liberty and the overall happiness of the people. The creation of a republic, however, would entail more than simply eliminating a king and substituting an elective system of government. Their vision was an utopian one. They would, through their government, reorder society and politics to ensure liberty and equality. Their definitions of liberty and equality were, however, different from those we have today. To these revolutionaries, liberty would be achieved through a government dedicated to the “public good.” To them, the public good was the promotion of stability and the protection of private property. These goals, they believed, would promote the people’s happiness. While America would also be based on the principle of equality, equality did not mean a social leveling. What the Founding

Fathers sought was a government elected by the people, who chose as their leaders the natural aristocracy—that is, those who were most qualified based on talent, virtue, and devotion to the public good.⁵

This millennial vision was crumbling by the 1780's. Many Americans had become disillusioned; their young state was faltering. John Randolph, a delegate from Virginia, in the first major speech delivered at the Constitutional Convention, summarized what most other delegates believed. They had to create a new government if they were to prevent "the fulfilment of the prophecies of the American downfall."⁶ Signs of anarchy and selfishness were everywhere. States failed to pay Congress' requisitions, the central government had no money, and the foreign debt went unpaid. States that paid their requisitions were bitter toward those that did not. Moreover, commercial discord had arisen among the states as some enacted trade barriers against others. Delegates to the central Congress did not show up; it was nearly impossible to obtain a quorum. Nine states had their own navies. Treaties were violated. In other words, as Randolph contended, the "government could not defend itself against the incroachments from the states. . . . The prospect of anarchy . . . [was] every where."⁷ Every effort to solve these problems through constitutional amendments was thwarted as individual states jealously guarded their power. Many feared that the nation was disintegrating and would be taken over by foreign powers.⁸

Other signs of anarchy abounded. People were not even obeying the laws which were enacted by their state governments, for they increasingly believed that those legislatures were not speaking for them.⁹ And in the spirit of the philosophy of the American Revolution—if government does not serve the people's interest, the people have a right to overthrow it—alienated groups began opposing their legislatures and taking the law into their own hands. Riots and mob action occurred with increasing frequency. The most threatening was Shay's Rebellion of 1786, in which disgruntled Massachusetts farmers, trying to save their property from being confiscated for nonpayment of debts, marched on their courthouses and closed them down. The Founding Fathers feared that rebellion would become contagious and that property would be destroyed. But if it were any consolation, traditional po-

5. For a detailed discussion of the nation's ideology during the revolutionary era, see G. WOOD, *supra* note 2, at 46-74. Also helpful is B. BAILYN, *IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967). See also sources cited *supra* note 2.

6. J. MADISON, *supra* note 2, at 28.

7. *Id.* at 30.

8. See *id.* at 28-30; see also G. WOOD, *supra* note 2. For a different vision of the Confederation period, see the works of M. JENSEN, *supra* note 2.

litical theory predicted that such anarchy might occur; throughout history, this had always been the fate of republican governments.¹⁰

A far more frightening phenomenon was troubling the young nation. More disturbing than anarchy and the breakdown of governmental authority was the threat of tyranny, a new kind tyranny—a tyranny by the people themselves. John Randolph explained that a new constitution was needed “to provide a cure for the evils under which the U.S. laboured; that in tracing these evils to their origin every man had found it in the turbulence and follies of democracy.”¹¹ Elbridge Gerry, a delegate from Massachusetts, agreed: “The evils we experience flow from the excesses of democracy. The people do not want virtue, but are the dupes of pretended patriots.”¹² They “are daily misled into the most baneful measures and opinions by the false reports circulated by designing men.”¹³ Therefore, the Constitutional Convention had to create a system which would guard against “the danger of the levelling spirit.”¹⁴ The people were electing selfish, incompetent, unworthy men to their state legislatures, “[m]en of indigence, ignorance & baseness.”¹⁵ What brought James Madison, the “Father of the Constitution,” to the Convention as a devout nationalist was his experience serving in the Virginia Legislature for four years. There he saw instability and confusion, poorly written laws, and the decline in the quality of its members. Instead of virtuous men, there were representatives who were influenced by interest groups such as land speculators or who were merely scrambling for their own private advantage.¹⁶

Most of those who attended the Philadelphia Convention agreed that the state legislatures, in the hands of these incompetents, were running amuck—enacting paper money laws, force acts, and statutes which suspended the recovery of debts. The rights of the minority—the propertied classes—were being trampled.¹⁷ The fact that such legislation *did* represent the will of the majority disturbed the Founding Fathers the most. For Madison, the chief fear was that “the few will be unnecessarily sacrificed to the many.”¹⁸ The main cause of these dis-

10. See, e.g., J. MADISON, *supra* note 2, at 402, 404, 656–59; G. WOOD, *supra* note 2, at 403.

11. J. MADISON, *supra* note 2, at 42.

12. *Id.* at 39.

13. *Id.*

14. *Id.*

15. *Id.* at 73.

16. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 WM. & MARY Q. 215, 224 (1979).

17. See J. MADISON, *supra* note 2, at 13–19, 29–30, 73–74, 402, 404, 656–59.

18. G. WOOD, *supra* note 2, at 413 (citing Madison to Thomas Jefferson, October 17, 1789).

turbing events was that designing, incapable, untalented men were dominating governments rather than the natural aristocracy who the Founding Fathers believed were the only people who had the necessary education, refinements, and training to legislate wisely for the public good.¹⁹

Thus, the men who eventually gathered in Philadelphia acted to correct two contradictory tendencies: that the national government would be ineffective or that it would be tyrannical. The nationalists (later called Federalists) proposed an entirely new system of government to solve the weaknesses inherent in the confederation and to prevent the excesses occurring in the states. The difficulty that they faced was how to create a democracy which could still be strong enough to protect itself from foreign powers, as well as to secure private property rights against the debtor majority. To solve this problem, the Founders proposed a government based on the new concept of federalism, combined with the new notion of popular sovereignty, and limited by the institutional device of checks and balances.

The delegates agreed that all branches of their new government had to be selected, either directly or indirectly, by the people if the people were to have confidence in and support that government. But how in a democratic republic could one be certain that the people would elect qualified representatives? James Madison proposed the solution: The problem, as he saw it, was that the districts from which representatives were chosen were too small. Consequently, a government had to be created which would "enlarge the sphere as far as the nature of the Gov^t. would admit. This was the only defence agst. the inconveniencies of democracy consistent with the democratic form of Gov^t."²⁰ The old notion that republics had to be small and have a homogeneous population to survive was wrong. It was clear that the people were not homogeneous. Society would always be divided among "rich & poor, debtors & creditors, the landed, the manufacturing, [and] the commercial interests."²¹ In addition, as Madison continued,

In framing a system which we wish to last for ages, we sh^d not lose sight of the changes which ages will produce. An increase of population will of necessity increase the proportion of those who will labour under all the hardships of life, & secretly sigh for a more equal distribution of its blessings. These may in time outnumber those who are placed above the feeling of indigence. According to the equal laws of suffrage, the power will slide into the hands of the former. . . . [S]ymtoms, of a leveling

19. See J. MADISON, *supra* note 2, at 73-74; G. WOOD, *supra* note 2, at 476-99.

20. J. MADISON, *supra* note 2, at 76.

spirit, have sufficiently appeared in . . . certain quarters to give notice of the future danger. How is this danger to be guarded agst. on republican principles?²²

Madison's solution was to enlarge the republican state to stifle the propensity of small republics to act rashly. In a large society, people would be broken up into so many interests and factions that a common sentiment would less likely be felt and an oppressive majority hard to form.²³ Moreover, the natural elite would be chosen to run this new government. Designing politicians could win only in small districts where their demagoguery could be effective. Enlarging the district would temper crass electioneering. Reputation and talent would count more. As James Wilson, a Pennsylvania delegate, argued, the election of representatives from large districts would be the "most likely [way] to obtain men of intelligence & uprightness."²⁴ "There is no danger of improper elections if made by *large* districts. Bad elections proceed from the smallness of the districts which give an opportunity to bad men to intrigue themselves into office."²⁵

The government that the Federalists originally proposed in the Virginia Plan, however, was not quite what they received. They envisioned a strong national government with state power greatly diminished. They were forced to compromise with those who feared small state interests would be swallowed up. But the desires of the small state delegates created a theoretical problem. The common political notion at the time was that sovereignty was indivisible; there could be but one absolute, supreme power.²⁶ In Britain, the supreme power was Parliament. In the United States, under the Articles of Confederation, it was the states. How could the states protect themselves from the encroachment of this new national government if they did not retain their sovereignty? If the states were sovereign, how could a national government be effective? James Wilson provided the solution when he argued that no government is sovereign; it is the people who are sovereign. They retain the power and merely dispense portions of it for the public good—some to the national government and some to the states.²⁷ From this federalist solution, a clear idea of constitutionalism developed. A

22. *Id.* at 194.

23. *See id.* at 76–77 (Madison's speeches); *id.* at 75, 85, 157–58 (Wilson's speeches); THE FEDERALIST NO. 10 (J. Madison) (Madison also elaborates on the idea of a large republican state). For further elaboration on these ideas, see G. WOOD, *supra* note 2, at 499–518.

24. J. MADISON, note 2, at 85.

25. *Id.* at 74.

26. For a fuller discussion of the eighteenth century notion of sovereignty and the shift in American thought on this topic, see G. WOOD, *supra* note 2, at 344–92.

27. I PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788, at 229, 301–02, Published by the University of Pennsylvania Press (1966). (F. Stone eds. 1970).

constitution distributes and limits power. It is the supreme law which no government or branch of government can change or disobey. Only the people can amend the constitution. From this evolves the very undemocratic notion (if democracy is defined as majority rule) of judicial review, where a nonelected judiciary determines whether any branch of government has exceeded its authority under the constitution.

Thus, a federalist system developed, a system of a limited government with power divided between the central government and the states.²⁸ The final solution to the question of majority tyranny was a system of checks and balances.²⁹ All power still stemmed from the people, but the people sometimes acted capriciously and reasoned incorrectly.³⁰ The Senate and the President, in Madison's view, were to protect the people from themselves.³¹ The Senate and the President, still elected at least indirectly by the people, would check the "sudden impulses" of the majority "to commit injustice on the minority."³²

The system which emerged was designed to solve the problems of late eighteenth-century America. How well has it survived for two hundred years as society changed and new problems developed? In examining this question again, we focus on the structure of government. The government created in 1787 was not an efficient government. The system of checks and balances was designed to prevent hasty action. But for a world power, quick action is often needed. Moreover, the original system of federalism has been radically altered through evolutionary changes, judicial interpretations, and constitutional amendments; states are now much more subservient to the central government. But can our greatly expanded central government act effectively for the public good? As the country has grown, Congress has become too big to wield effective power. Therefore, Congress and the nation look to the executive branch for stronger leadership. By doing so, the system of checks and balances crumbles. More and more, presidents have bypassed Congress and have become popular national leaders—so-called plebiscite presidents, rallying the people to their programs. Moreover, the permanently preeminent presidency, it seems, is the product of forces that will continue. Thus, the president will continue to expand his power with few checks. This expansion will be accomplished, by and large, with the support of the people and the Congress, who yearn for strong, decisive leadership. Perhaps it is time to heed the warning Roger Sherman uttered at the Constitutional Convention: "An independence of the

28. J. MADISON, *supra* note 2, at 194.

29. *Id.* at 322-23.

30. *Id.* at 193.

31. *Id.* at 311-12.

Executive on the supreme Legislature, [is] . . . the very essence of tyranny³³

One question for our generation, then, is how to achieve firm decision making while still preventing the abuse of power in the hands of one person. Ben Franklin, on the last day of the Constitutional Convention, issued a warning of sorts to future generations which is an appropriate conclusion for us to ponder. He said:

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 farther that this is likely to be well administered for a course of years, and can only end in Despotism, as other forms have done before it, when the people shall become so corrupted as to need despotic Government, being incapable of any other.³⁴

33. *Id.* at 48.

