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THE UNITED STATES, CHECKS AND BALANCES, AND A
COMMERCIAL REPUBLIC — AN EXPERIMENT

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Chapter 4: The United States, Checks and Balances, and a Commercial Republic – An Experiment

Abstract: This chapter explains how the concept of the rule of law grew and changed in the founding of the United States. The United States was founded by people who thought they were adopting their common law heritage. United by a hustling spirit and a deep distrust of big government (especially England's), the Founders were deeply influenced by the Scottish Enlightenment and its focus on individual liberty (as can be seen in Madison's Federalist Papers), and they were determined to create a commercial republic (Hamilton). With the passage of the Constitution, they were fascinated by the French Revolution, and some (Jefferson) felt a strong accord with its theoretical concepts. Others (Adams) believed that the Philosophes were unrealistic, far too involved in theory, and had not seen the down-side of legislation-centered democracy.

While originally English in the focus on limited government and individual liberty, the American conception of the rule of law first became more self-conscious, more self-critical, and next developed a deeper (or at least more self-conscious) set of checks and balances than its parent country. That concept – the American understanding of the relationship between man and government – has gradually become more conflicted and intertwined with Rechtsstaat during and after the Great Depression and the creation of a national income tax, social security, and other 'safety-net' governmental programs to help those in need, as will be discussed in Chapter 5.

1. Introduction/Transition – Summary of Common Law and Civil Law ROL

To review the previous two chapters, the common law concept of the *rule of law* can be defined as an ideal relationship among law, government, and man, grounded in two very basic concepts: 1) law and order, and 2) limited government. Hayek's description has several aspects: 1) the rule of law limits governmental power, including the powers of the legislature; 2) It is more than constitutionalism because it requires that all laws conform to certain principles; 3) Laws are certain and known in advance; 4) All laws are general, in other words they apply equally to all; 5) Separation of powers is an integral part of the rule of law; 6) In executing laws, the executive must follow certain procedural rules that prescribe when and where its coercion may be used and in what manner, and those actions are subject to judicial review; and finally 7) Coercion is admissible only when it conforms to general laws and not when it is a means of achieving particular objects of current policy. This is to say that properly viewed, the government is a civil association in that it has no aim other than protecting its citizens' individual liberty, whether from outside invaders or inside miscreants, and there is an expectation of equality under the law – that the law applies equally to both ordinary citizens and the powerful, and **that government's powers are limited to what the polity has granted**. This system grew spontaneously in England and has its roots in the Anglo-Saxon culture of individuality.

The civilian concept of *rechtsstaat* or *rule through law* is commonly substituted for the *rule of law* in both civilian and international entities. The concepts are similar, but they differ significantly in their underlying views of the relationship between citizen and government and the source of the

right to liberty.¹ *Rechtsstaat* grew out of the civilian tradition of deductive logic, Roman law, and French Enlightenment and positivist theories of government. While both systems value liberty and equality, they differ in which value should be prioritized, how those values should be protected, and how government and law should be structured. The civilian tradition emphasizes equality and community over liberty and posits that experts should both create laws that prevent or resolve conflict and apply them.² And in the civilian view, government has an additional responsibility: to improve its citizens or their lives by providing various social welfare programs. In contrast to the common law conception of negative rights (the right to be left alone), the civilian concept is predicated on positive rights, which leads in a different direction (as shown previously in Chapter 3). In this view, government should limit itself and follow its own laws, but there are no areas where governmental interference is prohibited.

In contrast, the common law traditionally values individual liberty, equality under the law, and focuses on managing conflict, not necessarily solving or preventing it. It held on to the concept that the law belongs to the people, not the sovereign, that experts are *not* always needed, and that inductive knowledge from experience and practical solutions are superior to theories about human society. **As mentioned previously, either system can result in a functioning government.**

The American constitutional tradition, as we shall see, has added another component to the theory of the rule of law, one that grew out of its analysis of its English tradition as well as its experience in drafting constitutions – that of checks and balances that are an intentional (and sometimes unintentional but customary) built-in attempt to manage human corruptibility. True to the American character of hustle, the United States has a history of an amazing thirst for innovation and economic development, the reasons for which will be introduced here and then developed further in the next section of the book. The chapter will end by explaining how beginning in the twentieth century, politics in the United States have caused it to swing back and forth between the two concepts.

2. Colonies, the British Empire, and Self-Government

On July 4, 1776, fifty-six American colonists committed treason by issuing the following now-famous statement declaring their Independence:

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

Before listing 27 complaints, the representatives of the Thirteen Colonies declared that they were rebelling against the English King's 'absolute Tyranny.' But in fact, what they were objecting to were a long series of unsuccessful dealings with Parliament.

A common misperception is that the American Colonists had been tyrannized by English Absolutist

Monarchs and that the U.S. Constitution was the first time they experienced popular government. None of that was true! 1. They were not badly treated according to the standards of the time; 2. England's government was not absolutist, despite the Stuart kings' desires to the contrary, and 3. Every single colony had its own popular government with an elected assembly more or less from its inception. In fact, one could say of the American Revolution that never have so many objected so loudly about so little.

In contrast, France completely remade its society, eliminated two of the three estates, embraced equality and eventually liberty (neither of which its citizens had previously experienced), and built completely new popular-based governmental institutions. The Americans just wanted what they thought they were entitled to under the English Constitution, as well as little or no taxation.

A Habit of Self-Governance

The first colonists have been described as faithful, courageous, desperate, and either hustlers or hustled by English promoters.³ The description is probably apt. The Southern colonies were primarily founded by profiteers and those who hoped to become successful landowners. Jamestown (Virginia) was the first successful such colony, after three prior failures (including the Roanoke colony that mysteriously disappeared). Named after James I, it was founded in 1607 by 105 soldiers of fortune who nearly starved because they wasted their first year hunting for gold and either fighting with or begging food from the Indians. The colony only began to thrive when it started farming tobacco.

In contrast, many of New England's colonists were religious dissenters—meaning they disagreed with England's version of Protestantism – and were therefore more likely to be both faithful and desperate to get away from religious persecution. All, north and south, could have been described as venturesome in that they were venturing to an undeveloped, unknown area far from any support by the British – no one would or could defend them, no one could rescue them. They would have to be completely self-reliant for periods of up to a year. In terms of self-government, Virginia's 1619 Charter authorized an elected assembly to share legislative and judicial authority with the governor and his council, and the first Assembly passed a law requiring that colonists plant food crops, not just tobacco.⁴ Subsequently, every one of the 12 original colonies that followed had representative governments from the very beginning, some more active than others:

Massachusetts was founded by Puritans in 1620, when the Mayflower landed at Cape Cod rather than Long Island, their Mayflower Compact set up a popular government with laws of their own making and was also a mutiny against the terms of the Charter granted by James I. Other colonies in Massachusetts were settled by Puritan leaders in 1632, all of whom elected representatives to General Courts which then developed laws under the Massachusetts Bay Co. Charter.

Maryland was founded in 1634, named after Charles' 1st's wife. The original settlers protested when the governor tried to appoint a first assembly and won the right to elect their own representatives. They adopted Virginia's governmental structure in 1650 – power shared between a governor's council and a popular assembly.

Connecticut was founded by a Puritan-spin-off from Massachusetts, and its General Court was set up in 1638, along the same lines as the parent Charter.

Rhode Island was founded by two people expelled from Massachusetts Bay as non-believers – Roger Williams & Ann Hutchinson. In 1640, Williams drafted his Twelve Articles to govern Rhode Island, a constitution based on religious tolerance, assemblies elected by all heads of families, and a weak government. Rhode Island became known as a “a refuge for scoundrels and a model for no one,” but it attracted a polyglot population of entrepreneurs who became successful by trading with the Dutch and the Indians.⁵

New York 1664 A part of a settlement with Holland, New Amsterdam was surrendered to England and Charles II granted it to his brother James, the Duke of York (later James II), who renamed it New York. In taking it over, he promised to respect pre-existing property rights, allow self-government, and give land to new settlers.

New Jersey 1664 – James, Duke of York, sub-contracted the development to New England Puritans who founded a number of cities (Piscataway, Middletown, Shrewsbury, Newark, Elizabethtown), but refused to pay him any rent on the land until they were granted the right to an elected self-government. Originally divided into East and West Jersey, West Jersey is granted popular government under Quaker “Laws, Concessions, and Agreements” which mandated freedom of religion, trial by jury, election of judges, easy purchase of land, elected assembly with taxation power, and an elected executive commission. East Jersey was granted the same in 1680.

Carolina 1670: Land granted to Anthony Ashley Cooper and John Locke in 1663, Locke drafted its first constitution: 2/5 land to be hereditary nobility, 3/5 distributed among commoners, 8 ‘sovereign’ proprietors would appoint a governor and council, their only power to propose laws to a popularly elected assembly. Religious tolerance, land grants to all who pay passage for settlers, voting rights for all freeholders, impartial selection of jurors – and the right to hold slaves as chattel property. Carolina was peopled with colonists from England, Bermuda, and Barbados. Locke’s constitution in effect from 1670 to 1691, when it was rejected as too authoritarian and replaced with one that was more popular-based. Carolina split into two separate colonies, North Carolina and South Carolina in 1712.

Pennsylvania 1681: Quaker William Penn was granted a generous charter by Charles II, even though he knew Quakers were fiercely egalitarian, opposed to nobility and monarchy, and pacifist. Eighteen ships set sail for Pennsylvania, ahead of 11,000 settlers within 10 years. Pennsylvania’s Charter provided two elected houses, the upper to propose laws, the lower to vote on them and administer justice. Other terms included a broad franchise, all trials by jury, prisons to rehabilitate, universal education, and religion a matter of personal conscience. By 1700, Philadelphia was the second largest city in North America after Boston.

Georgia 1758: Charter was granted in 1733, settled in 1758, Georgia’s popular government was ineffective until 1758 when the 2nd governor established 8 electoral districts and set up an effective government

Reasons for rapid development

When colonists arrived, thanks to the Indians, a number of their first settlements were patches of forest previously cleared and either sold to them by Indians or were abandoned by them. (90% of

the local Indians had recently died from European diseases). Otherwise, however, they were amazed by the expanse of the forests because England was mostly deforested. In every case, land seemed so infinite that every man could dream of becoming a baron – a dream promoters encouraged in every way possible because the large tracts granted by the King were worthless until settlers invested in them.⁶

Massive numbers of colonists were drawn to North America as a result of the availability of land. For example, the population of tobacco-dependent Virginia exceeded 18,000 by 1650 and stretched far up the James, York, Rappahannock Rivers and Chesapeake Bay.⁷ New Amsterdam became popular because it was open to immigrants from all nations, including Huguenots, Catholic Walloons, Puritans, and Sephardic Jews.⁸ Wood became New England's primary export, and later coopers for barrels, ship-building, salt fish, and cattle.

The sheer numbers of colonists overwhelmed the remaining native tribes. Sometimes colonists treated the remaining Native Americans fairly, sometimes they did not.⁹ Three wars were fought when the rapid expansion of colonies began to displace the remaining Native tribes.¹⁰

Parliament's Declaration Act & the Navigation Acts & the American Response

Surprisingly, the English monarchs who had absolutist pretensions were the ones who founded the American colonies and were also the ones who allowed and even endorsed their self-governing Charters. Legally-speaking, the colonies were largely neglected by the English until 1650, when the Rump Parliament and Council of State (before Cromwell's take-over) apparently noticed that the colonies were selling a lot of tobacco to the Dutch.¹¹ Their mercantilist response was first the Declaration Act which declared that all colonies "are and ought to be subordinate to and dependent on England," and are "subject to such laws, orders and regulations as are or shall be made by the Parliament of England" – whether or not such laws contradicted a colony's chartered privileges or own enacted law. The following year, Parliament added the Navigation Acts which forbade all colonial commerce with foreign ships.

Virginian farmers immediately ignored the Navigation Acts. They were not about to let their tobacco crops sit in warehouses simply because the ship in the river flew the wrong flag! Other colonies, including Massachusetts, Rhode Island, and Connecticut, actually forbade their inhabitants from obeying the new law. The New England Confederation of states (formed in 1643) concluded a free trade treaty with New Netherlands (the Dutch colony that eventually became New York), and Virginia concluded a trade agreement with the Dutch.

Nothing further was done until the Restoration of the Stuart line, when in 1660 a penurious Charles II tried to increase his coffers by enforcing the Navigation Acts. He set up councils for trade to administer them, required most foreign goods bound for the colonies to pay duties in England first, and taxed cargos to induce colonists to 'buy English.'¹² He intended to fashion an orderly New World empire by enforcing royal charters and the new Navigation Acts issued by Parliament. New Navigation Acts in 1660, 1663, and 1673 granted English ships a monopoly on all imperial trade and started stationing customs officials in American ports and obliging colonial governors to assist them. The Council for Trade became the Lords of Trade in 1675 and were charged with supervising colonial affairs, at times the appointed royal governors could disband the assemblies or veto legislation passed by those assemblies.

The colonist merchants responded with what became their usual level of obedience to the mother country: smuggling, bribing customs officials, complaining (very) loudly, boycotting, and keeping fraudulent books. On the far side of the Atlantic, merchants of all kinds created lobbies to cajole or bribe members of Parliament to pass, amend, or annul laws that affected their trade with American producers. The stakes became higher because colonial trade became so profitable: it increased from £800,000 in 1660 to £1,750,000 in 1690. Charles II then tried to appease the colonies by approving new charters for Connecticut and Rhode Island, but Massachusetts refused even to ask his permission, refused to provide information on its population or trade, and its merchants competed with English merchants to find new ways to violate the Navigation Acts.¹³ (Charles II declared war against the Dutch for their violation of the Navigation Acts, eventually leading to the ceding of New Amsterdam to his brother James, then the Duke of York.)

The Lords of Trade tried for 10 years to get Massachusetts to negotiate amicable terms, and when that didn't happen, sent colonial administrator Edward Randolph to recommend ways to encourage the colony to comply with British law. He found New England completely insubordinate to English authority. The Lords of Trade had thought that after a recent horrific Indian war, Massachusetts might be willing to accept both English authority and English protection, but "being Puritans, they humbled themselves before God, not before men and certainly not before kings."¹⁴ Furthermore, the Massachusetts General Court told the Lords of Trade that Parliament's laws had no force in New England, and Boston even set up a rival customs office in 1681 to funnel duties to the colony's treasury. The Lords of Trade's response was to sue Massachusetts Bay, Plymouth, Connecticut, and Rhode Island in the Crown's Chancery Court to revoke their charters. By 1687 (two years after James II took the throne), they won every case.

When the Chancery Court revoked the New England colonies' charters, it fell on James II to enforce that decision. He apparently decided to imitate what Phillip II of Spain had done with a rebellious Netherlands: he appointed councils to replace their elected assemblies, restricted town meetings, appointed royal customs officials to collect taxes, raised the rent on land, declared Anglicanism to be the established religion, and he sent a new governor to Boston to make New England pay for royal administration. When the news of this reached the colonies, Bostonians charged the governor's residence, arrested the governor, seized a royal ship in the harbor, and chose a Council for Safety to serve as interim government until the General Court could reconvene. Similar rebellions spread down the coast. Before England could respond, James II fled into exile, and the colonies seemingly returned to something of a *status quo ante*.

Despite the seeming reversion to benevolent neglect, the Glorious Revolution of 1688 affected the American Colonies and their inhabitants deeply. It annulled the adoption of any established religion, reinforced the tight connection between the founding Protestant sects and self-government, de-legitimated any future attempt to set aside the established self-governing charters, and reinforced all English subjects' understanding – even those in America—of their inalienable rights to life, liberty, property, the bearing of arms, freedom of worship, and due process of law as enumerated in the Toleration Act and Bill of Rights signed by William and Mary. Parliament was declared to have "supreme and absolute power," and under the 1700 Act of Settlement, the King no longer had any power over the judiciary.¹⁵

The After-effects of the French and Indian War

Between 1688 and 1776, the relationship between the American colonists and England continued to deteriorate. Colonial growth was matched by the British Government's increasing desire for control, income, and respect, none of which the colonists gave willingly. The number of colonists continued to increase rapidly: by 1740, it was close to one million. (England's population was only six million). The first American Great Awakening (the first of many religious revivals) took place in the 1730s, with masses of evangelists and new Protestant sects competing for members. The American character continued to be one of self-determination, religiosity, daring, entrepreneurship and hustle. They also drank a lot -- apparently necessary to support all that religious fervor -- per capita, they consumed over four gallons of rum per year, as well as distilling over a million gallons per year for export. They purchased the necessary molasses from French, Dutch, and Spanish islands rather than English.¹⁶

While many of the original colonial representative assemblies did not initially display much authority or competence prior to 1688, after 1713, they all began to display sovereign attributes, including issuing paper currency, raising armies, and governing themselves and their colonies. In order to obtain lines of credit, rather than using tobacco, wampum, gunshot, Spanish coins, or bushels of corn to barter as they often did at home, the colonies needed currency, which was perennially in short supply, and they started making their own paper currency. They raised militias because their homes, families, and futures were periodically threatened by the French, Spanish, and Indians. Domestic manufacture of iron and wood led to both gunsmithing and ship-building. Their lower assemblies had powers to tax and spend, control and pay civil servants (including crown-appointed governors), make rules for elections and provide legislators' privileges such as free speech and immunity, as well as build infrastructure.

William and Mary and their successor Queen Anne (the last of the Stuart line, she died in 1714)¹⁷ tried to centralize control over the colonies as James II had, but by 1700 Parliament had no stomach for the trouble or expense that would entail.¹⁸ In 1733, under pressure from British sugar merchants, Parliament passed the Molasses Act which slapped a prohibitive tariff on foreign sugar in order to force Americans to buy British for their rum, but the Americans resorted to their usual dodges and continued to buy foreign sugar.

The fall-out from what the Americans called the French and Indian War (1754-63) significantly increased friction with Great Britain. Despite George II's 1763 Proclamation limiting their westward expansion and trying to divert them north to Nova Scotia and south to Florida, The Americans had continued to push westward, squabbling with the French who claimed the Ohio Country (now Western Pennsylvania, Ohio, and parts of Indiana). The British competed with the French, especially over the right to trade with local Indian tribes, and both were trying to build fortifications in the area. War in the U.S. began when a young Lieutenant George Washington and his small company of Virginia Militia and Indians ambushed a French company near what is now Pittsburgh, Pennsylvania. Two years later, the squabbles between Britain and France in the New World became part of a global conflict that began when the Austrians tried to get Silesia back from Prussia's Frederick the Great -- the Seven Years War. When the dust cleared in 1763, France had been replaced by Great Britain as the predominant European power, and the American colonists were the least taxed people on earth.¹⁹

The War on Taxes

By the 1770s, the colonies' gross domestic product was already about 40 percent that of England,

and white Americans probably enjoyed the highest standard of living of any people on earth.²⁰ Defending the American colonies during this conflict was costly, and the British national debt had risen from £73 million to £137 million.²¹ The British government therefore looked for ways to offset this debt as well as ways to pay for the 10,000 soldiers it had stationed in the colonies to protect them. One way was to enforce laws already in place, and it cracked down on the Americans' avoidance of customs duties. The colonists reacted angrily.

Initially Parliament passed two separate bills providing for the British colonial troops: The Quartering Act of 1765 and the Stamp Act. English subjects were traditionally required to house and supply soldiers stationed for their protection, and the Quartering Act merely reiterated this obligation.²² The Colonists immediately saw this as insulting because they had been paying for their own militias from the inception of their colonies without Parliament's interference. When they objected loudly, the Quartering Act was allowed to expire in 1770.²³ The Colonists also continued to object to the three-penny tax on molasses (reduced from the initial 6-penny) that was finally imposed in 1764, probably because between the vigilance of customs officials in both the West Indies and America, they could no longer smuggle it in.²⁴ But they continued smuggling in Dutch tea.

In order to raise money for the garrison, the British Parliament then passed the Stamp Act imposing a tax on every piece of printed paper used by the Colonists: Ships papers, legal documents, licenses, newspapers, publications, and even playing cards. It seemed relatively benign to Parliament, but to the Colonists it was a further affront because they did not see a need for the military garrison. The "Sons of Liberty" groups in Rhode Island, Connecticut, New York, and the Carolinas destroyed the stamps, picketed royal offices, and burned British officials in effigy.²⁵ In Boston, they rioted and destroyed Governor Hutchinson's mansion (and other homes of British governmental agents). In response, Treasury Officials asked colonial assemblies if they could propose an alternative method of raising the money. The colonists and their assemblies simply continued to object vociferously to any and all taxes proposed particularly because they had no elected representatives in Parliament. As British subjects, they believed they had a right to their own elected representatives, rather than mere agents' whose actions they apparently regarded as ineffective. The anti-British slogan, generally attributed to James Otis about 1761 was "Taxation without representation is tyranny."

The relationship between the Colonists and Parliament became increasingly hostile even after the Stamp Act was repealed.²⁶ An offended British ministry decided to bring the colonists to heel through the Townshend Acts.²⁷ These four acts 1) prohibited the New York Assembly from conducting any further business until it complied with the financial requirements of the Quartering Act (a large portion of the British troops were stationed in New York); 2) imposed direct revenue duties payable at colonial ports for lead, glass, paper, paint, and tea; 3) established strict and even arbitrary methods of customs collections including spies, searchers, coast-guard vessels, writs of assistance, and search warrants; and 4) gave the struggling East India Company a subsidy on its importation of tea to the Colonies. The Tea Act was intended to help the troubled East India Company financially by making it competitive with the Dutch Tea the colonists were smuggling in. English tea could now be shipped directly to North America, bypassing the normal duties the company otherwise would have to pay. The colonists, however, would have to pay taxes at their end, though the price of the tea itself would be close to that of the smuggled Dutch Tea rather than more expensive. The colonists regarded the Townshend Acts as an immediate affront to their

tradition of self-government.

Tensions continued to rise. In early 1770, some four thousand troops were camped on Boston Common. Poor local workers hated them particularly because the soldiers competed with them for jobs during their off-hours. On March 5, 1770, a crowd of townsmen threw excrement, epithets, and even death threats at the soldiers. The soldiers panicked, fired their muskets and killed 5 colonists. This became known as the “Boston Massacre,” and the soldiers were tried for murder in Boston. (John Adams provided a skillful defense, putting the blame on Parliament, and the soldiers were acquitted.)

The most colorful act of resistance, however, was undoubtedly the Boston Tea Party. In response to the Tea Act (only remaining part of the Townshend Acts) the Colonists boycotted the East India Company’s tea. Several states either turned the ships away or impounded the tea. Some of the letters from Massachusetts Governor Hutchinson to a prominent British administrator discussing tensions in the colonies were leaked to Benjamin Franklin. Franklin, in turn, leaked them to the Massachusetts General Court, and from there they were published in local newspapers. In the letters, Hutchinson indicated an intent to limit colonial self-government, use troops (if necessary) against colonists, and enforce the Tea Act. In the midst of this, Hutchinson insisted that the cargos of three ships standing at anchor in Boston Harbor be offloaded. In response, on November 30, 1773, members of the Sons of Liberty dressed as Mohawks ‘offloaded’ the tea for him by dumping it into the harbor – a £10,000 loss. In 1774, the colonists convened the First Continental Congress, which appointed a committee to draft a statement of “rights, grievances, and means of redress”²⁸ – i.e. the Declaration of Independence.

Reasons for the Revolt

In sum, the reasons the Americans revolted were complicated, but a primary reason was grounded in law, and a close second was economic. With regard to law, Americans believed they were deprived of the representative government increasingly extended to Englishmen in England itself. They also believed that they were not only deprived of the protection of English law otherwise accorded to English subjects, they believed that they were treated as if they were an inferior people that England had conquered. With regard to economic reasons, Americans were land speculators. By the end of the French and Indian war, real estate prices had doubled or tripled in part due to low interest rates, and gold and silver were in short supply. Because of the short supply of money, land prices started to plummet, and when mortgages came due (similar to the housing bubble of 2008 in the United States), owners could not afford to pay them and faced either loss of property or debtors’ prison or both. When they asked England for help, it instead implemented measures that hurt the economy further --barring issuance of paper money, providing for English soldiers, the Stamp Tax, the tax on molasses, trade restrictions – all of which further increased the Americans’ rancor.²⁹

In 1776, in accord with their charge from the Continental Congress, Thomas Jefferson and the rest of the appointed committee (John Adams, Benjamin Franklin, Roger Sherman, Robert Livingston) produced the Declaration of Independence, and it was signed by representatives from twelve of the thirteen colonies at the Second Continental Congress in Philadelphia, Pennsylvania. Under English law of the time, all those who signed it could have been tried for treason, had the U.S. not become independent.³⁰

3. The Colonists' Ideas about Law, Government, and Economics

As has been pointed out, the Declaration of Independence posits abstract ideas about liberty, but it does not describe the government the Colonies intended to create.³¹ So what was it that the Founders were drinking (in addition to rum, no tea) that led to their obsession with liberty, and what was it they were reading that gave them their ideas about the relationship between man and government?

Law and Government

One might have thought that they would have adopted natural law -- some of the Declaration makes it look that way and one or two radicals embraced it -- but natural law theory was entirely alien to popular American thought. Even the two Delegates to the First Congress who were most knowledgeable about natural law argued strongly against it.³² All of the colonists' rights claims were based upon royal grants and the common law. Their property rights were derived from British sources, as were their claims of liberty. While their reading of John Locke might have thrown them temporarily into a state of nature wherein all previously existing law was nullified, the lawyers among them would have cited Blackstone who had intoned that there cannot be any case where all law is suddenly destroyed so that men would be compelled to build from a new foundation.³³ They were anxious to establish both the legitimacy and efficacy of a legal system -- as they understood it -- and their understanding was based on English common law.

Among those founders who attended law school and had studied Blackstone as well as political philosophy included John Adams, John Jay, Alexander Hamilton, Thomas Jefferson, John Marshall, Henry Clay, James Monroe -- many of them at Virginia's College of William and Mary with George Wythe. Those who attended the College of New Jersey (now Princeton) such as James Madison, studied with Scottish Minister John Witherspoon, and read Scottish Enlightenment political philosophy such as Frances Hutcheson, Thomas Reid, Lord Kames, Adam Smith, and David Hume. Alexander Hamilton, who was primarily self-educated, was rejected from Princeton, but studied law at King's College in New York (now Columbia) for one year (his education was interrupted by the Revolutionary war) and went on to practice law.

To a certain extent, as hard-headed practical men, the Framers disdained chimerical theory, but they did not entirely disregard it especially when drafting the Constitution in 1787, when they searched for ways to remedy the short-comings they experienced in the state republics. They turned to Locke rather than Grotius, Pufendorf, or others because his work was more useful for their purposes and he furnished a clear-cut rationale for independence. His *Two Treatises of Government* was among the most widely-read works of political theory ever penned, was the inspiration of a large amount of writing during the eighteenth century. Locke's theory of natural law differs from that of the continental natural law movement and was based on three fundamental principles: 1. Every man has a duty to praise, honor, and give glory to God; 2. Man is not at liberty to destroy himself, and 3. Because man is obliged to live in society in order to survive, he must preserve society in order to preserve himself. Locke posits that every man has property in his own person, as well as those things he produces with his own labor. Locke supports exchange of the products of labor because neither party is invading the rights of others. However, he believes that the introduction of money, though legitimate, is "a corrupting influence" because it leads man to

surrender his natural freedom and equality by entering into a political society and agreeing to submit to its authority.³⁴

According to Locke, “were it not for the corruption, and viciousness of degenerate Men, there would be no need” for government. Consequently, the purpose of uniting under governments is to preserve all men in their “Lives, Liberties, and Estates.” To accomplish this goal, government must establish “settled, known law,” in accord with the law of nature (as he previously described it), provide known and independent Judges with authority to resolve differences under the established law, and have power to execute such decisions. Such governments have no powers except those which are compatible with the end for which they are established, and cannot act arbitrarily, depart from their own laws, take from any man his property without his consent, or delegate law-making power to other hands. If a government violates these limits, it can legitimately be overthrown -- according to Locke.

One can easily see how Locke’s ideas were incorporated into the Declaration of Independence. Because of his support of limited government, the rule of law, and justified rebellion, Locke was read widely during the Revolutionary period, but not so much afterwards as American society became more acquisitive.³⁵ In addition to Locke, those Americans who were college-educated would have studied republican principles of political theory, the histories of the ancient republics (focusing on the causes of their declines), Montesquieu’s analysis of republican principles, and David Hume (especially his essay “*Whether the British Government Inclines more to Absolute Monarchy, or to a Republic*”).

Other less formally-educated Americans’ thoughts about republicanism, however, developed late and willy-nilly. After all, they were already accustomed to representative government. The changes they might have considered as a result of independence would be the absence of royal officials, the absence of hereditary status (which was already unusual in the Colonies), and all branches of government being elected rather than appointed. After the Declaration, more people educated themselves on theories of both democracy and republicanism. Many read ancient Latin and Greek sources such as Cicero, Tacitus, and Plutarch, and Aristotle, which was why a number of those who wanted later to sign their newspaper articles with pseudonyms would choose a Roman hero. During the debate over the ratification of the Constitution, Madison, Hamilton, and Jay signed their articles (now the Federalist papers) as Publius, who had founded the Roman republic. One of the more famous Antifederalists signed his “Brutus,” in honor of Caesar’s killer.

Many Americans may well have gotten their political theories (both classical and modern) through filters of the popular amusements of the times: plays, newspapers, orations, and grand jury charges. Thousands of Americans who may never have read any book except the Bible could share the classical revival of the time through plays and orators such as Thomas Dawes, Jr. who addressed a crowd in Boston after the Massacre with quotes from a wide variety of classical sources. Even Grand Jury charges such as those delivered by John Jay were popular!

North versus South and the role of public virtue in a republic

All in all, there were two very different views of republicanism in the infant United States: northern puritanical and southern agrarian. Both versions believed that public virtue was an absolute necessity for self-government. Public virtue involved firmness, courage, endurance, industry,

frugal living, strength, and above all, devotion to the needs of the public's corporate self and the community of virtuous men. It was both individualistic and communal: individualistic in that no member of the public could be dependent upon any other and still count as a contributing member of the public, and communal in that it was expected that every man give of himself to the good of the public as a whole.³⁶ It was widely believed that a lack of public virtue is what led to the death of Rome: strength would give way to weakness, republican liberty to licentiousness, licentiousness would degenerate into anarchy, and anarchy would inevitably lead to tyranny. Unlike the French philosophes, however, they did not think public virtue could be legislated into existence.

Puritan republicans sought a moral solution to the problem of republican decay. They wanted to improve people (though they did not expect the government to do so), while agrarian republicans believed in a socio-economic-political solution. Puritans thought that one was free to do only those things that are in the interest of the public, and individual liberty is subsumed in the freedom of one's political community. For instance, Puritan John Adams said that man's principles are "as easily destroyed as human nature is corrupted," and that republican governments could only be supported by "pure religion or austere morals." His message to his children was that he had worked hard to provide a free Constitution, that he wanted them to live frugally, work hard, and he threatened to disown them if they were to prefer "Fortune, Ease, and Elegance." His children should "revere nothing but Religion, Morality, and Liberty."³⁷ One still sees some this line of thought reflected in plain-living billionaires like Sam Walton (Walmart). Other billionaires similarly want their children to build their own futures and are donating all or most of their fortunes to charity, including Bill Gates (Microsoft), Warren Buffett, Mark Zuckerberg (Facebook), Chuck Feeney (Duty Free), Michael Bloomberg (finance), Andrew Lloyd Weber (hit musical composer), Pierre Omidyar (eBay).³⁸

Southern Agrarians from tobacco-plantation country, such as Thomas Jefferson and George Washington, similarly valued public virtue but had an entirely different conception of a valuable life. In contrast to the industry, frugality, and work ethic instilled into New Englanders from an early age, upper-level southern society was not only tolerant of a leisure ethic, but even disdained manual labor, and they aristocratically rejected what they saw as the crass, vulgar, inhumane elements of capitalist, industrialist society.³⁹ They valued, instead, the civilized life of gentlemen-farmers of letters. By the nineteenth century, southern plantations owners "grew into the closest thing to feudal lords imaginable in a nineteenth-century bourgeois republic."⁴⁰ Despite their easier-going ways, southern republicans believed that their society produced virtuous men. Virtue to them meant manliness, and manliness meant independence: owning enough land to provide for oneself and one's family, unencumbered by debt, and having the ability to bear arms and defend oneself against others.

While both north and south believed that landownership helped to preserve virtue, southerners believed that a wide distribution of land, combined with an extreme jealousy of power and careful attention to how it was allocated, could preserve public virtue regardless of the state of private virtue. They regarded the Yankee concept of private virtue as unnecessary to the maintenance of republican liberty. "the more a nation depends for its liberty on the qualities of individuals, the less likely it is to retain it. By expecting public good from private virtue, we expose ourselves to public evils from private vices."⁴¹ Thus, neither Locke nor American southerners trusted anyone to fully devote himself to the needs of the polity. This lack of trust became important in terms of the checks and balances included in the American Constitution and the reasons for them, and both

viewpoints are reflected in the constitution as eventually drafted.

4. The Articles of Confederation, the Continental Congress, and the Danger of Collapse

Quickly realizing a need for coordinated action after the Declaration, the Continental Congress wrote a constitution in 1777 that was ratified in 1781. In keeping with their desire for small, weak, and preferably local governments, the continental government created was minimal. The *Articles of Confederation and Perpetual Union* provided the name of the new country (The United States of America), that each state retained its sovereignty, and that this would be a league of friendship or a treaty for common defense and mutual welfare. It provided for a unicameral Continental Congress to meet annually, to which each state would send between two and seven delegates and have one vote. Congress had the exclusive power to declare war, appoint military officers, enter into treaties, appoint foreign ambassadors, and manage relations with American Indians. It could ask states for funds, borrow from foreign governments, or sell western land, but it did not have any taxing power. Each state would raise its own militia and appoint officers under the rank of colonel, and expenses would be paid out of a common treasury, to which states would voluntarily contribute. Congress would have the last word on disputes between states, and it would have the exclusive right to coin money as well as fix standards of weights and measures. Notably, no provision was made for an executive, nor could the Articles be amended except by unanimous vote by each state legislature.

The *Articles of Confederation* quickly proved to be insufficient for three reasons: 1. The absence of a power of the purse as well as the absence of any purse (i.e. no provision for a stable source of national funding); 2. The need for unanimous vote for any amendment; and 3. The lack of a chief executive or any judicial power which led to a lack of respect for both the language and the spirit of the Articles.⁴² It is a basic legal concept that one should not pass legislation that cannot be enforced, as it leads inevitably to a failure of the rule of law.

The fact that the Continental Congress could not do anything in the absence of a unanimous vote and the fact that it lacked an executive to enforce any such vote meant that it could not levy taxes or compel states to pay their fair share and led the infant country to the brink of bankruptcy. In 1783, Washington's officers, starving, wearing torn, stained uniforms and worn-out boots, threatened revolt because they had not been paid in months, though Washington was able to talk them down. Robert Morris, a successful Philadelphia businessman who had been appointed Superintendent of Finance used heroic efforts to straighten out finances but was unable to make much headway.⁴³ Benjamin Franklin secured a \$5.9 million loan from France, and John Adams secured \$2 million from Holland, but the money was soon gone. The paper money issued by the Continental Congress depreciated to near worthlessness, as did its government bonds. Inflation was rampant. State legislatures were not paying, and a bill to grant Congress the right to issue an import tax of 5% was scotched by Rhode Island's negative vote.

As a result, by 1785 (a mere 2 years after the U.S. won its independence), the infant United States was defaulting on its loans, which seriously jeopardized both U.S. trade and its ability to defend itself against foreign attack.⁴⁴ To top it off, the Barbary states of North Africa practiced state-

supported piracy to exact tribute, had captured several American merchant ships and demanded a ransom of \$60,000 -- which Congress paid because it did not have the means to defeat them. Naturally, the Pirates came back a few years later demanding more money. France, Spain, and Great Britain had little respect for the United States, and given their mercantilist habits, closed their ports to American products. Spain closed New Orleans against Americans, and London would not grant the U.S. a treaty for unrestricted commerce because John Adams could not promise that individual states would agree.

Once their territories were no longer in imminent danger, the states were no longer interested in the Continental Congress. It became very difficult to get a quorum, states started to dispute among themselves, and due in part to the failure to pay Revolutionary soldiers, law and order was breaking down. Members of Shay's Rebellion (impoverished Massachusetts farmers and former soldiers) allegedly demanded an abolition of debts, division of property, and even re-union with Great Britain, until the governor raised a private militia and disbursed them.⁴⁵ States disputed over navigation rights (Virginia/Maryland), put onerous restrictions on interstate commerce (New York/New Jersey), and even conducted wars against Indians without Congress's approval (Georgia). Furthermore, British loyalists who owned property in the new United States still faced confiscation and other acts of retribution in violation of the peace treaty with Great Britain. In February 1787, the Continental Congress agreed to the appointment of a Commission of delegates from all states to meet in Philadelphia in May to amend the Articles as "necessary." What resulted, however, of that hot summer in a closed room was not amendment, but instead an entirely new Constitution for the United States of America, which was eventually ratified by all 13 states in 1789 -- right about the time that France was beginning its much more disruptive and deadly revolution.

5. *The Constitution*

The 1787 U.S. Constitution was the result of some very difficult compromises, but it established what is now the oldest existing republic in the world. The document shows the thoughtfulness of the drafters, many of whom were by this time experienced in drafting constitutions: every former colony had needed to replace its charter, so by 1787, each state had a constitution, and some of them had drafted more than one.⁴⁶ France's motto has remained "*Liberté, Egalité, Fraternité*" throughout its five republics. The closest similar saying in the United States is probably the last clause of the Pledge of Allegiance: "*With Liberty and Justice for All*," which indicates an American pre-occupation with liberty, equality under the law, and the rule of law.

The Constitution as drafted shows attention paid to addressing the most important shortcomings of the Articles of Confederation: finance, defense against foreign aggression, lack of enforcement, overly stringent amendment requirements, and squabbles among the states. It grants the 'power of the purse' to Congress, including the power to lay and collect taxes, coin money, borrow money, establish monopolies in the form of patent rights, etc.;⁴⁷ provides substantial defense powers by providing Congress with the power to declare war as well as the power to raise and support army and navy,⁴⁸ and it gave 'teeth' to the new federal government with the creation of a strong executive power vested in the President⁴⁹ as well as a judicial power vested in a supreme court and "such inferior Courts as the Congress may from time to time ordain and establish."⁵⁰ Amendments to the Constitution are effective when ratified by three-fourths of the states, rather than an unanimous vote.⁵¹ (The same proportion was used for ratification of the constitution itself (9 of the original 13

states).⁵²

Squabbles among the states were dealt with in a number of different ways that provide limits on state sovereignty not found in the Articles. The supremacy clause provides that the Constitution and federal laws and treaties constitute “the supreme law of the land.”⁵³ The full faith and credit clause requires states to respect the lawful acts of all other states.⁵⁴ Disputes between states can be addressed by federal courts.⁵⁵ In terms of protecting federal strength, states were prohibited from coining money, entering into treaties with foreign powers, assessing imposts or duties on imports or exports, or declaring war.⁵⁶ The commerce clause gives Congress the power to regulate commerce among the states,⁵⁷ and the necessary and proper clause provides Congress with some elasticity in its ability to create laws necessary to fulfill the powers vested in it by the Constitution.⁵⁸

In terms of the adoption of law, while it does not specifically stipulate common law, the Constitution and the bill of rights include a plethora of common law terms that indicate a presumption that the United States was sticking to its traditional law: a right to trial by jury in both criminal and civil cases, a right to *habeas corpus*, prohibition against *ex post facto* laws, bill of attainder, speedy trial, the right to a warrant. It was left to the states’ individual sovereignty to adopt and develop substantive law as they saw fit, and 49 of the 50 states adopted their own versions of common law. What was understood to be common law included the areas of contracts, torts, property, succession, and trusts. To this day, each state is governed by its own law as it has developed over time. For example, Louisiana developed its own civil code patterned on indigenous French and Spanish sources, while Texas and California still show some of their Spanish heritage in community property and other laws. The United States Supreme Court, in a very famous case, *Erie v. Pennsylvania*, stipulated that the Federal government does not have its own version of common law.⁵⁹ In other words, there is no body of federal family law, etc. because a federal court’s power extends to only a few kinds of cases, such as those that involve federal legislation, the federal constitution, and disputes between people from different states. In the latter, known as diversity suits, a federal court has to follow the law of the state in which it sits. So, for example if a person from Michigan was in a car accident with a driver from Illinois, and the accident took place in Illinois, then he could sue the Illinois defendant in federal court in Illinois, and the court would apply Illinois tort law. (The option to use federal court allows an out-of-state party to a lawsuit to avoid state court systems because they might be concerned that the state court would treat the out-of-stater unfairly).

The body of common law as used by the states should be distinguished from the common law methodology used in all U.S. courts: the use of precedent and *stare decisis*. While federal courts generally use historical common law only when ‘sitting in diversity,’ they use common law procedure and precedent in every case they address. A federal trial court (known as a District court) must follow precedents set by its supervising appellate court (known as a Circuit court) and precedents set by the United States Supreme Court. So, in interpreting a federal statute, it will look to see if the Supreme Court has interpreted it, then if the supervising appellate court has addressed it, and finally if it itself has addressed that same statute. Cases from all of those courts are known as ‘mandatory’ authority. ‘*Stare decisis*,’ a Latin term meaning ‘let the decision stand’ became known only in the nineteenth century and refers to the obligation to follow decisions of one’s own prior authority or of a supervising court as a way of making case law more predictable. If a different Circuit court has addressed the statute, then that opinion will be ‘persuasive’ authority. The District court may be persuaded by it and may decide to follow it if there is no mandatory authority that

says otherwise, but it is not obligated to follow it. When a federal court is sitting in diversity, state court decisions from the state court of last resort are mandatory authority.

This brings us to the practical thought underlying much of the Constitution's construction. The Founders were very concerned about establishing law and order as well as limiting government by preventing tyranny – both the tyranny they thought they had experienced under British rule and the legislative tyranny they were experiencing under the recently-developed state constitutions. They were also very concerned about stability because even at this early stage, the United States would be the largest republic ever in existence and the prevailing wisdom from Ancient Greece to Montesquieu posited that large republics were unstable. *In other words, the American Founders were intentionally trying to instantiate the rule of law as they had envisioned it should have been under English rule, but for a much larger country.*

They wanted to establish both law and order and limited government by practical means based on what they knew from experience about popular government and human nature. Two primary devices were used to address these problems: federalism (both vertical and horizontal) and checks and balances. They are explained most explicitly in the Federalist Papers, written by James Madison, Alexander Hamilton, and John Jay to defend and promote the Constitution before it was ratified.

6. *Limited Government: The Federalist Papers, Federalism, and Checks and Balances*

While the Framers and other citizens of the nascent United States recognized that a stronger national government was needed, they were also concerned that it might become too strong, too large, and would intrude on the sovereignty of the several states. They wanted a stable balance between state and national power, and they also wanted both individuals and states represented at the national level. And they realized that this was likely to become a very large country: Above and beyond the land included in the original thirteen states, the United States had recently gained from the British what became known as the Northwest Territory, encompassing most of what eventually became six new states (Ohio, Indiana, Illinois, Michigan, Wisconsin, Minnesota). The Convention started deliberating on May 25, 1787 in Independence Hall, and Congress received a copy of the proposed Constitution on September 20 – the same day that copies began to appear in New York newspapers.

The release of this new document led to a firestorm of debate. Those who supported it called themselves Federalists, while those who thought it would lead to a monstrously powerful national government were termed anti-Federalists.⁶⁰ For example Anti-Federalist essayist Brutus argued that “The Constitution is radically defective” because it vested in Congress “great and uncountroulable powers” that it would use “to annihilate all the state governments, and reduce this country to one single government.”⁶¹ He further argued that it required the people to give up too many rights, and that “when the people once part with power, they can seldom or never resume it again but by force.”⁶² To this day, controversies in the United States are often centered around the extent of federal power, as well as whether individual rights have been intruded upon by either federal or state governments.

To defend the draft Constitution before it was to be voted on by the various states, “Publius” published eighty-five essays in New York City newspapers. Those essays have become known as the Federalist Papers and are so authoritative on the rationale and meaning of the Constitution and

its structure that they have been described as a “canonical text” of American government.⁶³ Of them, it has been since fairly well determined that Hamilton wrote fifty-one of the essays, Madison twenty-nine, and Jay, five. They were written for the most part independently with little collaboration among the three authors, and in haste.

Checks and Balances -- Ambition to Counter Ambition – “If men were angels, no Government would be necessary

A major concern was both corruption and finding ways to limit the power of the Federal government. Madison famously states in *Federalist 51* that

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”

He finds that the proposed government includes two kinds of checks and balances: vertical checks and balances wherein the state governments who are more numerous will act as a check on federal government power (discussed further in the next section), and horizontal checks and balances within the structure of the federal government itself. Montesquieu is famously credited with developing the concept of separation of powers, though he did not use the term. Basing his analysis on the English government of the time, he posited that in order to preserve liberty, legislative power should be separated from executive power, and the power of judging should be separated from both.⁶⁴

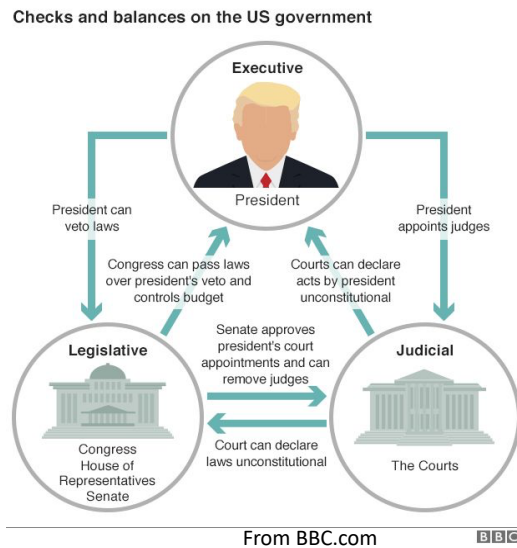
What the American draft constitution did *not* (and does not) have, however, was complete separation of the powers, which differs in concept from the French constitution. In truth, because the English legal institutions had developed organically, Montesquieu’s description (based on Bolingbroke’s) was inaccurate, the three branches of England’s government did not have strictly separated functions. There were a number of features in the English system that included back-and-forth limitations posed by one branch against the other two, and though certainly the focus and nature of the power had been separated into the three branches over time, for example Parliament for a long time maintained a judicial function. The graph in the next section shows how the U.S. Constitution set up a system of checks and balances so that no one branch can dominate the others, and each can protect itself from the other two.

Horizontal Checks and Balances as Rock, Paper, Scissors:



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In *Federalist 51*, Madison describes horizontal checks and balances as a way of giving each of the three branches the power to protect itself from the other two as well as a way to police and prevent corruption in the other two branches. He posits that in order for this to be the case, each branch must 1) be financially independent of the others, must 2) be given the means and motives to resist encroachments by the others, and 3) personal ambition must be made to counteract personal ambition. An easy way to think of this is to compare it to the game, Rock, Paper, Scissors, because no branch has the final word on anything, and each can challenge the other two.

As demonstrated in the graph from the BBC above, the legislature, the strongest branch, has financial independence because it has the power of the purse. To deter corruption, its members' salaries are set by law, and they may not get additional pay from another branch. It has the means and motives to resist encroachments because of its financial power, its taxing power, and the fact that it can override a Presidential veto. The split into two houses and complicated system required to pass new bills was intended to ensure that legislation would be the result of consensus among Senators and Representatives, thereby hopefully reducing the amount of 'bad' legislation passed. Thus, gridlock was intended to be a good thing in Congress. Its powers are limited to those that are "enumerated" in Article 1, §8. In terms of ambition countering ambition, Congress has the power to impeach the president as well as confirm or impeach federal judges.

The president's financial independence stems from the fact that his salary is set by law and cannot be either increased nor diminished during his Presidency, and like members of Congress, while serving, he cannot have any other pay. His powers are also limited to a list. The means and motives to resist the other two branches include his power to appoint judges, his power to conclude treaties (both with Congress's approval), his power to veto legislation, and his power to pardon. In terms of ambition countering ambition, he can only be impeached on conviction of treason or for high crimes and misdemeanors – this is a very high standard under American law, and impeachment cannot be brought not simply because the other party does not like the President or the President's

ideas.

The third branch, the judiciary, was believed to be the weakest branch (though that has since proven to not be the case). It is limited to hearing cases and controversies, meaning that it cannot hear anything that is not in dispute. Moreover, it can only hear a few kinds of cases. The Supreme Court judges' (and all other federal judges') salaries are set by law and cannot be diminished during their (lifetime) appointment. The fact that they are appointed for life means that they can resist pressure to decide a case one way or another brought by either of the other two branches, and their power against the other two branches is increased by judicial review, which was implied by the Constitution but not adopted until *Marbury v. Madison* in 1803. In terms of ambition countering ambition, the lifetime appointment avoids the pressure to conform that an elected position brings, hopefully lessening political influence.

Other Checks and Balances – the Jury and Judicial Review

Other checks and balances that are part of the Constitution include the jury system (protected in the Constitution in both criminal and civil cases) and judicial review, which has spread in some form around the world. In terms of criminal cases, “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.”⁶⁵ The Seventh Amendment (one of the 10 included in the Bill of Rights) provides that “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” These provisions, plus the Grand Jury used in deciding whether or not there is evidence for a criminal trial, give the ordinary public extraordinary power to check both the government and big business. A great deal has been written both for and against the jury system, and there is not much time to explore that here. In short, however, while jury trials are now very rare because they are so costly, they remain an important part of the U.S. legal system. As Alexis de Tocqueville said:

The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. [...] It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge toward society; and the part which they take in the Government.⁶⁶

Contrary to those who believe that ordinary people are incapable of understanding law, jury members do not need an understanding of law. Applicable law is explained to them in the Jury Instructions given to them before they retire to deliberate, and they can ask questions if they don't understand the Instructions (though admittedly drafting instructions that are understandable, accurate to the law, and impartial is difficult). Their job is merely to determine the facts – which side is telling the truth, using their innate sense of justice. With regard to a criminal trial, the jury's job is to determine whether the prosecution has proven that the accused committed the crime “beyond a reasonable doubt.” In a civil trial, they determine whether it was proven that the defendant “more probably than not” did what the plaintiff accused her of. A jury verdict is highly respected and very rarely overturned on appeal, because it represents the opinions of twelve disinterested people rather than only one judge – or even three judges.

In terms of being a check on the power of the prosecution or big government, the jury's common,

ordinary sense of life and justice in the United States has traditionally ‘kept it real.’⁶⁷ Given the way both federal and states attorney generals offices works, prosecutors have an incentive to get convictions, full discretion whether or not to prosecute, and have been known to be overzealous in pursuing defendants. The Grand Jury can short-circuit some of those attempts, while a trial jury can take a closer look and do the same by acquitting the accused. On very rare occasions, a trial jury has been known to refuse to find an accused guilty even where the evidence looks overwhelming to outsiders. The O.J. Simpson case may have been one such case. The jury may have decided that whether or not O.J. had murdered his ex-wife and her friend, the racism in the Los Angeles police department that they witnessed in court was unacceptable. Despite the strong DNA evidence produced by the prosecution, they acquitted Mr. Simpson. The resulting press sent a *very* strong message to the entire United States about the need to address racism in police departments.

A similar message was received by the multinational corporation, McDonalds, whose super-heated coffee had burned an older female plaintiff, Stella Liebeck. Originally, she asked only for reimbursement for her medical costs, but McDonalds refused to settle the suit before trial. The jury, angered by the callous and imperious way McDonalds had treated the plaintiff as compared to 700 others their coffee had burned, awarded her two days’ worth of national coffee profits as punitive damages, in addition to the costs of her medical treatment. The punitive damages award was \$2.86 million, subsequently reduced to \$640,000 by the parties’ agreement.⁶⁸ While the perception is that American juries often award overly-large and undeserved amounts of money to plaintiffs, the truth is that punitive damages awards are rare and capped at less than 10x actual damages, and tort reform is otherwise limiting awards where there has been a consensus that they are too high. (The author’s opinion is that the problem is not with the jury system, but with a public perception that a jury award should be something akin to winning a lottery.)

Those few members of the public who have an opportunity to serve on a jury still find it a very rewarding experience because they feel much more part of the legal system than merely by voting, and it enables them to use their understanding, intuition about human nature, and sense of justice to make an important decision.⁶⁹ American judges also support it, finding that given modern technology, there are almost no instances when a smart lawyer cannot help a jury understand a complicated factual situation and that in their experience, the jury usually reaches the right decision.⁷⁰

Judicial Review

The Constitution does not include a provision whereby the Supreme Court can review and invalidate an unconstitutional law, despite the fact that James Madison had argued for one during the Convention.⁷¹ In an incredible twist of fate, Madison’s later act (as Secretary of State under President Jefferson) of refusing to deliver a paper to a political rival was confirmed in *Marbury v. Madison*, wherein Chief Justice John Marshall founded the doctrine of judicial review.⁷²

The case was the result of a fierce political battle between out-going second President John Adams (of the Federalist Party) and in-coming President Thomas Jefferson (of the Democratic Republican Party).⁷³ Under President Washington, Congress added federal district and circuit courts, and during his presidency, Adams appointed John Marshall as Chief Justice of the Supreme court. After having lost the Presidency, but before Jefferson was sworn in, Adams was looking for ways to it

harder for Jefferson to implement his agenda, and so lame-duck Adams and his Federalist-controlled Congress passed another Judiciary Act creating more federal courts as well as justice-of-the-peace positions.⁷⁴ The 1801 act also gave the president the authority to appoint Federal judges and justices of the peace to those positions. In the last nineteen days of his administration, Adams appointed 58 judges. One of them was William Marbury, an ardent Federalist. They were later called “Midnight Judges” because Adams was appointing up to the very last minute, so much so that Marbury’s appointment had not been delivered to him by the time Jefferson was sworn in. Jefferson then ordered his new Secretary of State, James Madison, not to deliver Marbury’s appointment, and Marbury sued.⁷⁵ Chief Justice John Marshall faced threats of impeachment by the now Democratic Congress should the Supreme Court decide the “wrong” way.

The Court denied Marbury’s petition, holding that the Judiciary Act of 1789 was unconstitutional to the extent that it had expanded the Supreme Court’s jurisdiction to include original jurisdiction over writs of mandamus, the method by which Marbury had brought his lawsuit to court.⁷⁶ Consequently, Marshall held that though Marbury was due his appointment, the Supreme Court had no power to order it to be given to him.⁷⁷ Thus, in a masterful piece of political and legal maneuvering, Marshall both avoided impeachment and founded Judicial Review. *Marbury v. Madison* held that the Supreme Court (and any other court in the United States) is obligated to make sure that statutes passed by Congress that deal with judicial powers are within the limits set by the Constitution. The language used in *Marbury*, however, has since been interpreted as a broad power to determine the constitutionality of any statute, if it is in dispute. Nevertheless, judicial review is used very rarely in the United States. The average number of laws nullified per year is less than two.

Stability and Strength – a compound republic, federalism, and factions

The United States Constitution created a republic in that representatives are elected both directly and indirectly to represent the public. It is a compound republic because governmental powers are allocated between two levels of sovereign or near-sovereign entities: the federal government and the state governments.⁷⁸ In *Federalist 45*, Madison argued that the federal government would not present a danger to the states. A strong federal government is needed to protect against both foreign danger as well as protect against wars among the different states. He admits that in prior federal governments, the members lost power to the general government and that this is a concern. However, the federal government will have little if any control over state governments because it has no power to appoint state government officials, and state officials will far outnumber federal officials. States will still collect their own taxes and are likely to be responsible for collecting federal taxes as well – and even if that is not the case, federal tax collectors will be outnumbered by state officials. Moreover, the federal government is likely to be important only in times of war and danger, it is the states that will govern people’s everyday lives. While Madison was right that a strong federal government has since proven that it was needed, he has been proven wrong in that the federal government has, indeed, gained tremendous power at the expense of the states, as shall be discussed later.

Contrary to Rousseau who feared factions and therefore thought that only a ‘general will’ could lead to stability in a democracy, Madison posited that they could be used to strengthen a large republic as well as control the danger presented by the tyranny of the majority in a popular government. Building on an essay by Hume, in *Federalist 10*, Madison recognizes that democracies

(i.e. where citizens always vote by direct elections) tend to be unstable and torn apart by rival factions – i.e. by a group, whether a majority or minority of the whole, who are united by some common passion or interest adverse to other citizens' rights or the interests of the community, and he recognizes this as an existing problem among the states. Generally, in instances where a faction constitutes a majority, it will make decisions that are counter to the interests and even the rights of the minority. Madison finds only two ways of preventing the harms that such groups can cause: either remove the causes of faction or control its effects. The former, removing the causes of faction, either destroys liberty or is completely unrealistic. One cannot use a magic wand to give every citizen the same opinions, passions, or interests, and forcing them to agree destroys liberty. For example, a few years after the U.S. Constitution was put in place, Robespierre, misinterpreting Rousseau's General Will, insisted that any French citizen that did not agree with the Jacobins was committing treason and should meet up with *Mme La Guillotine*. Thus, since removing the causes of factions is unrealistic and against liberty, Madison turned to the alternative – controlling them.

Madison finds that people are diverse and naturally have different and unequal abilities to earn money, different values, and different morals, so government's most important purpose is to protect this diversity. We have different opinions on religion, government, different moral values, and we like different leaders. Diverse passions divide us into groups, and political parties not merely dislike each other, but even attempt to oppress each other more than they try to cooperate. The most common source of faction is the unequal distribution of property, but religious differences can also lead to friction, as well as political and ideological differences. Regulating the relationships between the haves and have-nots necessarily brings faction into the ordinary business of government. When people become part of government, they bring those factions and opinions with them, and are likely to try to develop rules consistent with their biases. The most powerful faction, in such a case, will win in a democracy –the stronger faction benefits to the detriment of the weaker one. This is often termed the 'tyranny of the majority.'

Saying that enlightened statesmen can balance these clashing interests and develop policies that benefit all is unreasonable because we know that politicians are not always enlightened statesmen (to say the least!). So, if an evil faction controls less than a majority of either the vote or the legislature, its views will be defeated. However, if it controls the majority, means must be found to encourage or force it to concede its passions to the rights and interests of the larger group. In a pure democracy, i.e. one governed by direct election, there is no way to control the potential evils of a majority faction, which was why democracies have always had a tendency to disrespect property rights, a tendency to elect unsuitable or even evil leaders who promise utopia or who promise whatever it is the mob wants or thinks it wants, and neither morality nor religion can stop a mob. A republic, on the other hand is different because a small number of citizens are elected by the rest to represent them, and its rule can be extended over a much larger group of citizens. One can hope that the elected representatives will be well-chosen, but that is not necessarily the case.

Madison argues that the larger the number of people, the more diverse they are, and the larger the territory, the more factions there are going to be – and the less likely they are going to either elect consistently bad men or be able to combine in a dangerous manner. The smaller a society, the fewer the factions that compose it, and the more likely they are to combine to oppress a minority. Thus, a large republic is likely to be more stable because the mere number of factions will make it much more difficult for any one faction to gain enough power to disrupt the entire society. One can analogize this easily to a game the author used to play with other parents and their small

children. Each parent grabs a different section on the side of a large, circular piece of parachute cloth and pulls it taut against the other parents who are doing the same. The more parents there are, the more taut and stable the cloth is so that each child can be bounced safely in turn in the middle of the cloth. Similarly, the larger the number of factions pulling in different directions, the more stable the government.

Madison felt that the compound structure of the United States would enhance this even further because while a bad faction may get control of one state, it is unlikely going to be able to control others, and the national government may then be called in to defeat it. The dangers he lists include a rage for paper money, for an abolition of debts (e.g. Shay's Rebellion), for an equal division of property (same). These, or any other "wicked projects" are therefore less likely to infect the entire Union. He could not have been thinking of the subsequent Civil War against slavery or the civil rights movement that eventually eliminated legally-endorsed segregation, but they are apt examples. Madison concludes that the Constitution presents "a republican remedy for the diseases most incident to republican government." While the United States certainly does not have a perfect record of protecting minority interests, it has proven itself both stable and able to take measures to correct such wrongs.

The Electoral College—another control over factions

The Electoral College is the method used in the United States to elect the president and vice president every four years.⁷⁹ It is an 'indirect' method of election, meaning that the individual citizens' accumulated vote does not directly determine who will be president – and thus it is one of the determinants that makes the United States a republic, rather than a direct democracy. The college currently consists of a total of 538 electors. Each state has the same number of electors as it has the sum of its senators and representatives, and each state determines the manner by which those electors are chosen under its own laws, as set forth in Article II, section 1, clause 2 of the Constitution. At this time, the Electoral College consists of 100 senators and 435 representatives, plus three electors from the District of Columbia for a total of 538.

Each state runs its own system of collecting popular votes for federal President and Vice President according to its own state laws in the first week of November. Although not originally planned this way, almost all states have adopted a 'winner takes all' policy in choosing electors: representatives of the winning candidates' party are chosen as electors for that state, regardless of how marginal the candidate's popular win was, but for Main and Nebraska. Because two presidents between 2000 and 2016 have won elections by electoral vote even though they lost the popular vote by a narrow margin (George W. Bush and Donald Trump), there is an on-going debate concerning whether the Electoral College should be maintained or whether the President should be elected by a direct popular vote. Opponents argue that the method is 'undemocratic,' that it forces candidates to focus on some 'swing' states more than others, and that it gives less populated states proportionately more power than heavily-populated ones.⁸⁰ Supporters argue that it requires the winning candidate to appeal to a broad spectrum of the country, not just the heavily-populated urban coasts; that it gives voice to less populated, agricultural states; that the states historically designated as 'swing' change from election to election, and that the Electoral College preserves the two-party system by forcing candidates to adjust their campaign promises to secure the approval of a broad consensus of voters.⁸¹ In other words, that it tempers two factions – in this case the interests of the large urban areas and the interests of smaller cities and rural areas.

The Bill of Rights

In addition to the concern about the balance of power among the people, the states, and the federal government, Anti-Federalists were concerned about the lack of a bill of rights. The original document did not have a bill of rights because it was not thought to be necessary. Towards the end of the Convention, Roger Sherman argued, when George Mason expressed his wish for such a list, that as there was nothing in the proposed Constitution that ran counter to the bills of rights included in many state constitutions, there was no need for duplication in the federal government, whose powers, after all, were limited. Hamilton agreed in *Federalist 84*, arguing that the Constitution contains three very powerful protections drawn from the common law and statute law of Great Britain: the protections of the right of *habeas corpus*, and the prohibitions on both *ex post facto* laws and titles of nobility. He argued that these are more likely to secure liberty than any provision in the New York Constitution, and reminds readers that the British documents, like the American Constitution, were created to limit governmental power. He argues that a bill of rights is not needed in a government whose power originates in the people themselves and may even be dangerous as they would contain exceptions to powers not even granted to government, thus giving the government pretext to expand its power at the expense of the people's liberty.

Madison further explained the potential danger of a bill of rights: First, he believed that 'mere parchment' rights would be meaningless should a popular government turn tyrannical, but he also believed that a bill of rights could be counterproductive because they would be unduly narrow as drafted, and the rights themselves could be eviscerated through the process of interpretation.⁸² The Constitution itself gave only limited power to the federal government, and anything beyond that which intruded on state or individual rights could be challenged in court, as was common law tradition.

Madison changed his mind when it became apparent that the Constitution would not be ratified by the requisite nine states without a bill of rights, which he drafted, and which led to the document's ratification. In keeping with his concern about the narrowing of rights, he included the following as the Ninth and Tenth Amendments: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." And "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Sadly, as a practical matter, a number of legal scholars have argued in effect that Madison's initial fears were justified, and that over time, litigation of the meanings of those abstract terms have led to expansion of governmental power and limitations on liberty. The rights the English came to regard as inherently theirs developed out of judicial decisions. The English constitutional documents, including the Magna Carta, the 1628 Petition of Right, and the 1689 Bill of Rights, merely set forth rights the English previously had by custom, and were in fact intended to limit the government's power, not the people's liberty. In a variety of cases, the reduction to a list of abstract concepts has seemingly led to increasingly narrower interpretations of those rights.⁸³

7. Slavery, the Constitution, and the Civil War

As the previous discussion showed, the Framers worked very hard to develop a Constitution that would establish the rule of law in the United States: Law and order, limited government, and equal

application of the laws. The Declaration of Independence states that “**all men are created equal**” and endowed with “certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.” The Constitution was established “in order to . . . secure the Blessings of Liberty to ourselves and our Posterity.” The Fifth Amendment provides that “**no person** . . . [shall be] deprived of life, liberty, or property, without due process of law. . . .” But it was not written without long negotiation over some very difficult compromises. Benjamin Franklin encouraged the delegates to sign and support the document “if you feel that this is the best we can do *now*.”⁸⁴

A number of the most prominent founders spoke against slavery. Thomas Jefferson, during his first term in the Virginia legislature, proposed legislation to emancipate slaves. John Adams termed slavery a “foul contagion in the human character.” Washington stated “there is not a man living who wishes more sincerely than I do, to see a plan adopted for the abolition of it.” Alexander Hamilton proposed that any slave who enlisted in the army should be given his freedom with his musket, Washington supported it, and it was put in place in South Carolina and Georgia with the approval of the Continental Congress. Benjamin Franklin termed it “an atrocious debasement of human nature,” and James Madison called it “the most oppressive dominion ever exercised by man over man.” John Jay said “The honour of the states, as well as justice and humanity, in my opinion, loudly call upon them to emancipate these unhappy people. To contend for our own liberty, and to deny that blessing to others, involves an inconsistency not to be excused.”

How then, could the drafters of the Constitution possibly justify slavery?

The reasons why slavery was not abolished by the adoption of the Constitution have been carefully studied. To begin with, in approaching another time or another culture, one must consider things in context. Slavery was not initiated by the United States, it was inherited. At the time, slavery was part of the normal fabric of life on earth as most humans knew it: At the beginning of the nineteenth century, it has been estimated that three-quarters of all living people were enslaved. The first European country to ban it was Denmark-Norway in 1802. England abolished it in 1833.

When the delegates convened in Philadelphia in 1787, they had a choice between two evils: negotiating a compromise with southern slave states or giving up hope of establishing a strong legal order predicated on the rule of law. As Madison noted, “The real difference of interests lay not between large and small states but between the Northern and Southern states. The Institution of slavery and its consequences formed a line of discrimination.” Even at that time, there was a cultural difference between north and south. Several of the northern states either banned the importation of slavery or banned slavery itself by 1804: Rhode Island, Pennsylvania, New Hampshire, New York, Connecticut, New Jersey, and Massachusetts. Delaware and Virginia had prohibited the slave trade and removed restraints on emancipation in 1778.

At the time of the Convention, twenty-five of the fifty-five delegates owned slaves,⁸⁵ even if some of them found it morally repugnant. While there were some slaves in New England (3,700 of a total population of over 900,000) and the Mid-Atlantic states (36,000, of whom 21,000 were in New York, less than 9,000 in Delaware), the vast majority were in the south.⁸⁶ Maryland and Virginia had more than 400,000 slaves, constituting almost forty percent of their population. North Carolina had a little more than 100,000 slaves, a bit more than twenty-five percent of their total population, South Carolina had 100,000, and a total population of 240,000. The population of Georgia was approximately 75,000, of whom 30,000 were slaves.

When the Southern colonies took steps toward independence, the difference between their declared values of liberty and equality and their reality became more apparent. Every Southern state except Georgia enacted some sort of prohibition or inhibition on the continued importation of slaves from Africa. Nevertheless, some, like Patrick Henry, might recognized the evil, but still not emancipate their slaves because they did not want to deal with the ‘inconvenience’ of having to do things for themselves.⁸⁷ Moreover, the South was dependent economically on slavery, both in terms of the ‘property’ value of the slaves themselves and on their labor. Virginia, Maryland, and North Carolina relied on slave labor to produce tobacco, though that was changing in 1787 – a labor-intensive crop, subject to market extremes, it also depleted the soil and so was not in their economic self-interest. Thus, some in those three states were imagining a future with fewer slaves and more diverse crops, such as wheat and livestock which were not as labor-intensive. Only South Carolina and Georgia had a strong economic incentive to promote the expansion of slavery because their two crops, indigo and rice, were both labor-intensive.⁸⁸

Slavery became a major issue during the Convention when it came to the calculation of the number of delegates each state could send to Congress. The Senate was easy – each state, regardless of its size, would have two Senators. The problem was the House of Representatives, where the number of Representatives depends on the population of the state. Naturally, the Southern states argued that their slaves should be counted so that they could have more Representatives, and just as naturally, the Northern states argued that they should not be counted. (It made for some pretty interesting and ironic discussion.) Eventually, they agreed that 3/5 of the entire population of slaves in a state could be included in determining the number of representatives and the amount of taxes a state owed.⁸⁹ Without a compromise on the issue, the Constitution would not have been written.

Two other slavery-related compromises made it into the Constitution. One provision -- that the importation of slaves could be barred by 1808 --⁹⁰ was not to reach because each side thought that they would ultimately win as new states joined the Union. (By 1804, there were 8 slave states and 8 free states, but nevertheless, the prohibition was passed by Congress in 1807). The fugitive slave clause was slipped in by the South towards the end of the Convention’s negotiations, requiring escaped slaves to be returned to their owners,⁹¹ but because of a general understanding that enforcement was to be left to the states, it was neither very controversial or much relied on until the 1840s, by which time the abolitionist movement had gained momentum, as had slaveholders’ demands that escaped slaves be returned.⁹² Nevertheless, in studying the history of the drafting, even the brilliant black reformer, orator, abolitionist, and writer Frederick Douglass, a former slave himself, found that the Constitution was in no way a racist document, but in fact supports individual liberty for all.⁹³

8. Cultural Change, Grassroots-Motivation, the Civil Rights Movement, and the Rule of Law

Over the next 60 years as the country expanded, the cultural and economic gulf between North and South broadened, ⁹⁴eventually resulting in the civil war (1861-1865), which was the most devastating and bloodiest war the United States has been involved in. The total number who died from either war wounds or war-related illnesses was more than that from all other American wars combined -- between 785,000 and 1,000,000 -- while the total population in 1860 was approximately 31 million. Furthermore, Lincoln’s assassination meant that the “Reconstruction”

he had intended became a time of further destruction in the South.

Former slaves were free, and ostensibly protected by three Amendments to the Constitution. As Frederick Douglas quipped: “A Man’s rights rest in 3 boxes. The ballot box, the jury box, and the cartridge box.” Southern soldiers lost their right to vote under the same three amendments. Widespread poverty remained, as many of the South’s cities were in ruins, its nascent industry and railways destroyed, its farms untended. The continuing anger of the now impoverished and disenfranchised white Southerners led to Jim Crow Laws, wide-spread lynching, and segregation in the South, which a thin-spread federal government was powerless to stop. Over the following decades, many African-Americans moved north for better opportunities. The South gradually recovered, but segregation remained until the 1950s and 1960s.

The grassroots Civil Rights movement, led by black luminaries as well as ordinary people of courage such as W.E.B. du Bois, Martin Luther King Jr., Rosa Parks, and Malcolm X brought national attention and increasing anger against segregation in the 1950s and 1960s, and following their lead, the Federal government stepped in. Beginning in the 1920s, a series of Supreme Court decisions interpreted the Fourteenth Amendment to mean that most of the Bill of Rights was enforceable against state governments. Then in 1954, the Supreme Court, in *Brown v. Board of Education*, held that racial segregation in Kansas’ public schools was unconstitutional because it violated the equal protection clause of the Fourteenth Amendment.⁹⁵

A judicial decision on its own, however, cannot have any effect without executive enforcement, and in 1957, President Eisenhower sent 1000 U.S. Army paratroopers along with the Arkansas National Guard to Little Rock to restore order and allow nine African American students to attend its Central High School. Congress followed suit by passing the 1960 Civil Rights Act which provided Federal voting supervision in states that were making it difficult or impossible for African Americans to vote, and the 1964 Civil Rights Act directly outlawed discrimination on the basis of race. The Supreme Court continued to be active, holding that discrimination on the basis of race (by hotels and restaurants) violated the commerce clause.⁹⁶

While the Civil Rights Movement certainly demonstrates one of the ways in which the power of the Federal Government has increased tremendously, as per the expectations of the Anti-Federalists, it also proves that Madison and Hamilton were right in predicting that the compound structure could be used against those factions that were intruding on the rights of a minority to help preserve the rule of law. While slavery and its attendant racism have left what seems to be a permanent mark on the United States -- African Americans experience a high illegitimacy rate, poor education, and a high crime rate -- on the other hand, however, black Americans’ joblessness numbers are (as of this writing) lower than they have ever been, and African Americans are now fully part of the United States fabric, contributing immensely to its richness both at home and abroad: from world-famous musicians, dancers, and sports figures, to scientists, doctors, professors, supreme court justices, and a president.

Moreover, the Civil Rights Movement and even the current controversy over the continuing problems faced by black Americans show that the American public is still passionately concerned about realizing the equal-application component of the rule of law as promised by the Declaration of Independence, though (as shall be seen), a number of legal scholars in the United States now view this, and the rule of law, quite differently – a topic to be discussed in the next chapter.

9. Conclusion

The Founders viewed the U.S. Constitution as an experiment in government and given the prominence of the United States and the stability of its government, that experiment certainly has been successful. That does not mean, however, that the government as realized is as the Founders visualized it, nor does it mean that the United States is a perfect society. As per Madison, men are not angels. As the Anti-Federalists feared, the Federal Government has grown much more powerful than Madison and Hamilton envisioned, and the states have lost some of their sovereignty as a result. Some of this aggrandizement has been the result of national and international events and the executive response to them. For example, nothing in the Constitution authorizes a president to purchase land on behalf of the country, but Thomas Jefferson did exactly that in 1803 in purchasing the Louisiana Territory from Napoleon. In so doing, he doubled the size of the United States. The Civil War closed the debate on whether states could secede from the Union, and also enabled passage of the 13th-15th Amendments, expanding the reach of much of the Bill of Rights and limiting states' powers. The 16th Amendment in 1913 created a federal income tax, thus granting the Federal Government a new source of funds far beyond the tariffs it had previously relied on and administered by the Internal Revenue Service, now one of the most powerful and feared federal agencies. The Great Depression and the New Deal resulted in the creation of now-massive federal agencies and entitlement programs including the Securities and Exchange Acts of 1933-1934, and the Social Security Act.

Other aggrandizements of federal power have come through Supreme Court interpretations of the Necessary and Proper Clause,⁹⁷ the Commerce Clause,⁹⁸ and the General Welfare clause.⁹⁹ And while the Supreme Court's interpretations of the Bill of Rights has expanded the meaning of some individual rights,¹⁰⁰ it has (in keeping with the Anti-federalists fears) narrowed others,¹⁰¹ possibly to mere parchment. The United States added a new dimension to the Rule of Law concept of limited government, but as will be seen in later chapters, those limitations have been tested and affected not only by the growth of governmental powers, but also by interaction with ideas from the continental *Rechtsstaat* and the economic culture in which it has developed.

¹ Antonio Padoa-Schioppa, *A History of Law in Europe from the Early Middle Ages to the Twentieth Century* (trans. Cambridge 2017)p 496 (But P-S did not fully understand that English right to liberty pre-existed the 1689 Bill of Rights)

² Nicholas Capaldi & Gordon Lloyd, *Liberty and Equality in Political Economy: From Locke versus Rousseau to the Present* (Edward Elgar Publishing 2016).

³ Walter A. McDougall, *Freedom Just Around the Corner: A New American History 1585-1828* 42-44 (2004).

⁴ McDougall at

⁵ McDougall at 63-65

⁶ McDougall at 41. See also id. at 39, Some Indian tribes were friendly to the colonists, some were not. The primary reason the Native Americans did not initially overwhelm the settlements was that tragically, ninety percent of New England's Native Americans had been wiped out before the colonists arrived by European infectious diseases such as influenza, chicken pox, smallpox, measles, and plague. Between 50 and 75 percent of the Great Lakes tribes died in the 1630s and 1640s, and 90 percent of the tribes around Chesapeake Bay disappeared by 1670. Germs went both

ways across the Atlantic, syphilis probably originated in the Western Hemisphere and was brought to Europe by Columbus's crew. M. Tampa, I Sarbu, SR Georgescu, A Brief History of Syphilis, *Journal of Medicine and Life*, vol 7(1): 4-10, 2014 Mar 15 Published online Mar 25, 2014

⁷ McDougall at 46.

⁸ McDougall at 51

⁹ McDougall at 60

¹⁰ McDougall at 91-92. In 1622, the Powhatan Confederacy attacked Virginian towns, and in 1637, a group of English, Mohegans, and Narragansetts attacked the Pequots in Connecticut. The bloodiest war, however, was that with the Wampanoags of New England. Wampanoags were initially tolerant of the settlers, but then 60,000 of them settled in New England. The last straw was apparently in 1671 when the white colonies tried to force Indians to surrender their guns and open new land to settlement virtually on demand. The Wampanoags started to terrorize various towns first in Massachusetts and then all over New England, leading to a highly destructive, bloody war: 600 whites were killed, 8,000 cattle, 12,000 buildings, and 4,000 Indians (40% of the population). Other Indians fled.

¹¹ McDougall at 69-70

¹² McDougall at 73-76

¹³ McDougall at 90

¹⁴ McDougall at 93

¹⁵ Bradley & Ewing at 28, 54.

¹⁶ McDougal at 117.

¹⁷ Anne was succeeded by the House of Hanover: George I (1714-1727), George II (1727-1760), George III (1760-1820).

¹⁸ McDougall at 114.

¹⁹ McDougall at 118.

²⁰ McDougal at 107

²¹ Jack M. Sosin, *Agents and Merchants: British Colonial Policy and the Origins of the American Revolution 1763-1775* (Nebraska 1965) p 37

²² Sosin at 51-55

²³ Quartering Act (Great Britain 1765), Encyclopaedia Britannica at www.britannica.com.

²⁴ Sosin at 48.

²⁵ McDougall at 217. The Sons of Liberty was a secret group of political dissidents formed originally in Boston Massachusetts to protest the passage of the 1765 Stamp Act and spread to other states.

²⁶ Sosin at 79-81

²⁷ Sosin at 99

²⁸ Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* p57 (1985)

²⁹ Robert Wright, "Why the American Revolution was Really an Economic Revolution," learnliberty.org (July 2016), available at <https://www.learnliberty.org/blog/why-the-american-revolution-was-really-an-economic-revolution/>

³⁰ Imogene Brown, *American Aristides* 144 (Fairleigh Dickenson U. Press 1981).

³¹ Martin Diamond, Lecture, "The Revolution of Sober Expectations," (October 24, 1973)(American Enterprise Institute for Public Policy Research), available at <https://contemporarythinkers.org/martin-diamond/book/the-revolution-of-sober-expectations/>

³² McDonald at 57.

³³ McDonald at 59, quoting Blackstone, *Commentaries*, 1:161-162.

³⁴ McDonald at 64.

³⁵ McDonald at 66.

³⁶ McDonald at 71.

³⁷ McDonald at 71-72

³⁸ Emmie Martin, "7 Billionaires who won't leave their fortunes to their kids," *CNBC* Make it (6 July 2017), available at

³⁹ See Eugene D. Genovese, *The Political Economy of Slavery: Studies in the Economy and Society of the Slave South* 48 (Negative attitude toward manual labor); 30 (rejection of the crass, vulgar, inhumane elements of capitalist society) (Wesleyan U. Press 1989)

⁴⁰ *Id.* at 31.

⁴¹ McDonald at 71-74.

⁴² Richard Beeman, *Plain, Honest Men: The Making of the American Constitution* (Random House 2009) p 9.

⁴³ Beeman at 10-11.

⁴⁴ Beeman at 12-13.

⁴⁵ Beeman at 16-18.

⁴⁶ Nadia E. Nedzel, *The Rule of Law: Its History and Meaning in Common Law, Civil Law, and Latin American Judicial Systems*, 10 *Richmond J. Global L. & Bus.* 57, 69-70 (2010) (citing Beeman and Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional convention* (1986).

⁴⁷ Article I §8.

⁴⁸ Article I §§8 & 9

⁴⁹ Article II

⁵⁰ Article III

⁵¹ Article V

⁵² Article VII.

⁵³ Article VI, cl 2Id

⁵⁴ Article IV Section 1

⁵⁵ Article III §2,

⁵⁶ Article I §8

⁵⁷ Article Article I § 8, clause 3

⁵⁸ Article I §8

⁵⁹ *Erie v. Pennsylvania*

⁶⁰ Beeman at 372-

⁶¹ *Anti-Federalist Papers: Brutus #5*

⁶² *Anti-Federalist Papers: Brutus #1*. Constitution.org.

⁶³ Beeman at 406

⁶⁴ Montesquieu, *Spirit of the Laws* Book XI Chapter 6 pp156-157 (trans Anne M Cohler et al)(Cambridge U. Press 1989)

⁶⁵ Article 3 §2.

⁶⁶ Alexis de Tocqueville, *Democracy in America*

⁶⁷ See Note, *Toward Principles of Jury Equity*, 83 *Yale L. J.* 1023 (1974); Norman J. Finkel, *But it's Not Fair*, 6 *Psych., Public Policy, & Law* 898 (2000).

⁶⁸ See *The Truth About the McDonald's Coffee Lawsuit*, available at <https://www.youtube.com/watch?v=Q9DXSCpcz9E> for an amusing recounting of the story.

⁶⁹ Hon. Mitchell Kaplan, *Voice of the Judiciary*, 60 *Summer Boston Bar J.* 1 (2016); R. James Archibald, *A View from the Bench*, 46 *Sept. Advocate (Idaho)* 12 (2003); Justice Mark Gibbons, *A Justice on the Jury*, 23 *Feb. Nev. Law* 26 (2016).

⁷⁰ See Nadia E. Nedzel, *Interview with Judge Carl E. Stewart of the U.S. Fifth Circuit Court of Appeals*, 232 *AROUND THE BAR* (Baton Rouge Louisiana Bar Association, February 2009); James S. Schultz, *The Expert Witness & Jury Comprehension: An Expert's Perspective*, 7 *Cornell J. of L. & Public Policy* 107 (1997); but see Peter Meijes Tiersma, *Dictionaries & Death: Do capital Jurors Understand Mitigation*, 1995 *Utah L. Rev* 1 (Courts have been wrestling with simplifying jury instructions for a while, it is a difficult process).

⁷¹ Beeman at 237.

⁷² *Marbury v. Madison*, 5 U.S. (Cranch 1) 137 (1803).

⁷³ John F. Preis, *Constitutional Enforcement by Proxy*, 995 *Va. L. Rev.* 1663, 1693-94 (2009); Major Kevin W. Landtroop, Book Review: [The Great Decision, 2009 Army Law. 53, 53 \(2009\)](#) (discussing the political maneuvering that led to the dispute). The material on judicial review is taken from Nadia E. Nedzel, *The Rule of Law, Its History and Meaning in Common Law, Civil Law, and Latin American Judicial Systems*, 10 *Richmond J. Global L. & Business* 57, 75-77 (2010).

⁷⁴ See James Étienne Viator, *Marbury & History: What Do We Really Know About What Really Happened?*, 37 *Revue Juridique Themis* 329, 338 (2003)

⁷⁵ See John F. Preis, *Constitutional Enforcement by Proxy*, 995 *Va. L. Rev.* 1663, 1693 (2009)

⁷⁶ Viator 338-339

⁷⁷ *Marbury*, 5 U.S. (Cranch 1) 137

⁷⁸ Madison, *Federalist* 39.

⁷⁹ *What is the Electoral College?*, available at <https://www.archives.gov/federal-register/electoral-college/about.html>.

⁸⁰ Rachel Tropp, *The Case Against the Electoral College*, 2019 *Harvard Pol. Rev.*, available at:

<http://harvardpolitics.com/united-states/the-case-against-the-electoral-college/>

⁸¹ Jarrett Stepman, *The Electoral College (Why we Use It and Why It Matters)* (Nov 8, 2016), available at: <https://nationalinterest.org/blog/the-buzz/the-electoral-college-why-we-use-it-why-it-matters-18331>; “Do You Understand the Electoral College?” YouTube (May 18, 2015)(Prager University), available at: <https://www.youtube.com/watch?v=V6s7jB6-GoU>

⁸² Robert L. Jones, “Lessons from a Lost Constitution: The Council of Revision, The Bill of Rights, and the Role of the Judiciary in Democratic Governance,” 27 J. L. & Pol. 459, 525 (2012); Jack N. Rakove, *The Madisonian Theory of Rights*, 31 Wm & Mary L. Rev. 245, 264 (1990).

⁸³ See e.g. Carney R. Shegerian, “A Sign of the Times: The United States Supreme Court Effectively Abolishes the Narrowly Tailored Requirement,” 25 Loyola Los Angeles L. Rev. 453 (1992)(enlarging the state’s ability to curb free speech, the First Amendment); Scott E. Sondby, “A Return to Fourth Amendment Basics: Undoing the Mischief of *Comara* and *Terry*,” 72 Minn. L. Rev 283 (1988); Nadia E. Nedzel and Walter Block, “Eminent Domain: A Legal & Economic Critique,” 7 U. Maryland L. J. Race, Religion, Gender, Class 140 (2007)(Criticizing *Kelo* and Berman’s Evisceration of the Takings Clause of the Fifth Amendment); Paul R. Clevenger, Note, “Narrowing the Scope of the Speedy Trial Right: *United States v. MacDonald*,” 36 S.W. L. J. 1213 (1983).

⁸⁴ Beeman at

⁸⁵ Beeman at 309

⁸⁶ Beeman at 310-311.

⁸⁷ Beeman at 312

⁸⁸ Beeman at 315.

⁸⁹ Art. I, §2.

⁹⁰ Art I § 9

⁹¹ Art. IV §2

⁹² H. Robert Baker, *The Fugitive Slave Clause & the Antebellum Constitution*, 30 Law & History Review 1133, 1137 (2012).

⁹³ But see the following discussing whether or not the Constitution was neutral on slavery: Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government’s Relations to Slavery* (New York: Oxford University Press, 2001); William W. Freehling, “The Founding Fathers and Slavery,” *The American Historical Review* 11 (1972): 81-93; Earl M. Maltz, “Slavery, Federalism, and the Structure of the Constitution,” *The American Journal of Legal History* 36 (1992): 466-98; and Earl M. Maltz, “The Idea of the Proslavery Constitution,” *Journal of the Early Republic* 17 (1997): 37-59. More recent arguments have pointed to the use of slavery by political actors to buttress other political positions. See Matthew Mason, “Slavery and the Founding,” *History Compass* 4 (2006): 943-55. Earl M. Maltz makes the case for the Supreme Court’s accommodation of both sides on the subject of slavery

⁹⁴ See generally Eugene D. Genovese, *The Political Economy of Slavery: Studies in the Economy and Society of the Slave South* (2nd ed 1989)

⁹⁵ 346 U.S. 483 (1954).

⁹⁶ *Katzenbach v. McClung*, 379 U.S. 294 (1964)(Congress was within its Commerce Clause power in prohibiting racial discrimination in restaurants as this a burden on interstate commerce), *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)(Congress was within its Commerce Clause power in passing the Civil Rights Act of 1964, which prohibits discrimination in public accommodations).

⁹⁷ *McCulloch v. Maryland*, 17 U.S. 316 (1819)(a state cannot override federal acts, such as the creation of a federal bank, that are within the necessary and proper extension of Congress’s enumerated powers.

⁹⁸ *Gibbons v. Ogden*, 22 U.S. 1 (1894)(a state cannot grant privileges to exclude out-of-state companies from engaging in commerce that crosses state lines); *Katzenbach v. McClung*, 379 U.S. 294 (1964)(Congress was within its Commerce Clause power in prohibiting racial discrimination in restaurants as this a burden on interstate commerce), *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)(Congress was within its Commerce Clause power in passing the Civil Rights Act of 1964, which prohibits discrimination in public accommodations).

⁹⁹ *South Carolina v. Dole*, 483 U.S. 203 (1987)(Congress can make the raising of a state minimum drinking age to 21 a prerequisite for receiving federal funds for improving highways).

¹⁰⁰ See e.g. *Roe v. Wade*, 410 U.S. 113 (1973)(finding that the Fourteenth Amendment’s Due Process Clause provides a fundamental ‘right to privacy’ that protects a woman’s liberty to choose to abort a pregnancy); *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015)(similarly finding that the Fourteenth Amendment protects same-sex marriage). In both of these cases, the issues

¹⁰¹ See e.g. Carney R. Shegerian, “A Sign of the Times: The United States Supreme Court Effectively Abolishes the

Narrowly Tailored Requirement,” 25 Loyola Los Angeles L. Rev. 453 (1992)(enlarging the state’s ability to curb free speech, the First Amendment); Scott E. Sondby, “A Return to Fourth Amendment Basics: Undoing the Mischief of Comara and Terry,” 72 Minn. L. Rev 283 (1988); Nadia E. Nedzel and Walter Block, “Eminent Domain: A Legal & Economic Critique,” 7 U. Maryland L. J. Race, Religion, Gender, Class 140 (2007)(Criticizing Kelo and Berman’s Evisceration of the Takings Clause of the Fifth Amendment); Paul R. Clevenger, Note, “Narrowing the Scope of the Speedy Trial Right: United States v. MacDonald,” 36 S.W. L. J. 1213 (1983).