


5-2011

# The Role of Law: How Law Shapes and Alters the Foundations of Societies

Derek Robert Funk  
*Utah State University*

Follow this and additional works at: <http://digitalcommons.usu.edu/honors>

 Part of the [Law Commons](#), and the [Political Science Commons](#)

---

## Recommended Citation

Funk, Derek Robert, "The Role of Law: How Law Shapes and Alters the Foundations of Societies" (2011). *Undergraduate Honors Theses*. Paper 75.

This Thesis is brought to you for free and open access by the Honors Program at DigitalCommons@USU. It has been accepted for inclusion in Undergraduate Honors Theses by an authorized administrator of DigitalCommons@USU. For more information, please contact [becky.thoms@usu.edu](mailto:becky.thoms@usu.edu).



**THE ROLE OF LAW: HOW LAW SHAPES AND ALTERS THE  
FOUNDATIONS OF SOCIETIES**

by

**Derek Robert Funk**

**Thesis submitted in partial fulfillment  
of the requirements for the degree**

of

**DEPARTMENTAL HONORS**

in

**Law & Constitutional Studies  
in the Department of Political Science**

**Approved:**

---

**Thesis/Project Advisor**  
(Peter McNamara)

---

**Departmental Honors Advisor**  
(Veronica Ward)

---

**Director of Honors Program**  
(Christie Fox)

**UTAH STATE UNIVERSITY**  
**Logan, UT**

**Fall 2011**

## Introduction

When one considers the abundant number of nations, laws, and forms of government that have emerged throughout the history of civilization, it becomes apparent that although mankind shares common traits and attributes, societies often implement different principles as they strive to protect their interests and achieve their goals. As the philosopher Jean-Jacques Rousseau remarked, “besides the principles that are common to all, every nation has in itself something that gives them a particular application, and makes its legislation peculiarly its own.”<sup>1</sup>

Because every society faces a unique set of challenges, every society must solve its particular dilemmas in a unique fashion. In his celebrated work, *The Spirit of Laws*, Montesquieu observed that “the government most conformable to nature is that which best agrees with the humor and disposition of the people in whose favor it is established.”<sup>2</sup> This treatise seeks to illustrate that the law of a society must be founded upon principles that not only promote its welfare and goals, but also are compatible with its culture. If a society is to be successful, its government must also be capable of recognizing threats to stability and managing them in a fashion that preserves its ideals and foundational principles.

This treatise is divided into three parts. Part I consists of an abstract philosophical discussion on the nature of government and role of law within society. In Part II, the role of law within the American system of government is portrayed. Part III begins with a consideration of the role fulfilled by the Supreme Court within the American legal system and concludes with a discussion concerning the potential usefulness of the Court in preserving the fundamental principles of American society.

---

<sup>1</sup> Rousseau, Jean-Jacques, *The Social Contract and Discourses*, p. 226

<sup>2</sup> Montesquieu, *The Spirit of Laws*, p. 6.

## **PART I: ON THE ROLE OF LAW**

### **I. The Role of Law in Civil Society**

#### *On the purpose of laws in general*

Many philosophers have attempted to explain the origin of law, and of civil society. The purpose of this treatise is not to examine these perpetual questions, but rather to accept the fact that laws exist and examine the role of law within civilized society, beginning with the purpose of law, and then proceeding to how that purpose may best be achieved by humanity.

The purpose of law is to produce one of two things: either [1] an idealistic society or [2] a practical society more tolerable than what has been labeled by some philosophers as the state of nature, in which there are no formal ties between mankind, and no civil or statutory law.

#### *On the goals of idealistic and practical societies*

The goal of an idealistic society is perfection; the goal of a practical society is stability and order.

The laws of an idealistic society are designed to promote faith in idealistic beliefs and improve the character of individuals and this, in turn, is thought to benefit society. The laws of a practical society are designed to resolve conflict and promote the concept of justice, and are generally concerned with regulating interactions between individuals.

The laws of an idealistic society are concerned more generally with the welfare of the soul, its development and preservation. The laws of a practical society are more generally concerned with the welfare of the body. The laws of a practical society promote cooperation and discourage strife among its citizens in an effort to promote the temporal needs of the body and a safe environment in which to enjoy them.

The two societies may also be understood in terms of negative and positive liberty. As outlined by Isaiah Berlin, negative liberty “is involved in the answer to the question ‘What is the area within which the subject-- a person or group of persons -- is or should be left to do or be what he wants to do or be, without interference by other persons?’”<sup>3</sup> In contrast, positive liberty “is involved in the answer to the question

---

<sup>3</sup> Berlin, *Two Concepts of Liberty*, pp. 6-7

‘What, or who, is the source of control or interference, that can determine someone to do, or be, one thing rather than another?’<sup>4</sup> A practical society is mostly concerned with setting the parameters regulating negative liberty, and the laws of such a society specify the limits of government and the limits of individuals so that individual liberties are not encroached upon in an improper manner. Conversely, an ideal society often establishes a source of divine guidance, whether it be a deity, a prominent figure or group of figures, that produces laws instructing the individual members of society on how to best govern themselves in harmony with others. While disobedience to the law is enforced with negative consequences, oftentimes the penalties are enforced upon the individuals by themselves through guilt and penitence, or as they are subjected to emotional distress stemming from the shame of failing the society or the fear of eternal punishments in the next life.

*On the enforcement of laws in each society*

Laws are enforced in a practical society by means of punishment and reward, reinforced with appeals to justice. In an ideal society, laws are similarly enforced through actual punishment and reward based on a concept of justice. Additionally, as observed previously, the laws of an ideal society are further reinforced by idealistic beliefs, and in some cases, abstract punishment and reward (i.e. punishments and rewards that are not immediate, but are believed to take place at some later time in the future or in the next life).

*On the effectiveness of law and the dissolution of governments*

The law of an idealistic society proves effective until the majority loses faith in the ideal. The law of a practical society proves effective until fear of punishment or aspiration for reward is lost by the majority of the people.

These two forms of society may be established under any form or structure of government; democracies, monarchies, aristocracies, and even tyrannies rely on some form of law, whether it be idealistic or not, to maintain order. While some forms of government are certainly more compatible with the goals of either an idealistic or a practical society, what is more significant and relevant is that in every case, the legitimacy of law relies upon the tacit consent of the majority; for if the majority loses confidence in the laws, the legitimacy of the society is undermined and the society is often overturned by revolution and new laws are

---

<sup>4</sup> Idem

instated. Thus, those who control the creation and enforcement of law must pattern their actions after the will of the majority.<sup>5</sup>

What is to be concluded then, is not that each form of government is equally accountable to the majority, but rather that each form of government is accountable in some degree to the will of the majority. If the majority dislikes government, a revolution will eventually take place, whether it be political or more likely, by force. When this occurs, the government is dissolved and the society is annihilated.<sup>6</sup>

Society may also be dissolved due to the conquest of foreign powers, but as such matters are generally resolved through military strength rather than diplomacy, a failure to defend against invasion may only be attributed to law indirectly. And as the object of the present inquiry is to determine how a society may utilize law to guard against self-destruction, we will neglect matters of war for the moment; for one must first produce a stable society if one wishes to have any hope of defeating foreign powers.

## II. The Object of Government in Civil Society

### *On the first aim of government and how this is to be obtained*

The first aim or goal of government must therefore be to win the consent of the majority, whether by force or persuasion; otherwise, there can be no legitimate sovereignty.

While force may in some cases produce immediate results, force also breeds resentment and malcontent on the part of the conquered, and sows seeds of revolution in the population from the very beginning. Thus, governments founded upon force are often unstable and violent in nature, for force must be exercised continually to suppress rebellion.

---

<sup>5</sup> Admittedly, the extent to which they do so depends largely upon their level of accountability to their fellow members of society. For example, a democratic government by nature is more likely to discern and acquiesce to the will of the individual members of society, whereas in a monarchy, the sovereign power determines a mode of laws that is at the very least acceptable, if not favorable to the majority. However, even a tyrant with absolute power is wary of his mortality and is wary of placing his will above that of his subjects, although it is admitted that the deference given to society by a despot is significantly less than in other forms of government.

<sup>6</sup> It may be objected that a military dictator could rebuff a majority of unarmed citizens in an effort to preserve society, but with each citizen that is destroyed, the power of society diminishes and therefore such a course of action does not preserve society, but merely prolongs its destruction. Another objection that may be raised is that if a dictator controls the military and the citizens are kept unarmed, he may successfully maintain a regime by systematically destroying opposition and in this manner eliminate the threat of revolution. But this is not a method of countering a revolution in progress, but rather a method of incorporating fear and force into society as a manner of managing the majority.

In contrast, persuasion requires more time and deliberation; however, a government composed of individuals convinced of their citizenship and committed to the cause of perpetuating the society is far less likely to rebel against authority. Such a government need not be democratic in nature, for it is certainly possible to foster enthusiasm for an individual or a trusted group of individuals, particularly in an idealistic society, and men may peacefully submit to an aristocratic government or monarchy if they feel secure and satisfied with their leaders.

### *On equality and social justice*

Perhaps the greatest method of producing tacit consent and winning over the majority is by cultivating the concepts of equality and social justice within a society. In order for equality to be regarded as legitimate, each individual must feel free to act in the same capacity as every other member of society. At the same time, social justice can only be maintained if every individual in society is inclined to exercise their freedom in a similar, responsible manner within the boundaries of law. Unfortunately, as human nature is inclined towards avarice and ambition, equality often leads to the abuse of freedom and a loss of social justice. Conversely, any effort to produce social justice by influencing or controlling the actions of individuals necessarily encroaches upon the principle of equality.

This apparent paradox has led many to conclude that equality and social justice are incompatible. However, the opposite is true; that is, neither can exist without the other. For if there is no sense of social justice in enforcing the law, there can be no equality under the law, for some members of society will escape punishment while others go free. Conversely, there is no need for social justice if there is no sense of rights equally enjoyed by all to protect. Thus, equality and social justice exist in a symbiotic state of equilibrium, and if a society wishes to employ one, it must necessarily attend to the other at the same time.

Though the goals of equality and social justice are intertwined, the methods of producing them are fundamentally different. The degree of social justice is most directly influenced by the actions of the citizens in a society, while the degree of equality is most directly influenced by the policy of government. In other words, when a government institutes a law, it cannot ensure that the law will be universally observed, but can merely enforce the punishments if the law is disobeyed, which contributes to social justice only in an indirect manner. On the other hand, government may always introduce policy that directly affects equality in society, for it is the government that determines how rights are to be distributed among its citizens.

Thus, the most efficient way for government to produce both equality and social justice, is by constructing a policy that promotes the former. The equality being promoted may be actual or simply

illusory; what is important is that the majority feels that equality exists. The probability of this occurring obviously increases as the citizens are granted more political and civil rights, but absolute equality is not always necessary to win over the majority.

*On the degree of equality necessary to produce stable government*

In some cases, very minimal levels of equality are sufficient, as in the example previously mentioned where there is particular zeal for the individuals who govern society. When this occurs, the majority tends to accept that more rights be given to those in leadership positions; thus, as love and trust increase, actual equality may decrease proportionally without offending the majority.

*On accountability*

Another tool in producing an attitude of equality amongst a society is that of accountability. If every member of society believes that they are equally accountable to the laws, they are unlikely to disregard their faith, fear, or aspirations, and will remain faithful to the government. In this case, the equality need not be of freedom, for equality of servitude is just as effective in producing a sense of justice founded upon accountability. That is, a society may be equally accountable to tyrannical laws and remain content in their position, but if occasion arises that there be any group of citizens who are privileged or exempt from the law, society voices outrage; the government must then restore the legitimacy of accountability or risk revolution.

This is the first of two great mistakes that diminish the spirit of equality in society: allowing a minority figure or faction (generally outside of government) to exercise power over the majority. The latter mistake is the negation of the former, and is most relevant in enlightened and idealistic societies; that is, allowing the majority to exercise what is perceived as unjust dominion over the minority. Thus, in addition to discerning the will of majority, a sovereign power must also maintain equilibrium between majority and minority rights.

### **III. On Stability of Government**

*On maintaining equilibrium between majority and minority rights*

Upon examination, the first scenario is quite preventable; the second is inherently problematic. In the first instance, it is easy for government to enact laws that protect the majority from minorities, since law is generally understood as a means of promoting the public welfare. Laws that benefit the majority of society



do not merely have the support of the force of the population, but conform to most concepts of justice as well, and are rarely controversial. The only way for a government to err in the first respect, then, is to favor a certain group of citizens based upon some arbitrary distinction rather than merit,<sup>7</sup> and this is easily avoided.

While it is relatively easy to protect the civil rights of the majority, it becomes more difficult to protect the rights of minority groups and prevent discrimination in a society, particularly under a government founded upon democratic principles.

In the cases of tyrannies, monarchies, and aristocracies, policy is already determined by a minority authority figure; therefore it is not unusual, and rather, expected by the citizens that laws benefiting minorities will be introduced in some instances. Therefore, under these forms of governments, the sovereign power may effectively regulate the relationship between majority and minority factions in most cases.

However, in a democratic government, this regulation becomes more difficult; for in a society where the law is always based upon the will of the majority, it necessarily follows that the will of the minority is neglected, which in turn can result in inequality and suppression of minority rights. A dilemma is therefore produced, namely, how inalienable and idealistic rights of the minority can be protected when the law is determined by majority rule. Thus, in enlightened societies, the government must not only consider the will of the majority, but the balance of liberty and equality.

This problem is naturally compounded as a society expands and the concept of diversity<sup>8</sup> is given credibility. Thus, in general, small societies are more easily managed than vast empires, for in most cases, societies with lower populations will contain fewer factions than societies with large populations. Additionally, if the case should arise where a small population contains many factions, it is easier to discern a common ground among individuals living within similar geographical parameters than it is to foster commonality among factions dispersed throughout large geographical expanses. That is, small societies necessarily share common interests with respect to economy, resources, and defense; thus, it becomes difficult for a faction to sever all ties to fellow citizens and function independently, particularly if the society is surrounded by other formidable civilizations. In contrast, large societies often produce degrees of economic

---

<sup>7</sup> Such a scenario is hard to envision, for when arbitrary favoritism exists, it tends to favor the majority rather than the minority. An exception could be conceivably constructed in matters of conquest, when a more technologically advanced minority conquers a majority that is weaker in military aspects, but even in this case deference must be immediately given to the majority if the minority wishes to retain their acquired territory.

<sup>8</sup> Throughout the remainder of Part I, the term “diversity” is meant to be understood as diversity of opinions and interests, not diversity of race or any other physical attributes and traits.

and military security sufficient to allow factions to grow powerful and threaten the rights of their fellow citizens and the fundamental principles of society.<sup>9</sup>

When competing interests are introduced into a society, the chains of culture and plagues of passion produce conflict between different groups, reason becomes relative to each individual or faction, and the natural desires of self-interest and fear of the unfamiliar result in discrimination and suppression of minority rights.

Thus, the foundation upon which discrimination is built is diversity of interests, and there can be no discrimination and no suppression if there are no competing interests within a society. This is difficult to accomplish, but not impossible.

*On diversity and how to limit its effects*

The concept of diversity stems from the fact that there are fundamental differences between every individual and every group or faction. However, every individual, group, or faction is also supplied with fundamental similarities, the most fundamental being that all citizens will identify themselves as being part of mankind. Discrimination is therefore produced by choosing to focus on differences, rather than similarities. Rarely is this decision based upon reason; most often, it is directed by passion and prejudice. Thus, the real issue is not whether the individuals or groups are actually more different than similar, but rather whether this is perceived to be the case and accepted by the majority.

It is unlikely that a society will ever achieve complete unanimity; however, a government may utilize certain resources to minimize the perceived differences between the majority and minority factions, and promote the antithesis of diversity, which is often labeled as unity by idealistic societies, and patriotism by practical societies.

Perhaps the most obvious resource stems from the fact that all citizens are necessarily humans. From this axiom there arise numerous relationships between citizens that may be utilized by government to extend the bonds of self-interest from the individual to the entire species, and subsequently the entire society.

---

<sup>9</sup> In *The Federalist Papers*, #10, Publius proposes a “Republican remedy” to the problem of factions in large societies. Since his remedy will be discussed in Part II of this work, we will not address the issue at this point.

Additionally, if a society can successfully foster a strong sense of universal political identity, diversity may be further discouraged within a society, and disregarded entirely or applied to foreign powers, as the government sees fit.<sup>10</sup>

*On universal foundations of faith*

Most philosophers claim (or at least imply) that reason is univocal and non-contradictory and champion reason as a sort of divine oracle, a source of truth and possessing all the keys to establishing the perfect society. However, it would appear that although mankind may collectively possess the ability to reason, this ability differs in application among the different parts of humanity. That is, as a child's capacity to reason increases and grows, the child is simultaneously influenced by the culture and ideas surrounding the child. Additionally, all individuals, whether they be children or adults, accumulate diverse interests and are exposed to complex dilemmas throughout their lifetimes. As a result, what one society deems perfectly reasonable is often regarded as manifestly erroneous by another society, and vice versa.<sup>11</sup>

Perhaps the root of the problem is not that perfect reason does not exist, but rather that a society of individuals is incapable of being perfectly reasonable. One of the inherent difficulties of utilizing reason is that in order to reach the proper conclusion, one must begin with the proper premises. Since no individual possesses a complete knowledge of the elements and laws that make up the universe, it would seem that no individual possesses a complete understanding of the universe. And if the capacity of human knowledge is limited and finite, each individual will inevitably be exposed to questions they have no answer for and no relevant knowledge or experience capable of resolving the matter. This is particularly true in cases in which the subject being discussed is entirely new to the individual.<sup>12</sup> Thus, it would seem that every individual must at some point base their decisions upon a foundation built, if not entirely, then at least in part, upon the beliefs of others.<sup>13</sup>

---

<sup>10</sup> Once again, it is not our intent to examine foreign relations and foreign policy, and therefore we must neglect the consideration of which course of action is most beneficial to a society.

<sup>11</sup> Much has been said on the subject of cultural relativism, and it is not the intention of this treatise to engage in a discussion of the merits of accepting or rejecting the practices of certain societies. It is also not the purpose of this treatise to determine if there exists a form of society that is most correct or efficient. However, it should be noted that it is very difficult for an established society to adopt the reasoning and practices of other societies that may have developed under very different circumstances. Thus, if stability and perpetuation of a society is one's goal, in general, it is better to retain original principles and practices than to solicit guidance from other, dissimilar civilizations.

<sup>12</sup> One must only reflect upon the nature of their education and upbringing to realize that essentially all of their beliefs are founded upon the experience and teachings of reputable figures and the majority of these figures are no longer living. Thus, there is a peculiar attribute of humanity that motivates each generation to pass its knowledge to the next, and in this manner society progresses and becomes much more complex than if each individual was limited to his or her own knowledge and experience. This is why there is so much disparity of beliefs across cultures.

<sup>13</sup> It should be noted that some philosophers, such as Descartes, have employed methods of self-doubting to negate the influence of culture and upbringing. However, the process is quite difficult and it is questionable whether one can truly

In other words, the limits of reason and absolute knowledge are often supplemented with articles of faith acquired from one's cultural environment. Conversely, new hypothesis and *a priori* assumptions are often fortified with arguments constructed in a reasonable manner. As these supporting arguments become increasingly complex, the ultimate foundation based on pure faith is often obscured and forgotten as emphasis is placed upon the evolving argument.

Thus, another method of eliminating diversity that is less obvious, but no less effective, is that of providing a society with a universal foundation of faith. As was established earlier, what matters is not the actual relationship between factions, but rather, the perceived relationship. While different factions base their perceptions upon different modes of reasoning, in every case there is a fundamental foundation of faith that governs their decisions. Therefore, if a government wishes to produce and maintain a universal mode of reasoning among society, a government must produce and maintain a universal foundation of faith by educating the people in matters consistent with the goals of society. If this is accomplished, the actions of every individual citizen will be in accordance with the same principles, and there will not only be a lack of discrimination, but a consistency in action that is directed to the good of society.<sup>14</sup>

It is important to note that the faith mentioned in this instance may be faith in external sources of information, or perhaps in the judgments of one's inner self, not necessarily in deity. Such foundations need not be religious in nature, but are often based upon science, or philosophy, and can take many forms, just as the structure of government can take many forms. The nature of the foundation of faith is only relevant in the sense that its goals must be consistent with the goals of society.<sup>15</sup>

It should also be noted that producing a universal foundation of faith is inherently more difficult in complex societies than in isolated societies, for new ideas and experiences are always being presented to citizens in a complex society, whereas in an isolated society the citizens reach a point where nearly everything is familiar to them. Thus, as the size of society increases, the resources to combat diversity and

---

doubt everything one has been taught and still function in society. Furthermore, it is hard to envision a functioning society in which every member routinely participated in the exercise of self-doubt. Additionally, in order for a society to be purely founded upon self-doubt, every individual in the society would have to participate in the exercise and achieve the same result; otherwise, they would either be unable to cooperate or they would have to rely upon the experience of others who completed the exercise successfully.

<sup>14</sup> Upon reflection, one will recognize that the production of an absolute foundation of faith is tantamount to the desired application of the role of law in idealistic societies.

<sup>15</sup> A major element of many foundations of faith will be economic theory. As this treatise focuses primarily on law and political institutions, an extensive discussion of the particular influences and ramifications of different economic policies will not be taken up. However, it should be noted that a society's economic policy plays a vital role in determining the parameters of equality and social justice within a society.

discrimination decrease, the result being that the law of society becomes increasingly complex. The government is no longer bound by a single, distinct majority, but in differing areas of policy, there will be differing coalitions of citizens; the government must therefore address the wills of multiple majorities. Each generation introduces new belief systems that are preserved in statutes that are binding upon their posterity. Eventually the people will reject the common laws of the society in favor of their individual foundations of belief, and there will be revolution, secession, or anarchy.

*On admittance to society*

It has been shown previously that the potential for revolution increases as additional cultures and beliefs are introduced to a society, particularly if these cultures and beliefs are opposed to those already in place<sup>16</sup>. Thus, efforts should be made by a society to manage revolutionary principles and limit the harmful effects of such principles.

An idealistic society may overcome this by producing prerequisites of admittance calculated to foster a spiritual equality and unity of faith among its members; by so doing, the foundation of faith is established the moment each individual enters the society, and must merely be maintained. Idealistic societies also tend to excommunicate members from society if they act in a manner contrary to the foundation of faith, and in this manner they eradicate any seeds of diversity.

Conversely, a practical society generally exercises less control over admittance and prefers the punishment of incarceration over expulsion when laws are broken.<sup>17</sup> Unless a foundation of faith is introduced in a period of revolution or founding, the government of a practical society rarely has access to any resource but the rule of law. Therefore, a practical society can never overcome the challenges of diversity. It may, however, delay the consequences by enacting moderate laws and exercising restraint in matters where there is no overwhelming majority.

---

<sup>16</sup> It should be noted that diversity may be beneficial to a society when properly integrated. That is, while new members of a society must be persuaded to follow the existing laws of that society, allowing for a free exchange in matters not controlled by the government cultivates innovation and progress within a society in such matters.

<sup>17</sup> When offenders are imprisoned rather than removed from society, the citizens forge a connection between society and the criminal world, for the prisons and their occupants must necessarily be part of their reality. When offenders are removed from society, the laws retain more credibility, for those who break them are no longer in the midst of those who keep them.

*On how idealistic and practical societies may achieve their respective goals*

Thus, the establishment of equality and justice enable both the ideal society and the practical society to reach their respective goals. For in the first case, a universal foundation of faith produced and maintained upon these principles will most certainly result in perfection; and, in the second case, focusing on the relationship between equality and justice results in moderate laws, which most certainly result in stability and order.

In conclusion, the role of law is to sustain the existence government, and allow society to achieve its goals of stability and various degrees of perfection. To avoid revolution, a government must appease the majority faction, and as society becomes increasingly complex, a government must consider the balance of equality and justice concerning majority and minority factors. The most effective means of securing the support of the majority is by persuasion; in particular, fostering sentiments of equality and justice among the people. In an idealist society, this is achieved by establishing a universal foundation of faith and eliminating diversity. In a practical society, there can be no universal foundation of faith, and the government must take great care to enact laws that produce a moderating effect. Thus, both idealistic and practical societies may facilitate equilibrium between equality and justice and by so doing, effectively establish the rule of law and reach the goals of their societies.

## **PART II: A COMMENTARY ON THE ROLE OF LAW IN THE UNITED STATES**

### **I. The Role of Law in the United States**

#### *On the nature of American society*

As we have previously established, understanding the foundations of a society is an important step in determining policy and appropriate forms of government within a society. The chief struggle of a society is to remain true to its original principles, and maintain a solid foundation of faith while balancing majority and minority interests.

The development of the rule of law in the United States of America provides an apt and instructive illustration of the difficulties inherent to this process for numerous reasons. First, the adoption of the American Constitution was, as observed by Publius in *the Federalist Papers*, a test to determine “whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.”<sup>18</sup> Thus, the American experiment provides an example of a government deliberately designed to achieve particular long-term goals and protect certain core beliefs valued by the society, rather than the arbitrary whims and demands of a victorious conqueror.

Additionally, the American experiment is a relatively recent and well-documented event, and the rule of law is therefore easier to track than in ancient societies with complex histories. As de Tocqueville so eloquently stated,

[t]he spirit of analysis has come to nations only as they aged, and when at last they thought of contemplating their cradle, time had already enveloped it in a cloud, ignorance and pride had surrounded it with fables behind which the truth lies hidden. America is the only country where one has been able to witness the natural and tranquil developments of a society, and where it has been possible to specify the influence exerted by the point of departure on the future of states [...] they had already reached that degree of civilization that brings men to the study of themselves, they have transmitted to us a faithful picture of their opinions, mores, and laws [...] America therefore shows us in broad daylight what the ignorance or barbarism of the first ages hid from our regard.<sup>19</sup>

---

<sup>18</sup> Kesler, Charles R., & Rossiter, Clinton (Eds.), *The Federalist Papers*, p. 27.

<sup>19</sup> Tocqueville, Alexis de, *Democracy in America*, p. 28.

### *On the foundation of American society*

American society was founded upon natural rights philosophy, democratic and republican theory, and the principle of limited government. In addition, the American legal system incorporated the concept of an independent judicial branch and also inherited the common-law tradition of Great Britain. These key aspects of the American founding are critical to understanding the American legal system and the principles it attempts to uphold.

What is particularly interesting about American society is that, although it might initially seem that natural rights philosophy demands standards that may only be accomplished by an ideal society, in actuality, American society is a practical society. This is because, in addition to the lofty ideals set by natural rights philosophy, American society is also founded upon doctrines that recognize the inherent frailties of men, such as the principle of limited government. Rather than seeking to eliminate such frailties, the founders accepted them as part of human nature and sought instead to limit their effects. Thus, a complex society emerged in which idealistic principles direct the policy of society, but perfection is not expected as an end result.

## **II. Natural Rights Philosophy**

### *On the key principles of natural rights philosophy*

As stated in the Declaration of Independence, American colonists held these important truths to be self-evident: that “all Men are created equal,” that “they are endowed by their Creator with certain unalienable Rights,” and that “among these are Life, Liberty, and the Pursuit of Happiness.”<sup>20</sup> Additionally, the colonists understood that “to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.”<sup>21</sup> The colonists also believed that “whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.”<sup>22</sup>

From this succinct summary, we may draw three basic themes of natural rights philosophy. First, every individual has an equal right to life, liberty, and the pursuit of happiness. Second, the purpose of

---

<sup>20</sup> *Declaration of Independence*, par. 2.

<sup>21</sup> *Idem*

<sup>22</sup> *Id.*



government is to protect these rights. Finally, the legitimacy of government is based on the consent of the governed, and therefore the people have the right to withdraw their support and establish a new form of government if the existing government fails to provide for their needs.

In order to understand the aforementioned principles, it is necessary to consider the first origins of society and, in particular, the concept of a state of nature and the social compact theory.

#### *On inalienable rights*

The majority of natural rights philosophers held that before societies formed and governments were introduced, humanity existed in a state of nature, in which every individual essentially provided for his or her needs and his or her protection. As depicted by the philosopher John Locke, the state of nature was

a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending on the will of any other man.

A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection.<sup>23</sup>

This is not to say that each individual was equal in terms of physical strength or cunning, but rather, in the state of nature, there existed no reserves of wealth or posts of hereditary power to be filled. Each individual was offered the “same advantages of nature” and given no artificial means to augment survival. Additionally, no artificial modes of oppression, no government, and no formal, written laws or constitutions existed in the state of nature. Thus every individual retained a personal sovereignty over his or her life, labor, and physical well-being.

#### *On the purpose of government and law*

Ideally, in such as state, individuals maintain order by following the law of nature, or the law of reason. Locke continues,

though this be a state of liberty, yet it is not a state of licence [sic]; though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it. The state of nature has a law of nature to govern it, which obliges every one; and reason, which is that law, teaches all mankind who will but

---

<sup>23</sup> Locke, *The Second Treatise of Government and A Letter Concerning Toleration*, p. 2-3.

consult it, that, being all equal and independent, no one ought to harm another in his life, health, liberty or possessions [...] Every one, as he is bound to preserve himself, and not to quit his station wilfully [sic], so, by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice on an offender, take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another.<sup>24</sup>

But while “the execution of the law of nature is in that state put into every man’s hand, whereby everybody has the right to punish the transgressors of that law to such a degree as may hinder its violation,”<sup>25</sup> problems eventually emerge. Though all exist in a state of political equality, and there exist no artificial means of oppression, there must necessarily be some individuals who are naturally stronger or more cunning and are able to take advantage of weaker individuals unable to produce any means of punishing their oppressors. As the philosopher Thomas Hobbes noted,

the laws of nature [...] of themselves, without the terror of some power to cause them to be observed, are contrary to our natural passions, that carry us to partiality, pride, revenge, and the like. And covenants without the sword are but words, and of no strength to secure a man at all. Therefore notwithstanding the laws of nature (which every one hath then kept, when he has the will to keep them, when he can do it safely), if there be no power erected, or not great enough for our security, every man will, and may lawfully rely on his own strength and art, for caution against all other men.<sup>26</sup>

This troubling aspect of human nature leads to three key defects of the state of nature, as outlined by John Locke:

[1] There wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them. For though the law of nature be plain and intelligible to all rational creatures; yet men, being biased by their interest, as well as ignorant for want of study of it, are not apt to allow of it as a law binding to them in the application of it to their particular cases [...]

[2] [T]here wants a known and indifferent judge with authority to determine all differences according to the established law. For every one in that state, being both judge and executioner of the law of nature, men being partial to themselves, passion and revenge is very apt to carry them too far, and with too much heat in their own cases, as well as negligence and unconcernedness, to make them too remiss in other men’s [...]

[3] [T]here often wants power to back and support the sentence when right, and to give it due execution. They who by any injustice offended will seldom fail, where they are able, by force to make good their injustice; such resistance many times makes the punishment dangerous, and frequently destructive to those who attempt it.<sup>27</sup>

---

<sup>24</sup> Idem, p. 3.

<sup>25</sup> Idem, pp. 3-4.

<sup>26</sup> Hobbes, *Leviathan*, p. 106.

<sup>27</sup> Locke, *The Second Treatise on Government and A Letter Concerning Toleration*, pp. 57-58.

Because these defects result in a state of confusion and instability, eventually individuals unite into a society and form government in order to establish universal codes of conduct and provide consistent and fair enforcement of those standards. As Thomas Paine observed, in the state of nature

the strength of one man is so unequal to his wants, and his mind so unfitted for perpetual solitude, that he is soon obliged to seek assistance and relief of another, who in his turn requires the same [...] thus necessity, like a gravitating power, would soon form [man] into society, [...] [and] as nothing but heaven is impregnable to vice eventually man must recognize the necessity of establishing some form of government to supply the defect of moral virtue.<sup>28</sup>

In sum, natural rights philosophy recognizes that “there is a universal justice emanating from reason alone.”<sup>29</sup> However, it also recognizes that in order “to be admitted among us, [the observation of justice] must be mutual” and that “[h]umanly speaking, in default of natural sanctions, the laws of justice are ineffective among men” because “they merely make for the good of the wicked and the undoing of the just, when the just man observes them towards everybody and nobody observes them towards him” and therefore “[c]onventions and laws are [...] needed to join rights to duties and refer justice to its object.”<sup>30</sup> Thus, the purpose of government is to protect individual rights by providing more stability and consistency than would exist in the state of nature.

*On government by consent of the governed*

It is also important to recognize that, according to natural rights philosophy, individuals willingly enter into a social contract to protect their collective interests. In other words, government cannot be forced upon individuals because of their inalienable rights to govern themselves in the state of nature. As Locke explains,

[m]en being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty and puts on the bonds of civil society is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it. This any number of men may do, because it injures not the freedom of the rest; they are left as they were in the liberty of the state of nature. When any number of men have so consented to make one community or government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest.<sup>31</sup>

---

<sup>28</sup> Paine, *Common Sense, Rights of Man, and Other Essential Writings of Thomas Paine*, pp. 5-6.

<sup>29</sup> Rousseau, *The Social Contract and Discourses*, p.210

<sup>30</sup> Idem

<sup>31</sup> Locke, *The Second Treatise on Government and A Letter Concerning Toleration*, p. 44.

Thus, initially the law of a society gains its legitimacy from the consent of those who entered into the social contract. Afterwards, the law retains its legitimacy by remaining faithful to the will of the majority. The will of the majority may be expressed explicitly in various manners, according to the design of the society's constitution. Additionally, on a more fundamental level, Locke observed that "every man that hath any possessions, or enjoyment of any part of the dominions of any government, doth thereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government during such enjoyment as any one under it."<sup>32</sup> Thus, consent may be manifested both expressly and tacitly, and, in the absence of consent, the laws lose their legitimacy and society dissolves.

### III. Democratic & Republican Theory

#### *On the merits of democratic rule*

The effectiveness and utility of democratic government, or government based upon the collective will of the people, has long been debated by philosophers, and democracy has often been portrayed unfavorably. For example, in Plato's Republic, Socrates describes democracy as a regime in which the citizens "[do not] care at all from what kinds of practices a man goes to political action, but honors him if only he says he's well disposed towards the multitude" and this results in "a sweet regime, without rulers and many-colored, dispensing a certain equality to equals and unequals alike"<sup>33</sup> In other words, democracy was depicted by Plato as a misguided attempt at equality that resulted in bad laws that sought to satiate the desire of the unwise majority. Democracy also ultimately ended in chaos and disorder for Plato, because the citizens in a democracy "end up [...] paying no attention to the laws, written or unwritten, in order that they may avoid having any master at all"<sup>34</sup> and thus the regime is destined to decay into anarchy.

While Plato's criticism of democracy is certainly reasonable and well-founded, it is important to note that Plato's understanding of the origins of democracy was fundamentally different than that of the natural rights philosophers. Plato envisioned a cycle of regimes, beginning with a monarchical or aristocratic government ruled by philosopher-kings that slowly decayed into a timarchic government, then an oligarchy, then a democracy, then anarchy, and finally ending in a tyranny, the lowest and most contemptible of all the regimes. Thus, for Plato, democracy came into being when the lower classes in an oligarchy rise up in rebellion and "the poor win, killing some of the others and casting out some, and share the regime and the

---

<sup>32</sup> Idem, p. 55.

<sup>33</sup> Bloom (Ed.), *The Republic of Plato*, p. 236 at 558b.

<sup>34</sup> Idem, p. 242 at 563 d.

ruling offices with those who are left on an equal basis; and, for the most part, the offices in it are given by lot.”<sup>35</sup>

In contrast, as we have seen above, natural rights philosophers envisioned a state of nature in which each individual held equal rights simply from being born as a human being. For them, the source of equality was not rebellion from oppressive laws, but inalienable rights. Thus, when a group of equal individuals enters into the social contract and forms a society, rule by majority is the only legitimate source of authority, for there is no king or ruling class to guide the new society. Additionally, natural rights philosophers, such as Thomas Paine, held that “It is always in the interest of a far greater number of people in a Nation to have things right than to let them remain wrong” and therefore “when public matters are open to debate, and the public judgment free, it will not decide wrong, unless it decides to hastily.”<sup>36</sup> In other words, majority rule is also supported by reason, for in such a society the law applies equally to each individual, and therefore the burden of unjust or unwise laws is shared by the entire community, prompting a swift change of policy.

Additionally, natural rights philosophers envisioned a more organized democracy than the loosely structured and unpredictable democracy of Plato. Once individuals left the state of nature to enter into the social contract, they were expected to be obedient to laws established by the will of the majority (assuming that the government protected their inalienable rights to life, liberty, and the pursuit of happiness). As Rousseau explained,

In order then that the social compact may not be an empty formula, it tacitly includes the undertaking, which alone can give force to the rest, that whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free; for this is the condition which, by giving each citizen to his country, secures him against all personal dependence. In this lies the key to the working of the political machine; this alone legitimizes civil undertakings, which, without it, would be absurd, tyrannical and liable to the most frightful abuses.<sup>37</sup>

Thus, for the natural rights philosophers, democratic rule was the only legitimate form of government because it was the one form capable of recognizing and maintaining the natural equality of mankind. Democratic government was also seen by natural rights philosophers as the only sure means to protecting individual liberties; for while a tyrannical king or an ambitious aristocracy might trample upon the rights of the less powerful, it was understood that the majority of people, if they were given equal rights, would protect those rights from the encroachment of scheming minorities. A government organized in this

---

<sup>35</sup> Idem, p. 235 at 557a.

<sup>36</sup> Paine, *Common Sense, Rights of Man, and other essential writings of Thomas Paine*, p. 301.

<sup>37</sup> Rousseau, *The Social Contract and Discourses*, p. 195.

manner would allow individuals to leave the state of nature and confidently depend upon his or her government to protect the inalienable rights of its citizens.

*On the inherent weaknesses of democratic rule*

Despite these merits of democratic rule, there remained inherent weaknesses in democratic theory. In addition to the problem of instability illustrated by Plato, upon reflection it becomes apparent that if the law is based solely upon majority rule, there is no incentive for those in power to protect the rights and interests of minorities within society. As de Tocqueville observed, “What therefore is a majority taken collectively, if not an individual who has opinions and most often interests contrary to another individual that one names the minority?”<sup>38</sup>

Put differently, in every case in which a majority passes a law, a minority of citizens suffer an unfavorable outcome. While in most cases the inconvenience is minor and manageable, in a pure democracy there is no guarantee that a malicious majority will not take away crucial rights from a discriminated minority. Furthermore, when rights are usurped from a minority in a pure democracy, the only redress the unfortunate citizens have is an appeal to the very majority that initially wronged them. As Publius elaborated,

a pure democracy [...] can admit of no cure for the mischiefs [sic] of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would at the same time be perfectly equalized and assimilated in their possessions, their opinions, and their passions.<sup>39</sup>

Finally, there is no guarantee that the citizenry will in fact pursue what is best for the nation in the long term. Since men are naturally inclined to satisfy their own present needs and ignore the needs of future generations, in a pure democracy there is great incentive for the ruling majority to sacrifice the well-being of future generations for the pleasures of moment and a comfortable present. Often democratic government produces legislative instability because “it is of the nature of democracies to bring new men to power” and therefore “laws have the least duration” for “[t]he majority being the sole power that is important to please, the works that it undertakes are eagerly agreed to; but from the moment that its attention goes elsewhere, all

---

<sup>38</sup> Tocqueville, *Democracy in America*, p. 240.

<sup>39</sup> Kesler, Charles R., & Rossiter, Clinton (Eds.), *The Federalist Papers*, p. 76.

efforts cease.”<sup>40</sup> Thus, democracies often lack the will power to pursue long-term policy and achieve long-term goals.

*On representational government and republican theory*

Since it was essential for natural rights philosophy to preserve the merits of democratic rule, representational, or republican, government was presented as a means to remedy the weaknesses of pure democracy. While a government in which each individual citizen participated might be unstable and logistically limited to small areas, a representational government in which the individual citizens elected representatives to protect their interests showed more promise. As presented by Publius,

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens and greater sphere of country over which the latter may be extended.<sup>41</sup>

Ideally, a scheme of representation would “refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”<sup>42</sup> Such representatives would be removed from the immediate passions of the people and able to act rationally for the good of the nation while still being held accountable to the individual interests of the people through frequent elections.

Traditionally, earlier philosophers who had discussed representative democracies, such as Montesquieu, had held that although a republic based upon representation could be larger than a pure democracy, such a government would not be an effective way to manage a large nation. This was because, as outlined by Montesquieu,

In an extensive republic there are men of large fortunes, and consequently of less moderation; there are trusts too considerable to be placed in any single subject; he has interests of his own; he soon begins to think that he may be happy and glorious, by oppressing his fellow-citizens; and that he may raise himself to grandeur on the ruins of his country.

[Additionally] [i]n an extended republic the public good is sacrificed to a thousand private views; it is subordinate to exceptions, and depends on accidents. In a small one, the interest of the public is more obvious, better understood, and more within the reach of every citizen; abuses have less extent, and, of course, are less protected.<sup>43</sup>

---

<sup>40</sup> Tocqueville, *Democracy in America*, pp. 238-239.

<sup>41</sup> Kesler, Charles R., & Rossiter, Clinton (Eds.), *The Federalist Papers*, p. 76.

<sup>42</sup> Kesler, Charles R., & Rossiter, Clinton (Eds.), *The Federalist Papers*, p. 76.

<sup>43</sup> Montesquieu, *The Spirit of Laws*, p. 120.

However, when defending the American Constitution, Publius rejected the necessity of small republics, and argued that in actuality, a large republic was the only effective means to provide a representational democracy with long-term stability. While he admitted that a great weakness of representational government was that “[m]en of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people,” he maintained that this would be less likely to occur in a large republic because “the proportion of fit characters be not less in the large than the small republic, [and] the former will present a greater option, and consequently a greater probability of a fit choice.”<sup>44</sup> Additionally, he held that “as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practise [sic] with success the vicious arts by which elections are too often carried.”<sup>45</sup>

With respect to the argument that in a large republic it is hard to determine the public interest, he responded that there would be “greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest.”<sup>46</sup> This was because,

The smaller the society, the fewer probably will be the distinct parties and interests, the more frequently will a majority be found of the same party; and the small the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison one with each other.<sup>47</sup>

Thus, according to republican theory, by providing for representation and elections, a democratically themed government may be implemented in order to provide more stability to legislation and a greater sphere of influence while maintaining the ideals of equality and natural rights. A large republic provides additional stability by setting contentious factions against each other and ensuring that no faction gains supremacy over the others.

---

<sup>44</sup> *Idem*, p. 77.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* p. 78

<sup>47</sup> *Id.*



#### IV. Limited Government

##### *On the purpose of limited government*

The principle of limited government is closely related to the principle of government by consent of the governed. In general, a limited government is a government whose power is “limited to the public good of society.”<sup>48</sup> More specifically, the principle of limited government states that “the ruling power ought to govern by declared and received laws, and not by extemporary dictates and undetermined resolutions.”<sup>49</sup> This is because,

all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws; that both the people may know their duty and be safe and secure within the limits of the law; and the rulers too kept within their due bounds, and not be tempted by the power they have in their hands to employ it to such purposes, and by such measures as they would not have known, and own not willingly.<sup>50</sup>

Additionally, power given to government must remain in the hands in which it was placed by the people. Thus, in a representative democracy in which an elected legislature is given the responsibility of producing laws,

[t]he legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen authorized to make laws for them.<sup>51</sup>

##### *On how the American Constitution provides for limited government*

The first and foremost means of limiting the government in America is the language of the Constitution itself. For example, Article I, Section 1 states that “All legislative Powers herein granted shall be vested in a Congress of the United States” illustrating that the purpose of the Constitution is to set up the structure of government, to enumerate the powers granted to the government, and to designate which parts of government hold which powers. While the proper grants and limits of power and the right to exercise those powers has been in constant flux since the founding, it is clear that the Constitution provided for a

---

<sup>48</sup> Locke, *The Second Treatise of Government and A Letter Concerning Toleration*, p. 62.

<sup>49</sup> *Idem*, p. 63.

<sup>50</sup> *Id.*, p. 64.

<sup>51</sup> *Id.* pp. 65-66.

government that incorporated the principle of separation of powers, the principle of checks and balances, and the principle of federalism to limit the power of government.

*On the principle of separation of powers*

The principle of separation of powers is based upon the understanding that the end of government may be divided into separate and distinct powers. According to Montesquieu, “[i]n every sort of government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.”<sup>52</sup> He continues,

By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.<sup>53</sup>

Since each of these powers is able to be understood and carried out distinctly and separately from the others powers, it is possible to distribute the different powers to different branches of government. And indeed, the principle of separation of powers states that such a division is desirable, for, as Montesquieu noted,

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.<sup>54</sup>

The Constitution of the United States clearly attempts to separate the legislative, executive, and judicial powers between three branches of government. Indeed, the very structure of the document manifests this principle, with Article I devoted to the legislative branch of government, Article II outlining the powers of the executive branch, and Article III devoted to the judicial branch. Publius himself references Montesquieu and declares that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be

---

<sup>52</sup> Montesquieu, *The Spirit of Laws*, p. 151.

<sup>53</sup> *Idem*.

<sup>54</sup> *Id.*, p. 152.

pronounced the very definition of tyranny.”<sup>55</sup> It is clear, then, that this principle was of paramount importance in the drafting of the American Constitution.

*On the principle of checks and balances*

Interestingly, one of the objections raised by the Anti-Federalists who opposed the Constitution was that the Constitution did not separate the powers of government to the proper degree. Taking the Senate established by the federal constitution as the most blatant and definitive manifestation of the violation of this principle, the Anti-Federalist writer Brutus observed,

[It] will possess a strange mixture of legislative, executive and judicial powers [...]

[1] They are one branch of the legislature, and in this respect will possess equal powers in all cases with the house of representatives [...]

[2] They are a branch of the executive in the appointment of ambassadors and public ministers, and in the appointment of all other officers, not otherwise provided for [...]

[3] They are part of the judicial, for they form the court of impeachments.

It has been a long established maxim, that the legislative, executive and judicial departments in government should be kept distinct [...] I admit that this distinction cannot be perfectly preserved [...] But still the maxim is a good one, and a separation of these powers should be sought as far as is practicable. I can scarcely imagine that any of the advocates of the system will pretend, that it was necessary to accumulate all these powers in the senate.<sup>56</sup>

In contrast, Publius argued that not only was it impossible to completely separate the different powers, was impractical to do so as well. He responded,

To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments as laid down in the Constitution? The only answer that can be given is that as all these exterior provisions are found to be inadequate the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.<sup>57</sup>

This was to be accomplished by “giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others” for “[a]mbition must be

---

<sup>55</sup> Kesler, Charles R., & Rossiter, Clinton (Eds.), *The Federalist Papers*, p. 298.

<sup>56</sup> Ketcham, Ralph (Ed.), *The Anti-Federalist Papers and the Constitutional Convention Debates*, p. 335.

<sup>57</sup> Kesler, Charles R., & Rossiter, Clinton (Eds.), *The Federalist Papers*, pp. 317-318.

made to counteract ambition” and although “[a] dependence on the people is, no doubt, the primary control on the government [...] experience has taught mankind the necessity of auxiliary precautions.”<sup>58</sup>

Thus, in the American system of government, in addition to Constitutional provisions delegating different powers to different branches, there exist additional internal checks which ensure that the balance of power between the branches remains stable.

#### *On the principle of federalism*

The American Constitution also sought to limit government by providing for a federal system of government, or a system in which a national government coexists with state and local governments and each retains sovereignty within their respective spheres. As illustrated by Publius,

In the compound republic of America, the power surrendered by the people is first divided between two distinct government, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.<sup>59</sup>

Hence, by producing a federal system, the Constitution once again divides power and utilizes the ambition of the national government to counteract the ambition of state governments and vice versa in an effort to prevent either sphere of government from becoming too powerful and encroaching on the rights of the people.

### **V. The Independent Judiciary**

#### *On the merits of an independent judiciary*

In addition to placing the judicial power in a separate and distinct branch, the framers of the American system sought to ensure that the justices themselves would be free from external influences. In particular, Article III § 1 of the Constitution provides that “[t]he Judges, both of the supreme and inferior Courts, shall hold their office during good Behaviour [...] and shall [...] receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” Thus, in the American system, once justices have been appointed and confirmed, they may not be removed from office or have their pay diminished if their decisions are held to be unpopular by the people or the other branches of

---

<sup>58</sup> Idem, p. 319.

<sup>59</sup> Idem, p. 320.

government, and in this manner they are enabled to make impartial judgments. As observed by Publius regarding the judiciary,

as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

[T]he complete independence of the courts of justice is peculiarly essential in a limited Constitution [...] which contains certain specified exceptions to the legislative authority [...] Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.<sup>60</sup>

Publius also assured that if granted independence, the judiciary itself would not endanger the rights of the people because

the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in the capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.<sup>61</sup>

*On the dangers of an independent judiciary*

Despite such arguments, the Anti-Federalists criticized of the lack of accountability enjoyed by the judicial branch. The Anti-Federalist Brutus questioned “whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible.”<sup>62</sup> He maintained that

The judicial are not only to decide questions arising upon the meaning of the constitution in law, but also in equity.

By this they are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter [...]

They will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can

---

<sup>60</sup> Id., p. 465

<sup>61</sup> Id., p. 464.

<sup>62</sup> Ketcham, Ralph (Ed.), *The Anti-Federalist Papers and the Constitutional Convention Debates*, p. 304.

correct their errors, or control their adjudications. From this court there is no appeal. And I conceive the legislature themselves, cannot set aside a judgment of this court, because they are authorised by the constitution to decide in the last resort. The legislature must be controlled by the constitution, and not the constitution by them.<sup>63</sup>

Brutus was also concerned that an independent federal judiciary would result in “an entire subversion of the legislative, executive and judicial powers of the individual states” because “[e]very adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government [would] affect the limits of the state jurisdiction” and since it was likely that “the judicial power of the United States, will lean strongly in favour of the general government, and will give such an explanation to the constitution, as will favour an extension of its jurisdiction,” it followed that “[i]n proportion as the former enlarges the exercise of their powers, will that of the latter be restricted”<sup>64</sup> and the states would gradually lose the ability to check the national government.

Lastly, Brutus argued that the judiciary would even end up controlling the legislature itself. He observed that

In determining these questions, the court must and will assume certain principles, from which they will reason, in forming their decisions. These principles, what ever they may be, when they become fixed, by a course of decisions, will be adopted by the legislature, and will be the rule by which they will explain their own powers. This appears evident from this consideration, that if the legislature pass laws, which, in the judgment of the court, they are not authorised to do by the constitution, the court will not take notice of them; for it will not be denied, that the constitution is the highest or supreme law. And the courts are vested with the supreme and uncontrollable power, to determine, in all cases that come before them, what the constitution means; they cannot, therefore, execute a law, which, in their judgment, opposes the constitution, unless we can suppose they can make a superior law give way to an inferior. The legislature, therefore, will not go over the limits by which the courts may adjudge they are confined.<sup>65</sup>

Thus, Brutus famously concludes that “there is no power above [the judiciary] to set aside their judgment” for “they are independent of the people, of the legislature, and of every power under heaven” and therefore the judiciary should not be counted on to exercise discretion and impartiality because “[m]en placed in [that] situation will generally soon feel themselves independent of heaven itself.”<sup>66</sup>

---

<sup>63</sup> *Idem*, pp. 295-296.

<sup>64</sup> *Id.*, pp. 296-297.

<sup>65</sup> *Id.* pp. 299.

<sup>66</sup> *Id.* p. 305.

## VI. The Common Law Tradition

### *On the English constitution*

Apart from the concept of an independent judiciary, the basic framework for the American legal system was inherited from the British model. In addition to formal written laws passed by the legislature, the British model incorporated an informal system of law supplied by judicial rulings. As summarized by Blackstone,

The municipal law of England [...] may with sufficient propriety be divided into two kinds; the *lex non scripta*, the unwritten, or common law; and the *lex scripta*, the written, or statute law.

The *lex non scripta*, or unwritten law, includes not only general customs, or the common law properly so called; but also the particular customs of certain parts of the kingdom; and likewise those particular laws, that are by custom observed only in certain courts and jurisdictions [...]

[T]he monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. [...] I therefore stile these parts of our law *leges non scripta*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.<sup>67</sup>

### *On the role of precedent*

To understand the common law system, it is crucial to recognize the role of precedent. Blackstone continues,

[A] very natural, and very material, question arises: how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositary of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land.

Their knowlege [sic] of that law is derived from experience and study [...] and from being long personally accustomed to the judicial decisions of their predecessors. [...] The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of records, in publick [sic] repositories set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance [...]

---

<sup>67</sup> Blackstone, *Commentaries on the Laws of England*, Book II, Introduction, § 3, p. 63-64.

For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason [...]

The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration.[...] [A] modern judge might wish it had been otherwise settled; yet it is not in his power to alter it.<sup>68</sup>

Thus, in a common law system, if a case is presented to a court, the court looks to the history of similar cases for guidance. If the present case is shown to be sufficiently different than previous cases, a new judgment is given by the court. However, if it is determined by the court that the matter in question has already been resolved by a previous case, pre-established principles are upheld and deference is given to the earlier precedent.

#### *On the problems of precedent*

There are various arguments against a judicial system which must defer to previous judicial rulings in addition to constitutions and legislative acts. One argument is that by giving so much weight to obscure legal doctrines and precedents, the citizenry becomes unfamiliar with the law. As de Tocqueville noted, “there is nothing [...] more obscure for the vulgar and less within his reach than legislation founded on precedents.”<sup>69</sup> This is because as time goes by, certain clauses of a constitution or legislative acts must be applied to various particular circumstances. As the cases are compounded, the role of the clause or act becomes increasingly complex, and the average citizen is eventually forced to appeal to the experts of the legal profession if they are in need of an extrapolation of the effects of the law in question.

Another criticism is that in some cases, earlier precedents may be the result of human error and should be overturned. As Hobbes maintained,

[B]ecause there is no judge, [...] but may err in a judgment of equity, if afterward, in another like case, he finds it more consonant to equity to give a contrary sentence, he is obliged to do it. No man's error becomes his own law, nor obliges him to persist in it. Neither (for the same reason) becomes it a law to other judges, though sworn to follow it. For though a wrong sentence given by authority of the sovereign, if he know and allow it, in such laws as

---

<sup>68</sup> Idem.

<sup>69</sup> Tocqueville, *Democracy in America*, p. 255.



are mutable, be a constitution of a new law in cases in which every little circumstance is the same, yet in laws immutable (such as are the laws of nature) they are no laws to the same or other judges in the like cases for ever after. [...] [A]ll the sentences of precedent judges that have ever been cannot all together make a law contrary to natural equity, nor any examples of former judges can warrant an unreasonable sentence, or discharge the present judge of the trouble of studying what is equity (in the case he is to judge) from the principles of his own natural reason.<sup>70</sup>

As Blackstone made it clear, the common law system does theoretically provide for precedent contrary to reason to be overturned, but each overturned precedent undermines the rule of law. That is, if precedent is equated with the law, the overturning of precedent must be equated with a revocation of law. Thus, if precedent is constantly being revoked within such a society, it must result in instability and disrespect for the law.

A final criticism of the common law system is that, in practice, appeals to reason are often used as a means to supplant custom and precedent with their personal interests or the prevailing opinions and interests of the day. As Hobbes also observed,

Ignorance of the causes and original constitution of right, equity, law and justice disposeth a man to make custom and example the rule of his actions, in such manner as to think that unjust which it hath been the custom to punish, and that just, of the impunity and approbation whereof they can produce an example (or, as the lawyers which only use this false measure of justice barbarously call it, a precedent), like little children, that have no other rule of good and evil manners but the correction they receive from their parents and masters; save that children are constant to their rule, whereas men are not so, because, grown strong and stubborn, they appeal from custom to reason, and from reason to custom, as it serves their turn, receding from custom when their interest requires it, and setting themselves against reason as oft as reason is against them [...] <sup>71</sup>

In this manner, the rule of law is once again undermined; and in more troubling fashion, for the root of the problem is not merely human error, but rather human nature itself.

## VII. Inherent Conflicts

### *On the inherent conflicts of the American Foundation of Faith*

Thus, the foundation of American government incorporates natural rights philosophy, democratic and republican theory, and the principle of limited government, and also inherited a common law tradition from Great Britain. The result is a complex core of values and interests that often conflict with each other. For example, the law of reason championed by natural rights philosophy must compete with the ignorance of

---

<sup>70</sup> Hobbes, *Leviathan*, p. 181.

<sup>71</sup> Hobbes, *Leviathan*, p. 61.

society and the multiple, individual interests reinforced by ambition and human nature. The democratic principle of majority rule appears at times to contradict the mandate of natural rights philosophy to respect and protect the inalienable rights of minorities. Republican theory replaces the actual interests of individual citizens with perceived interests. By separating the executive, legislative, and judicial powers the Constitution pits the branches against each other by design, and the principle of federalism ensures that the national government must compete with state and local governments. The adoption of a Constitution that establishes the limits of government, along with the common law tradition of upholding judicial precedent, sets the interests and values of past generations at odds with the interests and values of the present generation.

It is remarkable that, in spite of these inherent conflicts, the American system of government has lasted over two hundred years and retained the basic ideals and structure of its original foundation. This is not to say that the American existence has been an entirely stable or static one, but rather that, although the balance of both interests and power have admittedly fluctuated, the variations have remained more or less within the original framework.

Yet it may not be enough to merely retain all the original principles in some form or another. It may be necessary to revive and revitalize them periodically in order to ensure that they are not neglected or abandoned. As observed earlier, a society must always be aware of threats to its foundation, and a slow decay of principles may be just as damaging in the long run as a radical and swift rejection of those principles. In the American system, both the government and the people are expected to actively participate in the pursuit and defense of the nation's ideals, and a passive acknowledgement of fundamental principles may not be enough to ensure that the foundation remains solid.

Next, we will consider how the American government and the American people might best preserve and cultivate American ideals. In particular, we will focus on the curiously vague parameters of the federal judiciary in the American system, and how the Supreme Court may best be utilized to most effectively uphold the rule of law and provide stability in American society.

### **PART III: ON THE AMERICAN JUDICIARY**

#### **I. On the Vague Nature of the American Judiciary**

*On the curious position of influence inherited by the judiciary in America*

As we have previously observed, each society possesses a fundamental foundation of principles that must be maintained in order to ensure that the goals of each respective society are accomplished and that stability is maintained throughout the process. We have also observed that the foundations of American society are quite complex, and in many cases it would appear that fundamentally accepted principles may be invoked by opposing parties to champion conflicting causes. While it is true that internal checks and balances were intentionally fostered within the American system in an effort to avoid concentrated power, in such a system there is an inherent danger of gridlock within the legislature and gradual loss of political efficacy until apathy overcomes the citizenry and civic virtues virtually disappear.

When the citizenry of any society based upon individual rights and personal freedoms ceases to display an interest in participating in politics, such rights must necessarily be safeguarded by some other means, or they will ultimately be desecrated by despotism and lost in a vortex of centralized power. In the American system, the federal judiciary is not elected by the people or chosen by the popular legislature, but rather appointed by the chief executive and approved by the Senate. Justices are not held accountable to the general population, as their terms are for life and they may only be removed from office if they commit a significant criminal act. Such a system is designed to free the court from the chains of politics and allow justices to produce just and impartial decisions. The ties to the people, as well as federal and state governments, are severed and sacrificed in an effort to remove the passions and prejudices of malicious majorities and the agendas of powerful political interests. Some have suggested that the vague parameters and inherent independence of the American Judiciary combined with its formidable power of judicial review place it in a position to fulfill this role. We will next examine the nature of the American Judiciary and consider how its unique position might be utilized to uphold the fundamental principles of American society and sustain the most basic aim of society, that of stability.

*Philosophical commentary on the role of the judicial branch*

At the time of the American Revolution, the notion of a separate, independent judicial branch was a relatively new concept and there had never been any practical application of the idea on a national level prior to the founding of the United States of America. Consequently, its role and the proper means of

implementing the responsibilities of the judiciary had not been fully developed, and though there was much writing on the more established executive and legislative branches of government, there was little to be said about the judicial branch. However, a few philosophers did provide limited commentary that is useful in understanding the origins of the judicial branch of government.

Montesquieu portrayed the judiciary as a protector of individual rights and upholder of law. He observed,

In despotic governments there are no laws; the judge himself is his own rule. There are laws in monarchies; and where these are explicit, the judge conforms to them; where they are otherwise, he endeavors to investigate their spirit. In republics, the very nature of the constitution requires the judges to follow the letter of the law; otherwise the law might be explained to the prejudice of every citizen, in cases where their honor, property, or life is concerned.<sup>72</sup>

De Tocqueville provided a more extensive and instructive outline of the primary characteristics of judicial power. According to De Tocqueville,

The first characteristic of judicial power among all peoples is to serve as an arbiter. In order that action on the part of the courts take place, there must be a dispute. In order that there be a judge, there must be a case. As long as a law does not give rise to a dispute, therefore, the judicial power has no occasion to occupy itself with it. The law exists, but the judicial power does not see it. When a judge, in connection with a case, attacks a law relative to that case, he extends the circle of his prerogatives, but he does not go outside it, since it was necessary in some way for him to judge the law in order to come to judge the case. When he pronounces on a law without starting from a case, he goes outside his sphere completely and enters that of the legislative power.<sup>73</sup>

The second characteristic of judicial power is to pronounce on particular cases and not on general principles. Should a judge, in deciding a particular question, destroy a general principle by the certitude people have that, each of the consequences of this same principle being struck down in the same manner, the principle becomes sterile, he remains in the natural circle of his action; but should the judge attack the general principle directly and destroy it without having a particular case in view, he goes outside the circle in which all peoples have agreed to enclose him: he becomes something more important, more useful perhaps than a magistrate, but he ceases to represent judicial power.<sup>74</sup>

The third characteristic of judicial power is to be able to act only when it is appealed to, or, following the legal expression, when it is *seised* [of a matter]. This characteristic is not encountered as generally as the other two [...] In its nature judicial power is without action; for it to move one must put it in motion. One denounces a crime to it, and it punishes the guilty; one appeals to it to redress an injustice, and it redresses it; one submits an act to it, and it interprets it; but it does not go by itself to prosecute criminals, search for injustice,

---

<sup>72</sup> Montesquieu, *The Spirit of Laws*, p. 75.

<sup>73</sup> De Tocqueville, *Democracy in America*, p. 94

<sup>74</sup> Idem

and examine facts. The judicial power would in a way do violence to this passive nature if it took the initiative by itself and established itself as censor of the laws.<sup>75</sup>

Thus, although the judiciary is designed to protect individual rights, its power is not absolute, but is limited to providing relief within the parameters of the conflicts brought before it. That is, the judiciary is not allowed to address any matter of public policy on a whim or granted the ability to legislate new laws. Rather its role is to resolve matters where the law is in conflict or unclear and act as arbiter in the specific cases and scenarios that are brought before it.

*A commentary on constitutional convention debates concerning the role of the judicial branch*

“The Records of the Federal Convention of 1787” reveal a disparity of time set aside for the consideration for the judiciary in proportion to the time set aside for the consideration of other matters.<sup>76</sup> Perhaps this is a reflection of the prevailing sentiment of the time that the judiciary would be the weakest of the three branches. As Publius famously put it in Federalist #78, “[t]he judiciary [...] has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive for the efficacy of its judgments.”<sup>77</sup> Perhaps it was felt that a common understanding of the role of the judiciary was already in existence. Or perhaps the judiciary was merely neglected due to a plethora of more important political topics and compromises that had to be considered by the participants of the convention.

Whatever the case, the brief discussions of the judiciary reveal that the majority of individuals at the convention considered it essential to the rule of law that the judiciary be free from political influence and bias in order to administer justice. Thus it was provided that, once appointed, the justices be allowed to remain in their offices for life (or until voluntary retirement), and that their pay not be diminished in an effort to shelter the judiciary from volatile popular opinion and the influence of the legislature.

But beyond the basic principles of independence and impartiality, there was a lack of consensus and understanding among the founders with respect to how the soon to be independent justices would best be

---

<sup>75</sup> Idem

<sup>76</sup> This convention was held in Philadelphia and its original purpose was to amend the faulty Articles of Confederation which preceded the current American Constitution of 1787. The convention thus became a stage for discussing the proper structure and role of government, and its debates offer an instructive window into the minds of the early American founders and their sentiments regarding the government that they were creating. The record used forthwith was edited by Max Farrand and the passages referred to are all drawn from the notes of James Madison.

<sup>77</sup> Kesler, Charles R., & Rossiter, Clinton (Eds.), *The Federalist Papers*, p. 464.

utilized in the new government. The debate over a proposal presented as the “Council of Revision” is particularly instructive when considering the various concepts of judicial participation presented at the convention. Those who supported the Council of Revision proposed that a group of judges be combined with the executive and that the council be given a collective veto power over legislation. The proposal was raised numerous times throughout the convention, and though it was ultimately rejected, it provided an arena for discussing the proper role that justices should play in the new government. The most important discussions of the topic took place on June 4, June 6, July 21, and August 15.

The concept was first introduced on June 4, as an amendment to a proposal that the Executive exercise a veto power of the legislation of Congress. On that day, Elbridge Gerry argued that the judiciary already held a “sufficient check [against] encroachment on their own department by the exposition of the laws, which involve a power of deciding on their Constitutionality” and Rufus King pointed out that judges “ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation.”<sup>78</sup>

The debate continued on June 6, and Gerry further argued that “the Executive, whilst standing alone [would] be more impartial than when he [could] be covered by the sanction & seduced by the sophistry of the Judges.” King reminded the delegates that “[i]f the Unity of the Executive was preferred for the sake of responsibility, the policy of it is as applicable to the revisionary as to the Executive power.” In response, James Madison maintained that only “a small part of the laws coming in question before a Judge [would] be such wherein he had been consulted,” but “much good on the other hand [would] proceed from the perspicuity, the conciseness, and the systematic character [which] the Code of laws [would] receive from the Judiciary talents.” A vote was taken and the proposal was defeated 8-3, but desires to return to the matter were expressed, and it was tabled for a later date.<sup>79</sup>

On July 21, the most extensive debate of the topic took place. James Wilson argued for the proposal and maintained that “the Judiciary ought to have an opportunity of remonstrating [against] projected encroachments on the people as well as on themselves.” This opportunity should be granted, he argued, because “[l]aws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect.” But if the convention, [l]et them have a share in the Revisionary power” they would “have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.”<sup>80</sup>

---

<sup>78</sup> Farrand, Max (Ed.), *The Records of the Federal Convention of 1787: Volume I*, pp. 97-101.

<sup>79</sup> *Idem*, pp. 132-140.

<sup>80</sup> Farrand, Max (Ed.), *The Records of the Federal Convention of 1787: Volume II*, p. 73.

Nathaniel Ghorum replied that he “did not see the advantage of employing the Judges in this way” because “[a]s judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures.” He later would argue that the proposal should be defeated on the grounds that “the Judges argued that “as the Judges will outnumber the Executive, the revisionary check would be thrown entirely out ought to carry into the exposition of the laws no prepossession with regard to them” and secondly, that “as the Judges will outnumber the Executive, the revisionary check would be thrown entirely out of the Executive hands, and instead of enabling him to defend himself, would enable the Judges to sacrifice him.”<sup>81</sup>

Oliver Ellsworth spoke next in favor of the motion, and observed that “the Judges will give more wisdom & firmness to the Executive” because “[t]hey will possess a systematic and accurate knowledge of the laws, which the Executive can not be always expected to possess.” In addition, he argued that “[t]he law of Nations will also come frequently into question” and in regards to such matters, “the Judges alone will have competent information.”<sup>82</sup>

James Madison added his support, maintaining first, that “[i]t would be useful to the Judiciary [department] by giving it an additional opportunity of defending itself [against] Legislative encroachments.” Second, that “[i]t would be useful to the Executive, by inspiring additional confidence & firmness in exerting the revisionary power.” And third, that “[i]t would be useful to the Legislature by the valuable assistance it would give in preserving a consistency, conciseness, perspicuity & technical propriety in the laws” which he stated were “qualities peculiarly necessary; & yet shamefully wanting in our republican Codes.” He also held that the proposal did not give too much power to the Executive and Judicial branches because it was likely that “notwithstanding this co-operation of the two departments, the Legislature would still be an overmatch for them” because “[e]xperience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex.” Thus, he “could not discover in the proposed association of the Judges with the Executive in the Revisionary check on the Legislature any violation of the maxim which requires the great departments of power to kept separate & distinct” and “[o]n the contrary he thought it an auxiliary precaution in favor of the maxim.”<sup>83</sup>

Gerry once again opposed the proposal on the ground that “[i]t was combining & mixing together the Legislative & the other departments [and] was establishing an improper coalition between the Executive & Judiciary departments.” He further argued that it was improperly “making Statesmen of the Judges” and

---

<sup>81</sup> *Idem*, pp. 73, 79.

<sup>82</sup> *Idem*, p. 74.

<sup>83</sup> *Idem*, pp. 74, 77.

“setting them up as the guardians of the Rights of the people” when “the Representatives of the people” should be “the guardians of their Rights & interests.”<sup>84</sup>

Caleb Strong affirmed Gerry’s argument that “the power of making [the laws] ought to be kept distinct from the power of expounding, the laws” because “[t]he Judges, in exercising the function of expositors might be influenced by the part they had taken, in framing the laws.”<sup>85</sup>

Gouverneur Morris interjected that “[t]he interest of our Executive is so inconsiderable & so transitory, and his means of defending it so feeble, that there is the justest [sic] ground to fear his want of firmness in resisting encroachments.” He “concurred in thinking the public liberty in greater danger from Legislative usurpations than from any other source” and “was extremely apprehensive that the auxiliary firmness & weight of the Judiciary would not supply the deficiency.”<sup>86</sup>

Luther Martin “considered the association of the Judges with the Executive as a dangerous innovation.” He also maintained that “[a] knowledge of mankind, and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature.” Additionally, Martin held that “[a]s to the Constitutionality of the laws, that point will come before the Judges in their proper official character” and in that character they already had “a negative on the laws.” Thus, if the convention “[j]oin them with the Executive in the Revision” the justices would possess a “a double negative.” Martin concluded his remarks with the observation that “[i]t is necessary that the Supreme Judiciary should have the confidence of the people” and that “[t]his will soon be lost, if they are employed in the task of remonstrating agst. popular measures of the Legislatures.”<sup>87</sup>

George Mason responded that the legislature could “be expected frequently to pass unjust and pernicious laws” and that the proposal would have the effect of “hindering the final passage of such laws” and also “discourage demagogues from attempting to get them passed.” He also pointed out that while judges “could declare an unconstitutional law void [...] with regard to every law however unjust, oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as judges to give it a free course.”<sup>88</sup>

---

<sup>84</sup>Idem, p. 75.

<sup>85</sup> Idem.

<sup>86</sup> Idem, p. 76

<sup>87</sup> Idem, pp. 76-77.

<sup>88</sup> Idem, p. 77.



Wilson once again insisted that “the joint weight of the two departments was necessary to balance the single weight of the Legislature” adding that “a rule of voting might provide against [the justices excluding the Executive from the process].”<sup>89</sup>

Finally, John Rutledge stated that he thought “the Judges of all men the most unfit to be concerned in the revisionary Council” because “Judges ought never to give their opinion on a law till it comes before them.” He also pointed out that the Executive would already have a council (his cabinet) and that “the Executive could advise with the officers of State, as of war, finance, &c. and avail himself of their information and opinions.” A vote was taken, and came out 3 ayes, 4 noes, and 2 divided, and a final vote was once again postponed.<sup>90</sup>

On August 15, Madison made a final motion that “all acts before they become laws should be submitted both to the Executive and Supreme Judiciary Departments, that if either of these should object 2/3 of each house, if both should object 3/4 of each House should be necessary to overrule the objections and give to the acts the force of law.” Charles Pinkney “opposed the interference of the Judges in the Legislative business [because] it will involve them in parties, and give a previous tincture to their opinions” and John Mercer went so far as to say that he “disapproved of the Doctrine that Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontroulable [sic].” The vote was taken, the proposal was defeated by an 8-3 vote, and the veto power was subsequently assigned to the Executive alone.<sup>91</sup>

Though unsuccessful, the consideration of the motion for a Council of Revision makes it clear that some delegates believed that judges should participate in the legislative process, as a check on laws that were not only unconstitutional, but also unclear, vague, or otherwise harmful to society. It also highlights the fact that many delegates believed the Legislative branch to be the most dangerous of the three branches, and the judiciary to possess only a small degree of power and influence. In contrast, those who opposed the measure felt that the judiciary should not be involved in the lawmaking process, as their chief role was to be impartially resolving conflicts of law and that in this capacity they were sufficiently protected from encroachment by the other branches. They also felt that the Executive should be free to act independently of the influence of judges in order that the accountability, autonomy, and efficiency of the office be retained, and believed that the political branches (i.e. the Legislative and Executive) would be the most responsive protectors of individual interests and rights, since they relied upon their constituencies for re-election.

---

<sup>89</sup> *Idem*, p. 79.

<sup>90</sup> *Idem*, p. 80.

<sup>91</sup> *Idem*, p. 298.

Thus, the debates over the Council of Revision illustrate that there was no clear consensus demonstrated by the founders with respect to an idyllic function of justices in the American legal system.<sup>92</sup> The judiciary was designed as an independent body, but there was no concrete function established for it to perform. Next, we will consider whether the Constitution itself provides satisfactory description and direction concerning the role that a judge is to play in American society.

*On the constitutional parameters of the judiciary*

The lack of extensive debate and consideration of the role of the judiciary at the convention is reflected in language outlining the constitutional parameters of the judicial branch is asserted in Article III of the American Constitution and is quite limited in volume. Section 1 addresses the structure of the judiciary and the tenure of the justices. It reads,

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.<sup>93</sup>

Thus, the Constitution explicitly only establishes one court, the Supreme Court, and leaves to Congress the responsibility of expanding the judicial branch. Additionally, the Constitution provides that justices hold their office during good behavior and that their salaries may not be diminished, in an effort to protect their judgment from being influenced by popular political positions and the machinations of the legislature. The Constitution provides no definite number stating how many justices are to comprise the Supreme Court, once again leaving the details to the discretion of Congress.

Section 2 deals with the original jurisdiction of the Supreme Court and also contains instruction concerning jury trials. Part of this section was modified by Amendment XI,<sup>94</sup> but the portion remaining in force reads,

---

<sup>92</sup> While the motion to allow the justices to take part in the law-making process was defeated by an 8-3 margin, many reasons were provided throughout the debate as to why the proposal was objectionable and one should hesitate to draw general conclusions from the results of the final vote.

<sup>93</sup> Article II, § 2 provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint [...] Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law” (i.e. other federal judges).

<sup>94</sup> Amendment XI (ratified February 7, 1795) states “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state” thus overriding the original language providing that “[T]he judicial

The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party [...] between citizens of different States; between citizens of the same State claiming lands under grants of different States [...]

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The judicial power thus extends to all “cases and controversies” in “law and equity” arising under the Constitution. While the meaning and import of these key phrases will be discussed in more detail later, at the present it is enough to note that the authority of the federal judiciary is founded upon the Constitution, and that the insertion of the word “equity” suggests that the founders anticipated that in some cases a judgment of fairness would need to be supplied by the justices. It should also be noted that once again Congress is provided with a degree of influence over the judiciary by means of expanding or limiting the Supreme Court’s appellate jurisdiction. Additionally, juries are to play a key role in the American system, thus incorporating the general population into the system of justice.

Finally, Section 3 defines treason and sets forth guidelines for convicting individuals of treason. It reads,

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Thus ends Article III, the shortest of the first three Articles of the Constitution, which outline the legislative, executive, and judicial branches respectively. Notably absent is any description as to the qualifications or powers of justices and the role they are to play in government. And while the structure of

---

power shall extend] to controversies between two or more States; between a State and citizen of another State [...] and between a State, or the citizens thereof, and foreign states, citizens, or subjects.”

the judiciary has been expanded and supplemented significantly by the Judiciary Act of 1789 and other subsequent acts of Congress, the archetypal American judge has remained undefined.

## II. On the Power of Judicial Review

### *On the early influence of the judicial branch in America*

In spite its uncertain beginnings, the judicial branch established itself as an integral part of the American system of government, leading Tocqueville to famously observe, “[t]here is almost no political question in the United States that is not resolved sooner or later into a judicial question.”<sup>95</sup> Tocqueville elaborated,

What a foreigner understands only with the greatest difficulty in the United States is the judicial organization. There is so to speak no political event in which he does not hear the authority of the judge invoked; and he naturally concludes that in the United States the judge is one of the prime political powers. When, next, he comes to examine the constitution of the courts, he discovers at first only judicial prerogatives and habits in them. In his eyes the magistrate never seems to be introduced into public affairs except by chance, but this same chance recurs every day.<sup>96</sup>

Thus, although the courts were unable to produce legislation and their rulings are limited to the cases that come before them, even early on in the history of the United States they exerted a noticeable influence over the political realm. Tocqueville explained that this was because “[t]here are in fact very few laws of a nature to escape judicial analysis for long, for there are very few that do not hurt an individual interest and that litigants cannot or will not invoke before the courts.”<sup>97</sup> Though in Tocqueville’s time the Supreme Court’s workload was still fairly moderate, his observation bears particular relevance today. America has grown into a complex, expanded republic where there exists an extremely large pool of individual interests. In such a society, a court with the appellate base that the Supreme Court possesses has access to nearly every (if not every) important political question of its era. Thus, as the republic has expanded, the discretion of the Supreme Court has also expanded, and its influence increased significantly.

An even more important factor that contributed to the expansion of judicial influence in America was the power of judicial review. The power of judicial review was firmly established in the court case *Marbury v. Madison* in 1803. In order to comprehend this important judicial power, it is helpful to review the roles of the Constitution and laws in American society.

---

<sup>95</sup> De Tocqueville, *Democracy in America*, p. 257.

<sup>96</sup> *Idem*, p. 93.

<sup>97</sup> *Idem*, p. 96.

*On the general authority of a written constitution*

It should be noted that the Court is not only limited to cases brought before it by the citizenry, but those cases must also be shown to arise under the Constitution or the laws of the United States, and must be resolved by the same. Thus, although the judicial system of the United States inherited many common law traditions from its Anglo origins, the justices are not able to exercise unlimited discretion when resolving disputes. Rather, they must show that their judgments conform to the principles enumerated in the Constitution and subsequent laws adopted by Congress.

To understand why this is so, it is important to understand the nature of a written Constitution. The philosopher Thomas Paine expounded the role of a Constitution, stating that

A Constitution is a thing *antecedent* to a Government, and a Government is only the creature of a Constitution. The Constitution of a country is not the act of its Government, but of the people constituting a Government. It is the body of elements, to which you can refer, and quote article by article; and which contains the principles on which the Government shall be established, the manner in which it shall be organised, [sic] the powers it shall have, the mode of elections, the duration of Parliaments, or by what other name such bodies may be called; the powers which the executive part of the Government shall have; and in fine, everything that relates tot he complete organisation [sic] of a civil Government, and the principles on which it shall act, and by which it shall be bound. A Constitution, therefore, is to a Government what the laws made afterwards by that Government are to a Court of Judicature. The Court of Judicature does not make the laws, neither can it alter them; it only acts in conformity to the laws made: and the Government is in like manner governed by the Constitution.<sup>98</sup>

Thus, the judicial branch and all other parts of the government are bound to conform to the principles of the Constitution, as constitutions are not produced by an act of government, but are created antecedent to the establishment of government. Paine explains that this distinction is of paramount importance because “[a] Government on the principles on which constitutional Governments arising out of society are established, cannot have the right of altering itself. If it had, it would be arbitrary. It might make itself what it pleased; and wherever such a right is set up, it shows there is no Constitution.”<sup>99</sup>

*On the purpose of laws in general*

Thus, according to the political theory at the roots of the American system, a Constitution is not formed by an act of government and therefore a distinction must be drawn between the Constitution itself and subsequent laws that are in fact acts of government. Additionally, as the Constitution may not be altered

---

<sup>98</sup> Paine, *Common Sense, Rights of Man, and Other Essential Writings of Thomas Paine*, p. 173.

<sup>99</sup> *Idem*, p. 175

by an act of government, the Constitution and subsequent laws do not reside on the same plane of authority. Publius observed in Federalist #78 that “[t]here is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid.”<sup>100</sup>

This principle established, the question remained, which portion of government would ensure that legislative acts contrary to the constitution be declared void? Publius continued,

the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.<sup>101</sup>

Thus, according to Publius, the judiciary was to fulfill the role of resolving conflicts between the Constitution and laws. However, the Anti-Federalists were opposed to the judiciary exercising that power. The Anti-Federalist Brutus warned that

[t]he judicial are not only to decide questions arising upon the meaning of the constitution in law, but also in equity.

By this they are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter[...]

They will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or control their adjudications. From this court there is no appeal. And I conceive the legislature themselves, cannot set aside a judgment of this court, because they are authorised [sic] by the constitution to decide in the last resort. The legislature must be controlled [sic] by the constitution, and not the constitution by them.<sup>102</sup>

Thus, in Brutus’ mind, it was not the legislature that threatened the autonomy of the Supreme Court, but rather the Court that threatened the autonomy of the Congress. This was particularly troubling to Brutus, for he felt that because the Supreme Court was part of the federal government, it would be naturally prejudiced towards the national interests when they came into conflict with individual or state rights. He observed that

---

<sup>100</sup> Kesler, Charles R., & Rossiter, Clinton (Eds.), *The Federalist Papers*, p. 465-466.

<sup>101</sup> Idem, p. 466

<sup>102</sup> Ketcham, Ralph (Ed.), *The Anti-Federalist Papers and the Constitutional Convention Debates*, p. 295 - 296.

this constitution, if it is ratified, will not be a compact entered into by states, in their corporate capacities, but an agreement of the people of the United States, as one great body politic, no doubt can remain, but that the great end of the constitution, if it is to be collected from the preamble, in which its end is declared, is to constitute a government which is to extend to every case for which any government is instituted, whether external or internal. The courts, therefore, will establish this as a principle in expounding the constitution, and will give every part of it such an explanation, as will give latitude to every department under it, to take cognizance of every matter, not only that affects the general and national concerns of the union, but also of such as relate to the administration of private justice, and to regulating the internal and local affairs of the different parts.<sup>103</sup>

Brutus concluded that “[t]he supreme court [would] then have a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature.”<sup>104</sup>

The Federalists response was that the Constitution did not “suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.”<sup>105</sup> Additionally, Publius explained that that “[u]ntil the people have, by some solemn and authoritative act annulled or changed the established form, it is binding upon themselves collectively as well as individually; and no presumption, or even knowledge of their sentiments can warrant their representatives in a departure from it prior to such an act.”<sup>106</sup> They also maintained, as observed earlier, that the judiciary had no access to “the purse” or to “the sword,” and was in actuality powerless to enforce its own decrees. Finally, the Federalists emphasized the role the Court would play as “an essential safeguard against the effects of occasional ill humors in the society” by not only “serv[ing] to moderate the immediate mischiefs [sic] of those [unjust and partial laws] which may have been passed” but also “operat[ing] as a check upon the legislative body in passing them” for Congress “perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, [would be] compelled, by the very motives of the injustice they meditate, to qualify their attempts.”<sup>107</sup>

It is interesting to note that Publius equated the Constitution with the will of the people “declared in the Constitution” rather than the will of the people “declared in the moment of judgment,” and that he

---

<sup>103</sup> Idem, p. 300.

<sup>104</sup> Idem, p. 307.

<sup>105</sup> Kesler, Charles R., & Rossiter, Clinton (Eds.), *The Federalist Papers*, p. 466.

<sup>106</sup> Idem, p. 468

<sup>107</sup> Idem, 469.

characterized the Court as a “safeguard against the effects of occasional ill humors in the society.” It would appear then, that insofar as the justices were charged with upholding the Constitution, it was understood that in that capacity they were to protect the interests of society as established in that document.

Publius’ reference to the amendment process is also intriguing, for it suggests that any additional protections or policy provided by the Court in areas not addressed by the Constitution would have to be preceded by an amendment authorizing such protections or policy. If this was Publius’ understanding, it becomes easier to understand why he remained unconcerned with the powers granted to the judiciary, for he would have envisioned them as being exercised within the parameters of a limited sphere of influence. However, as Brutus pointed out, no explicit language in the Constitution forbade the justices from abusing their powers, and since it allocated to the justices autonomous, lifetime appointments, no practical safeguards protected against potential “ill humors” of the justices.

### *Marbury v. Madison*

Although the power of judicial review was discussed during the debates over ratifying the Constitution, the power was not explicitly provided for in the Constitution and therefore if it was to be acquired by the judiciary it had to be established in practice. The opportunity came when the Supreme Court considered the case *Marbury v. Madison*. Marbury had been nominated as a federal judge by President Adams, had been confirmed by the Senate, and his commission had been signed and sealed with the Seal of the United States. However, before the commission was delivered, the Adams administration was replaced by the Jefferson administration, and Jefferson’s new Secretary of State, James Madison, refused to deliver the commission.

The Court determined that Marbury had a right to the judgeship and that he should be provided a remedy by the government, but that the particular remedy demanded by Marbury could not be provided by the Court. Marbury had appealed to the Judiciary Act of 1789, which provided that the Supreme Court could issue writs of mandamus, which required government officials to perform certain acts, in cases of original jurisdiction. However, the Court ruled that the language of Article III outlining the original jurisdiction of the Court comprised the entire expanse of the Court’s authority in that realm, and that therefore the act of Congress providing for the issuing of writs of mandamus was unconstitutional and void.

What is immediately relevant to our present discussion is the theoretical reasoning utilized by the Court. Chief Justice John Marshall issued the opinion, which first established that the government of the United States was one of limited government. He stated,



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

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.<sup>108</sup>

Thus, as observed earlier, since the Constitution preceded the formation of government and represented the will of the people, it holds a higher level of authority than laws passed by Congress. Next, Chief Justice Marshall established that it was in fact the role of the judiciary to resolve conflicts between the law and Constitution. He observed that

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

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

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which both apply.<sup>109</sup>

---

<sup>108</sup> *Marbury v. Madison*, 5 U.S. 176-177 (1803).

<sup>109</sup> *Idem*, at 177-178.

#### IV. On the Challenges of Judicial Interpretation

With the principle of judicial review firmly established in legal precedent, the power of the judicial branch increased significantly. Although the power was initially rarely invoked, it was appealed to more and more as the laws and problems of society became more and more complex, and now it is rare for a significant Supreme Court case to be resolved without considering the constitutionality of the matter at hand. As this process unfolded and the will of justices began to replace the will of the legislatures more frequently, the Court began to be accused of judicial activism, or founding their judgments upon obscure legal reasoning that ultimately supported their own personal opinions instead of the Constitution or established law.

While most discussions of judicial activism deal with specific cases and attempt to reveal and criticize various political agendas of the Court, the present discussion will merely consider the difficulties of interpreting the law and attempt to reach a method that conforms to and upholds the principles of the American founding.<sup>110</sup>

##### *On the difficulties of interpreting law*

It should be noted that no case comes before the judicial branch unless it involves a difficult question of law or equity. Chief Justice William Rehnquist observed, “[t]he law is at best an inexact science, and the cases our Court takes to decide are frequently ones upon which able judges in lower courts have disagreed. There simply is no demonstrably ‘right’ answer to the question involved in many of our difficult cases.<sup>111</sup>” Similarly, Justice Felix Frankfurter declared “there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers, carefully and with deliberate forethought, refused so to enthrone the judiciary.<sup>112</sup>”

These statements from prominent judges may seem remarkable, as the judiciary is often portrayed as a champion of liberty and defender of justice. But though it might seem that there should be a fair and just resolution to every question, when one reflects upon the number of interests and the various laws that must be considered in complex cases, it becomes easy to comprehend why the law may be called “an inexact science.” Thus, even the most learned legal minds may disagree on various matters, as is evident by the

---

<sup>110</sup> It should be noted that those who attempt to utilize methods of judicial interpretation as a means to achieve political policy, whether they be liberal or conservative, are themselves guilty of the very indiscretion that they accuse the infamous “activist judges” of. Impartiality is the ideal that defines the judiciary, and when the ideal of impartiality is sacrificed for other political ideals, however noble the cause, both the legitimacy and the effectiveness of the judiciary suffer.

<sup>111</sup> Rehnquist, *The Supreme Court*, p. 255.

<sup>112</sup> *Baker v. Carr* (dissent), 369 U.S. 270 (1962).

numerous concurring and dissenting opinions issued by the courts.<sup>113</sup> It should also be noted that the Court is also limited in its ability to remedy injustices by the vast number of petitions it receives. The time and resources of the Court are not infinite, and therefore some cases must necessarily be neglected in order to responsibly address any issues at all. Finally, as Justice Frankfurter seems to suggest, perhaps the Framers felt that there should not be a judicial remedy for every problem and designed the judiciary to be bound by the Constitution and laws of the United States. Perhaps the Framers envisioned that the great problems of the day being solved by the peoples' representatives in Congress and that alterations in government be provided the people themselves. Or perhaps the laws and Constitution are too restrictive, and law is in actuality an "exact" and easy science if the judges are allowed to exercise a proper degree of discretion when resolving injustices.

### *On modern theories of judicial interpretation*

The fundamental question of whether or not the Constitution should be interpreted strictly or loosely is the subject of much debate, and various modern theories of judicial interpretation have emerged. There are numerous scholars with numerous theories, but for the purposes of this treatise we will not examine their intricacies and variations. Rather, we will merely consider the basic arguments for a strict constructionist approach to interpreting the Constitution, and a loose constructionist approach to interpreting the Constitution respectively.<sup>114</sup>

Proponents of strict constructionism often appeal to the concept of "original understanding," meaning that the Constitution must be understood as promoting and protecting the principles understood by those who established it. The legal scholar Robert Bork summarizes the position as follows:

When we speak of "law," we ordinarily refer to a rule that we have no right to change except through prescribed procedures. That statement assumes that the rule has a meaning independent of our own desires. Otherwise there would be no need to agree on procedures for changing the rule. Statutes, we agree, may be changed by amendments or repeal. The Constitution may be changed by amendment pursuant to the procedures set out in article V. It is a necessary implication of the prescribed procedures that neither statute nor Constitution should be changed by judges [...]

What is the meaning of a rule that judges should not change? It is the meaning understood at the time of the law's enactment [...] The search is not for a subjective intention [...] [n]or would the subjective intentions of all the members of a ratifying convention alter anything. When lawmakers use words, the law that results is what those words ordinarily mean [...]

---

<sup>113</sup> A concurring opinion is issued when a justice agrees with the outcome of the majority, but supports alternate reasoning. A dissenting opinion is issued when a justice disagrees with the ruling of the majority.

<sup>114</sup> Each individual theory of interpretation necessarily includes a method for interpreting statutory law, and other forms of disputes. However, for the purposes of this treatise, we will only focus on arguments concerning Constitutional interpretation.

Law is a public act. Secret reservations or intentions count for nothing. All that counts is how the words used in the Constitution would have been understood at the time. The original understanding is thus manifested in the words used and in secondary materials, such as debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like.<sup>115</sup>

Thus, a judge who founded his or her interpretation upon an original understanding of the Constitution would seek to understand what the provision was initially designed to accomplish, consider any Amendments to the Constitution that may be relevant to the matter, and make a ruling based upon the original principles of the document. There are various criticisms of this approach. It is often described as an attempt to subject the living to restrictive rule by the interests and principles of the dead. Many of its detractors also argue that original understanding is often unclear and difficult to determine, particularly in this day and age when centuries have passed since the founding era.

A similar process has been described by Justice Antonin Scalia, which he has labeled “textualism.” He establishes first that “[e]very issue of law resolved by a federal judge involves interpretation of text--the text of a regulation, or of a statute, or of the Constitution.<sup>116</sup>” Next, he maintains that “[g]overnment by unexpressed intent is [...] tyrannical” and therefore “[i]t is the *law* that governs, not the intent of the lawgiver” and “[m]en may intend what they will; but it is only the laws that they enact which bind us.<sup>117</sup>” A textualist judge, therefore, recognizes that the text is the key to interpreting the matter, and that the intent must be manifest within the language of that text, otherwise the citizenry could never be informed of the law and the sovereign would necessarily be acting in a tyrannical and arbitrary matter.

This approach is often criticized as close-minded and limiting to the Court, but as Scalia explains, that is precisely the point, for a textualist believes that it is not the role of the Court to produce extraneous language to resolve a dispute when no such language has been provided. Scalia continues,

To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hidebound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws [...]

[W]hile a good textualist is not a literalist, neither is he a nihilist. Words do not have a limited range of meaning, and no interpretation that goes beyond that range is permissible.<sup>118</sup>

---

<sup>115</sup> Bork, *The Tempting of America*, pp. 143-144.

<sup>116</sup> Scalia, *A Matter of Interpretation*, p. 13

<sup>117</sup> *Idem*, p. 17.

<sup>118</sup> *Idem*, pp. 23-24.

The concept of a “limited range of meaning” is often frustrating to those who would use the Courts as a tool for broad social reform, or even for rectifying individual cases of injustice. Thus, many scholars maintain that in this complex era where multiple interests need to be balanced and changing social values need to be assessed, that the Court should be given broad discretion and interpret the Constitution loosely in order to meet the needs of modern day society.

This method is often referred to as the “living-Constitution” approach, meaning the Constitution is a living document whose meaning evolves over time in accordance to the norms of the day. While most theories supporting this view are quite complex,<sup>119</sup> a succinct statement of the position was provided by Justice William J. Brennan in the case *Gregg v. Georgia*. The case involved the Constitutionality of the death penalty, and in his dissent he referred to the language of an earlier case and argued that “[t]he Cruel and Unusual Punishments Clause ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’<sup>120</sup>” In a later speech at Georgetown University, he reiterated his support for the concept of an “evolving standard of decency,” stating,

[I]f the interaction of this Justice and the constitutional text over the years confirms any single proposition, it is that the demands of human dignity will never cease to evolve [...]

If we are to be a shining city upon a hill, it will be because of our ceaseless pursuit of the constitutional ideal of human dignity. For the political and legal ideals that form the foundation of much that is best in American institutions—ideals jealously preserved and guarded throughout our history—still form the vital force in creative political thought and activity within the nation today. As we adapt our institutions to the ever-changing conditions of national and international life, those ideals of human dignity—liberty and justice for all individuals—will continue to inspire and guide us because they are entrenched in our Constitution. The Constitution with its Bill of Rights thus has a bright future, as well as a glorious past, for its spirit is inherent in the aspirations of our people.<sup>121</sup>

Thus, those who support a loose constructionist approach to interpretation portray the Constitution as a tool for championing the ideals of American society and perceive the courts as the most effective means for rectifying social injustice. However, those who oppose the living-constitution approach argue that because the Supreme Court may only be overruled by the difficult process of amending the Constitution, granting the justices broad discretionary powers ultimately results in society being ruled by the standards of an elite faction. Such an objection was raised by Justice Benjamin R. Curtis, in a dissent to the Court’s opinion in *Dred Scott v. Sandford*. He observed that

---

<sup>119</sup> For a more extensive treatment of the living-constitution doctrine, see the works of Alexander Bickel, John Hart Ely, and Lawrence Tribe.

<sup>120</sup> *Greg v. Georgia*, 428 U.S. 153 (1976)

<sup>121</sup> Brennan, “The Great Debate,” Georgetown University, 12 Oct. 1985.

[t]o engraft on any instrument a substantive exception not found in it, must be admitted to be a matter attended with great difficulty. And the difficulty increases with the importance of the instrument, and the magnitude and complexity of the interests involved in its construction. To allow this to be done with the Constitution, upon reasons purely political, renders its judicial interpretation impossible--because judicial tribunals, as such, cannot decide upon political considerations. Political reasons have not the requisite certainty to afford rules of juridical interpretation [...] And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican Government, with limited and defined powers, we have a Government which is merely an exponent of the will of Congress; or, what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court.<sup>122</sup>

Thus, it would seem that there are inherent weaknesses in both positions. Those who advocate a strict approach to interpretation are forced to rely upon external sources to determine the original intent of legislation and give significant weight to the reasoning of earlier generations, with the result being that in some cases the current values of society are neglected. Those who advocate textualism must limit themselves to the text before them, which in some cases might limit their ability to resolve conflicts. Finally, those who support the idea of a living-constitution risk subjecting society to judge-made policy, which would seem to conflict with democratic and republican principles.

These difficulties have led some to despair, and conclude that as there is no manner of interpretation that is clearly ideal, the citizens must resign themselves to the evils of whatever method the majority of the Court chooses to follow. However, such an outlook assumes that the process of determining the meaning of law may only be influenced by the actions of judges, and ignores other possible avenues of resolving legal questions. Next, we will examine the role of the people in the American system of government, and how the citizens might safeguard their rights and interests without relying upon the Court to resolve every significant matter of law.

## **V. On the Role of the People in the American System**

### *On the role of the citizenry in general*

What is curiously overlooked in modern commentary on the American system of government is the role and duties of the American people. This is quite remarkable, for as we have seen, the interests of the

---

<sup>122</sup>*Dred Scott v. Sandford* (dissent), 60 U.S. 563 (1856).

people and their participation were central themes in early American political debates. Occasionally, the poor level of political efficacy and the apathy of the citizenry is remarked upon and lamented, but rarely are the people perceived as a possible solution; rather, the uneducated masses are seen as an obstacle to progress.

There are numerous evidences that the Founders envisioned the American people participating actively in government and taking upon themselves the responsibility of safeguarding their rights from the encroachment of government. An often overlooked principle of natural rights philosophy is the principle that “[e]very generation is equal in rights to the generations which preceded it, by the same rule that every individual is born equal in rights with his contemporary.<sup>123</sup>” Thomas Paine expounded this principle by explaining that

[t]here never did, there never will, and there never can, exist a Parliament, or any description of men, or any generation of men, in any country, possessed of the right or the power of binding and controuling [sic] posterity to the “*end of time*,” or of commanding for ever how the world shall be governed, or who shall govern it [...] Every age and generation must be as free to act for itself *in all cases* as the ages and generations which preceded it [...] Every generation is, and must be, competent to all the purposes which its occasions require. It is the living, and not the dead, that are to be accommodated. When man ceases to be, his power and his wants cease with him; and having no longer any participation in the concerns of this world, he has no longer any authority in directing who shall be its governors, or how its Government shall be organised, [sic] or how administered [...]

It requires but a very small glance of thought to perceive that altho’ laws made in one generation often continue in force through succeeding generations, yet that they continue to derive their force from the consent of the living. A law not repealed continues in force, not because it *cannot* be repealed, but because it *is not* repealed; and the non-repealing passes for consent.<sup>124</sup>

Thus, according to natural rights philosophy, each generation possesses the right and responsibility of protecting its interests. This does not mean that the laws must constantly be replaced or that a revolution must take place when each generation comes of age. Rather, the citizens in each generation are expected to consider the state of the laws and government before them, and if it does not meet their needs, they are to produce new legislation or amendments to the Constitution so that their needs are realized.

Additionally, early American documents reflect an understanding that the people are to actively defend their rights from oppressive forces. The language of the Declaration of Independence states,

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

---

<sup>123</sup>Paine, *Common Sense, Rights of Man, and Other Essential Writings of Thomas Paine*, p. 167.

<sup>124</sup>Idem, pp. 138-139, 141.

the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Such language suggests that, at least in the ideal sense, the people collectively are able to best ascertain their interests and mobilize themselves in an effort to preserve their rights.<sup>125</sup> The Constitution begins by proclaiming that

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Thus, the ultimate authority of the present Constitution and the government it sets up rests in the hands of the people themselves, and not in any local, state, or national government entity.

Moreover, in the early days of the republic, the people were appealed to on many occasions to actively consider their rights and privileges and ensure that government sufficiently addressed the needs of society. In Federalist #1, Publius directed the people to individually consider the importance of the proposed Constitution, to consider its merits, consider the public interest, and to accept or reject it based upon conclusions drawn from rational inquiry.<sup>126</sup> Shortly after the Constitution was ratified, James Madison felt that a “new doctrine” which “ascribe[d] to the executive the prerogative of judging and deciding whether there be causes of war or not, in the obligations of treaties” threatened the interests of the new republic and its citizens.<sup>127</sup> Interestingly, in addition to exercising his political influence within the corridors of government, he engaged in a public discourse with Alexander Hamilton, and under the pseudonym Helvidius, declared:

[I]n proportion as [such] doctrines make their way into the creed of the government, and the acquiescence of the public, every power that can be deduced from them, will be deduced and exercised sooner or later by those who may have an interest in so doing. The character of human nature gives this salutary warning to every sober and reflecting mind. And the history of government, in all its forms and in every period of time, ratifies the danger. A people, therefore, who are so happy as to possess the inestimable blessing of a free and defined constitution, cannot be too watchful against the introduction, nor too critical in tracing the consequences, of new principles and new constructions, that may remove the landmarks of power.<sup>128</sup>

---

<sup>125</sup> It might be objected that the Declaration was not produced by the collective will of the colonies, but rather the labor of an elite group of men who ascertained the needs of society and acted upon their convictions. While we should be careful to give too much weight to the language of the Declaration, we should also note that much of what it proclaimed was based in theory, and not upon practical application and experience. We can therefore infer that, at least in an ideal sense, the people were to be actively involved in determining their fate.

<sup>126</sup> Kesler, Charles R., & Rossiter, Clinton (Eds.), *The Federalist Papers*, p. 27-31.

<sup>127</sup> Frisch, Morton J. (Ed.), *The Pacificus-Helvidius Debates of 1793-1794*, p. 84.

<sup>128</sup> *Idem*, p. 85.



Thus, initially it was understood that the people would exercise their personal faculties of reason and participate not only in setting up the American system of government, but also in constantly monitoring the actions of their new government. They were expected to recognize and respond to any threats to their personal liberties. However, with time these important concepts of civic duty and citizen virtue appear to have faded in the minds of the American people.

*On Tocqueville's "equality of servitude"*

While such a turn of events might seem to be extraordinary, even in the early days of the republic the seeds of apathy were recognized by Tocqueville, and he warned that the United States was a country in danger of succumbing to what he called "equality of servitude." This weakness stems from the inherent American love for two ideals: "equality" and "liberty." As these ideals sometimes come into conflict with each other, the people are in constant danger of choosing equality over liberty. Tocqueville explains,

There is in fact a manly and legitimate passion for equality that incites men to want all to be strong and esteemed. This passion tends to elevate the small to the rank of the great; but one also encounters a depraved taste for equality in the human heart that brings the weak to want to draw the strong to their level and that reduces men to preferring equality in servitude to inequality in freedom. It is not that peoples whose social state is democratic naturally scorn freedom; on the contrary, they have an instinctive taste for it. But freedom is not the principal and continuous object of their desire; what they love with an eternal love is equality; they dash toward freedom with a rapid impulse and sudden efforts, and if they miss the goal they resign themselves; but nothing can satisfy them without equality, and they would sooner consent to perish than to lose it.

On the other hand, when citizens are all nearly equal, it becomes difficult for them to defend their independence against the aggressions of power. Since no one among them is strong enough then to struggle alone to advantage, it is only the combination of the forces of all that can guarantee freedom.<sup>129</sup>

According to Tocqueville, the desire for equality leads individuals to submit their individual autonomy to a central power and focus on individualistic, selfish pursuits. This is because,

[a]s conditions are equalized in a people, individual appear smaller and society seems greater, or rather, each citizen, having become like all the others, is lost in the crowd, and one no longer perceives [anything] but the vast and magnificent image of the people itself.

This naturally gives men in democratic times a very high opinion of the privileges of society and a very humble idea of the rights of the individual. They readily accept that the interest of the former is everything and that of the latter, nothing. They willing enough grant that the power representing society possesses much more enlightenment and wisdom than any of the men who compose it, and that its duty as well as its right is to take each citizen by the hand and lead him.<sup>130</sup>

---

<sup>129</sup> De Tocqueville, *Democracy in America*, p. 6.

<sup>130</sup> Idem, p. 641.

The end result of this development is described by Tocqueville in chilling prophetic language. He maintained that in America there would come to be

an innumerable crowd of like and equal men who revolve on themselves without repose, procuring the small and vulgar pleasures with which they fill their souls. Each of them, withdrawn and apart, is like a stranger to the destiny of all the others: his children and his particular friends form the whole human species for him; as for dwelling with his fellow citizens, he is beside them, but he does not see them; he touches them and does not feel them; he exists only in himself and for himself alone, and if a family still remains for him, one can at least say that he no longer has a native country.

Above these an immense tutelary power is elevated, which alone takes charge of assuring their enjoyments and watching over their fate. It is absolute, detailed, regular, far-seeing, and mild. It would resemble paternal power if, like that, it had for its object to prepare men for manhood; but on the contrary, it seeks only to keep the fixed irrevocably in childhood; it likes citizens to enjoy themselves provided that they think only of enjoying themselves. It willingly works for their happiness; but it wants to be the unique agent and sole arbiter of that; it provides for their security, foresees and secures their needs, facilitates their pleasures, conducts their principal affairs, directs their industry, regulates their estates, divides their inheritances; can it not take away from them entirely the trouble of thinking and the pain of living?

So it is that every day it renders the employment of free will less useful and more rare; it confines the action of the will in a smaller space and little by little steals the very use of free will from each citizen. Equality has prepared men for all these things: it has disposed them to tolerate them and often even to regard them as a benefit [...]

[They] are incessantly racked by two inimical passions: they feel the need to be led and the wish to remain free. Not being able to destroy either one of these contrary instincts, they strive to satisfy both at the same time. They imagine a unique power, tutelary, all powerful, but elected by citizens. They combine centralization and the sovereignty of the people. That gives them some respite. They console themselves for being in tutelage by thinking that they themselves have chosen their schoolmasters. Each individual allows himself to be attached because he sees that it is not a man or a class but the people themselves that hold the end of the chain.

In this system citizens leave their dependence for a moment to indicate their master, and then reenter it.<sup>131</sup>

While the language of Tocqueville is perhaps a bit dramatic and extreme, the dangers he warns against are very real threats to democratic governments, and their seeds, if not the fruits, are visibly apparent in American society today. Many American citizens are content to trust that their political party of choice will supply them with “tutelary” candidates that are wise enough to protect their interests in general. Some ceremoniously “leave their dependence for a moment to indicate their master” at the polls, while others simply ignore politics altogether unless their lives for some reason become directly affected by an injustice, at which point they cry out in anger that their government is unresponsive and ineffective.

---

<sup>131</sup> Idem, p. 663-664.

But what they do not realize is that it is their own inactivity that has produced such a sorry state of affairs, and the remedy is not to replace the offending “tutelary” power with an alternative “tutelary” power. If their interests are to be secured, they must first determine for themselves what those interests are and force their representatives in the political branches of government<sup>132</sup> to recognize those interests or lose their power. In a government that allows for citizen participation, individual liberties are best protected by the actions of the individuals themselves.<sup>133</sup>

## **VI. On How the People of America May Properly Utilize the Judiciary**

Thus, we see that in the beginning of the republic, the American people were considered an important, if not the most important, part of the political world. This must be taken into consideration when determining the proper role of the judiciary in American society.

The designers of the American political system took great care to set the judges apart as impartial that they might produce fair and just assessments of the laws presented before them. From this it may be inferred that judges were not intended to resolve political matters, but that such matters were to be left to the other branches of government directly accountable to the people for re-election. However, the courts were perceived as guardians of the rights of the people, and a means to rectify wrongs inflicted upon the people. Thus, in cases where no political solution has been provided to remedy an injustice, the question necessarily arises, what action are the courts entitled to make? Must the judges be limited to the text before them, or ancient standards of conflict resolution, or should they be allowed to exercise their own discretion and resolve the matter at hand?

If our solution is limited to the courses of actions available to the judges alone, it appears that we are presented with a pitiful situation. If we limit the judges to the text, injustices may go unpunished. If we allow

---

<sup>132</sup> That is, the Legislative and Executive branches.

<sup>133</sup> It might be objected that the current state of affairs makes such an effort an impossible task, and that the citizenry has degenerated to such a point that they lack the ability and focus to participate in government. It also may be objected that a stable policy-making elite is a better method of promoting the general welfare. Indeed, Tocqueville himself observed that “[l]egislative instability is an evil inherent in democratic government because it is of the nature of democracies to bring new men to power [...] laws have the least duration [...] the action of the legislator never slows [...] The majority being the sole power that is important to please, the works that it undertakes are eagerly agreed to; but from the moment that its attention goes elsewhere, all efforts cease.” However, it must be remembered that the purpose of this treatise is not to consider the practicality of the recommended solutions, but merely to consider threats to the American foundation of faith and what course of action would most effectively protect and preserve the original principles of American society. It is up to the American people to determine whether those principles are worth preserving, and whether they are willing to contribute the effort necessary to do so.

justices to remedy all injustice as they see fit, we are subjecting society to rule by a few unelected, unaccountable individuals.

What seems to have been forgotten by the American people is that they are provided with numerous means to remedy unclear or outdated law. The American Constitution not only allows the citizens to influence the legislative process through participating in elections, but it also provides them with a means to amend the document itself and restructure the foundations of their government as they see fit. Though this process was designed to be difficult in order to guard against instability and volatile public opinion, it is not an impossible feat to pass a Constitutional amendment. The process has been accomplished on numerous occasions throughout American history, and has provided the nation with many significant changes to its government and much social reform. It should also be noted that while the rulings of the Supreme Court establish precedent that governs all lower courts and consequently the entire nation, they may be overruled by Constitutional amendment. In spite of claims to the contrary, the system still grants the highest command over the operations and limits of their government to the people.<sup>134</sup>

Thus, if the American people wish to retain their influence over their government and its law, they must take action and begin to participate in that government. If the law is to remain founded upon the consent of the governed, and if the government is to remain one of limited powers, individual justices must refrain from participating in political disputes and avoid creating new policy. But if the justices are to be expected to stay within the parameters of law, the people must ensure that those parameters reflect their standards and protect their rights in a satisfactory manner. They must encourage Congress to draft clear legislation and not avoid controversial issues. They must exercise their rational faculties and use their vote as a tool to influence government, instead of ceremoniously casting it as a token acknowledgment of their servitude to the ideas of others. In short, there must be an end to inaction in the political realm. If this were to be accomplished, the judiciary would be free to uphold the language and intent of the laws and the Constitution without scruple, for it would represent the will of the people.

---

<sup>134</sup>Many argue that the amendment process is impossible, that Congress is too unresponsive, the citizenry too uneducated and apathetic, that lobbyists control national politics, etc. While such objections are founded upon a legitimate and lamentable state of affairs, the fact remains that the amendment process has not been abolished and remains a viable, if difficult option. The polls remain open to all citizens, and voting rights have been extended to the greatest extent in all of American history, and yet the majority of citizens take no action to educate themselves, promote causes, or cast their ballots. If they were to do so, their government would most certainly respond.

## Works Cited

- Baker v. Carr*, 369 U.S. 186 (1962).
- Berlin, Isaiah (1958). *Two Concepts of Liberty*. London, England: Oxford University Press.
- Blackstone, Sir William (2010). *Commentaries on the Laws of England: Book I (Classic Reprint Series)*. Lexington, KY: Forgotten Books.
- Bloom, Allan (Ed.) (1991). *The Republic of Plato*. New York, NY: Basic Books.
- Bork, Robert H. (1991). *The Tempting of America*. New York, NY: Simon & Schuster.
- Brennan (Jr.), William J. "The Great Debate." Georgetown University, Text and Teaching Symposium. Washington, D.C. 12 Oct. 1985.
- Dred Scott v. Sandford*, 60 U.S. 393 (1856).
- Farrand, Max (Ed.) (1966). *The Records of the Federal Convention of 1787: Volume I*. New Haven, CT: Yale University Press.
- Farrand, Max (Ed.) (1966). *The Records of the Federal Convention of 1787: Volume II*. New Haven, CT: Yale University Press.
- Frisch, Morton J. (Ed.) (2006). *The Pacificus-Helvidius Debates of 1793-1794*. Indianapolis, IN: Liberty Fund, Inc.
- Greg v. Georgia*, 428 U.S. 153 (1976).
- Hobbes, Thomas (1994). *Leviathan*. Indianapolis, IN: Hackett Publishing Company, Inc.
- Kesler, Charles R., & Rossiter, Clinton (Eds.) (1961). *The Federalist Papers*. New York, NY: Penguin Group, Inc.
- Ketcham, Ralph (Ed.) (1986). *The Anti-Federalist Papers and the Constitutional Convention Debates*. New York, NY: Penguin Group, Inc.
- Locke, John (2002). *The Second Treatise of Government and A Letter Concerning Toleration*. Mineola, NY: Dover Publications, Inc.
- Marbury v. Madison*, 5 U.S. 137 (1803).
- Montesquieu, Baron de (2002). *The Spirit of Laws*. Amherst, NY: Prometheus Books.
- Paine, Thomas (1969). *Common Sense, Rights of Man, and Other Essential Writings of Thomas Paine*. New York, NY: Penguin Group, Inc.
- Rehnquist, William (2002). *The Supreme Court*. New York, NY: Vintage Books.
- Rousseau, Jean-Jacques (1993). *The Social Contract and Discourses*. North Clarendon, VT: Tuttle Publishing.
- Scalia, Antonin (1997). *A Matter of Interpretation*. Princeton, NJ: Princeton University Press.
- Tocqueville, Alexis de (2002). *Democracy in America*. Chicago, IL: The University of Chicago Press.