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Constitutional Fathers—Constitutional Sons†

Louis Henkin*  

My title, obviously, borrows from Turgenev, suggesting generational contrast if not conflict. Unwittingly, perhaps, I may have also echoed Lawrence, for we are sons as well as lovers of the Constitution.

In this ceremonial year the reference to our political ancestors stirs various questions. One might ask whether their hopes have been realized; or whether, perhaps, the fears of the forgotten opponents of ratification have been justified. A different sweep of questions might explore, how do we run a twentieth century government on an eighteenth century blueprint? A question which I would not begin to know how to address might ask how we have avoided the fate of other countries—recurrent revolutions, strong-man-monarchy or military oligarchy, successive or suspended constitutions, emergency repression, and government by decree?

Directly, I address questions of a narrower focus, but nonetheless overwhelming. Our ancestors translated political ideas into revolution, constitution, and political institutions. What have two hundred years done to their ideas, their revolution, their constitution, and their institutions?

I.

This paper might be subtitled "Our Revolution-Constitution 200 Years Old." Hyphenating our revolution and our Constitution would bridge 13 years to justify celebrating in 1976 the anniversary of a constitution not born until 1789. It would not be a distortion, however, for the chain between independence and American constitutionalism is continuous, and the links are strong and intimate; and the authentic birthdate of both was in fact 1776.

That has not been universally understood. Many have noted the differences in language and spirit between the Declaration
of Independence and the United States Constitution. Indeed, it would be surprising if there were not such differences, for revolution and state-building are wholly different tasks, carried out in wholly different moods, as a hundred revolutions have learned in our time. A revolution defies authority, overthrows government, is above the law. The constitution that follows reimposes authority, provides legitimacy and a blueprint for new government, restores law. Declarations of independence are the manifesto, the ideal, the reach; constitutions are the grasp, the effort to realize revolutionary aims.

Also—as many other countries have learned more recently—revolutions do not solve all problems; at best, they create a new context and other conditions for solving them. In the American colonies, revolution had united diverse, antagonistic interests, subordinating differences and postponing difficulties. With independence, divergencies came to the fore, pre-war differences reemerged, but now we were no longer British subjects and dependents, and the problems had become all our own. As John Jay said: “It takes time to make sovereigns of subjects.”

Indeed, some problems had been aggravated by war and other difficulties during the ten years following the Declaration. The revolution itself unleashed radical forces: that victory and independence did not bring the millennium fed fires of discontent. The Constitutional Fathers, I remind you, met in Philadelphia during the year of Shays' Rebellion. “You and I did not imagine when the first war with Britain was over, that revolution was just begun.”

In fact, however, the Declaration of Independence and American constitutionalism are of one piece, and belong together in our national hagiography. The Declaration, invoking seventeenth century English philosophers against eighteenth century English politicians, asserted the principles which were deemed to justify self-government. (We would call it “self-determination” today). In doing that, the Declaration also implied and promised that these principles, sanctioned “in reason, conscience and piety,” would be the principles on which the new government would be founded.

1. See C. Beard, Economic Interpretation of the Constitution (1919).
4. R. Perry, Puritanism and Democracy 127 (1944).
This is indeed what happened; our rebellious ancestors became a generation of constitution-makers. Though practical men—pragmatists, not political theorists or thinkers—they were the first, perhaps the only “elite” in history to create deliberately a viable political society by reasoning, not on the basis of experience, but essentially according to a theoretical blueprint. The blueprint they used, impressionistically, half unknowingly, was that summarized in the Declaration of Independence.

I speak, you may have noted, of the intimate links between the Declaration of Independence and American constitutionalism, not between the Declaration and the United States Constitution. You will not find the principles of the Declaration reflected fully or clearly in the Constitution, because the Constitution was not a direct descendant of the Declaration, nor, I dare to say, was it at conception and birth an authentic, full-blown expression of American constitutionalism.

Let me explain this heresy. It contributes to understanding our national history and our politics as well as our law, to keep in mind our constitutional genealogy. With independence the thirteen colonies became thirteen states with state constitutions and state governments. These constitutions and governments were the direct descendants of the Declaration of Independence, carrying out its political promises. The Virginia Declaration of Rights antedated (by weeks) even the more famous Declaration of Independence, and Thomas Jefferson clearly owed to George Mason. The Virginia Declaration surely justifies a bicentennial celebration of American constitutionalism in 1976, and it, and John Adams’s constitution for the state of Massachusetts (1780), surely belong in a prominent place in the national testament.

The United States Constitution, 13 years younger, was not only a “come-lately,” but at best only a collateral heir of the Declaration, deriving from a concurrent but parallel development. At the time that the colonies were moving to independence, to self-government, they also moved to union: on the same day in June 1776 that a committee was appointed to draft a declaration of independence, another was appointed to draft articles of union.5 The Articles of Confederation, being articles of marriage, not of divorce, took longer to prepare, but they too were born in 1776 (and were completed by 1777, although they

5. See 5 JOURNALS OF THE CONTINENTAL CONGRESS 431, 433 (1906 ed.).
did not come into effect until 1781). As the proverbial schoolboy knows, the Constitutional Fathers came to Philadelphia authorized to improve the Articles of Confederation, but went beyond their instructions, abandoned the Articles, and produced in its stead the United States Constitution.

Conceptually, too, the United States Constitution descended not from the Declaration and its principles of self-government, but from the Articles and its quest for union. Although there was some concern in 1787 about disorder in the states, and a desire to preserve, perhaps reform, their "republicanism," the focus in Philadelphia was on the needs and uses of union, not on principles of government and the relation of individual to society, to which the Declaration and the state constitutions had spoken. Little of what had gone into the state constitutions from the Declaration was touched at Philadelphia. The state constitutions and the state governments were not modified or swallowed up by the new United States Constitution; only the links between state governments were transformed, into a small superstructure of government over the state governments, to deal with the consequences and issues of union.

In sum, while the state constitutions descended from the Declaration and its principles of self-government, the United States Constitution descended from the Articles and its concerns with union. The principles of American constitutionalism were alive before confederation, and remained largely unaffected by it. In principle, and probably in fact, constitutional government would have been alive here had the states abandoned the effort to confederate and gone 13 separate ways, had they become two or three confederacies, or had confederation under the Articles survived and succeeded, and the Constitution we know never been born.

My brief genealogical excursion will explain why, unlike the Declaration and the state constitutions, the United States Constitution articulates no political theory and contains little rhetoric. Unlike self-government, union had no political theory. Nor did union have much rhetoric, even in the dramatic days of 1776 when the Articles were being drafted. All the political theory in the Constitution is that implied in the fact of a written constitution, and in "We the people . . . ordain this Constitution." All the rhetoric is in a few borrowed, undefined references to "justice" and the "blessings of liberty." There was no bill of rights, of course; individual rights were not implicated in the issues of union that were the concern of the new superstructure
of government. Powers were allocated to different branches of the new government more or less separate, but there is no articulation and justification of the philosophy of the separation of powers, as there is in the early Virginia and Massachusetts constitutions. Even federalism, which was of course original, is not articulated or justified in principle, and owed less to Locke and Montesquieu than to the small experience of our ancestors, to their practical fears and needs, and to their political compromises, emerging as “the mosaic of their second choices.”

As the price of ratification, we know, opponents exacted the promise of a bill of rights, and one was added shortly after the new government was formed. Even with the Bill of Rights, however, the United States Constitution lacked much of what we identify with American constitutionalism and the promises of the Declaration of Independence. It is in the early state constitutions that we find full expression of a theory of republican government based on popular sovereignty, a social compact expressed in a written constitution, natural unalienable rights, limited government for limited purposes, free elections, universal (if qualified) suffrage, accountability and recall of officials, principles of separation of powers, an independent judiciary, no executive suspension of the laws. Early declarations of rights suggest principles not even implied in the United States Constitution, even as amended by the Bill of Rights—the right to be protected in life, liberty, and property (not merely that the government shall not deprive us of them); the right to justice

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6. Toward the end of the Convention George Mason suggested that a bill of rights be prepared, but the proposal was given short shrift and unanimously rejected. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 587-88 (1911) [hereinafter cited as FARRAND].

7. See VIRGINIA DECLARATION OF RIGHTS, June 12, 1776, § 5, reproduced in 7 F. THORPE, FEDERAL AND STATE CONSTITUTIONS 3812, 3813 (1909) [hereinafter cited as 7 THORPE—VIRGINIA DECLARATION]; MASSACHUSETTS CONSTITUTION OF 1780, pt. I, art. XXX, reproduced in 3 THORPE, supra at 1893 [hereinafter cited as 3 THORPE—MASSACHUSETTS DECLARATION]; text accompanying note 26 infra.


9. The principle of antecedent autonomy and retained rights is reflected in the ninth amendment to the United States Constitution: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” (Emphasis supplied.) And in the tenth amendment: “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.” (Emphasis supplied.)
and to a judicial remedy; the principle and the aspiration of equality.\textsuperscript{10}

Seeing the United States Constitution as originally only a secondary part of American constitutionalism is not to depreciate the achievement of the framers. They made a nation. They established the central government that governs us to this day, virtually unchanged in conception and in detail. It is their Constitution which has become the principal American constitution, subsuming and overwhelming state constitutions; it is their Constitution which is now heir to the promises of the Declaration, which is our rod and our staff, and our glory to the world, while the Declaration is largely reserved for children or relegated to ceremonial occasions, and state constitutions hardly seem to exist or to matter.

What I have called the genealogy of the Constitution has had profound import during our constitutional history and still shapes our lives today. It explains why the Bill of Rights, then not applicable to the states\textsuperscript{11} and not importantly implicated in federal activities, seemed hardly to matter during our first century (and beyond).\textsuperscript{12} Although federal power grew, thanks to nationalizing influences in American life legitimized by nationalistic interpretations of the Constitution, it took the Civil War and the constitutional amendments that constituted the peace treaty ending it to transform the relation of federal to state governments and establish the United States Government and the United States Constitution as we know them today.\textsuperscript{13} (We do not celebrate our Revolution-Constitution of 1868, or revere its framers.)

Because the United States Constitution achieved preeminence only halfway through our history, and because the nationalizing amendments were addressed only to the states, it


Virginia enjoined firm adherence and frequent recurrence to principles of "justice, moderation, temperance, frugality, virtue"; Massachusetts omitted "virtue" but added "piety and industry." Compare 7 THORPE—VIRGINIA DECLARATION, supra note 7, § 15 at 3814 with 3 THORPE—MASSACHUSETTS DECLARATION, supra note 7, pt. I, art. 18 at 1892. Was there a difference between Virginia and Massachusetts? Or between George Mason and John Adams?


\textsuperscript{12} The only time it was invoked by the Supreme Court before the Civil War was to vindicate the property rights of Dred Scott's master. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

\textsuperscript{13} See text accompanying notes 89—94 infra.
has continued to this day to suffer its genetic defects. The Constitution still suffers the lack of a political theory; it rests on a less-than-complete foundation of popular sovereignty, social compact, limited accountable government; it wants a full panoply of unalienable rights and a coherent theory of separation of powers or federalism.\(^{14}\) Doctrines homogenizing American constitutionalism, or creating new rights (e.g., indefeasible citizenship, political equality, essential individual autonomy as regards “private matters”)\(^ {15}\) had to be spun very slowly and late by questionable and controversial interpretations. We still do not have an authentic constitutional base for demanding equal protection of the laws of the federal government, having to intone “due process of law,” the same clause that Taney invoked to maintain Dred Scott’s slavery.\(^ {16}\)

I stress: whatever the genealogy, however long it took, American constitutionalism brought the kind of government implied and promised in the Declaration of Independence. One should quickly add that many saw, and see, in the Declaration—in “all men are created equal” and the unalienable rights “to life, liberty, and the pursuit of happiness”—other implications and promises. There was, there is, disagreement as to what these promised. Though our revolutionary fathers were radical as regards Great Britain, they were conservative at home—Washington, Mason, even Henry and Jefferson. For some, surely, 1776 was to be a “safe and sane” revolution of gentlemen, by gentlemen and for gentlemen.\(^ {17}\) That “all men are created equal,” it has been urged, supported popular sovereignty and social compact, justifying independence and self-government, but said nothing about economic and social equality. For others, however, equality and the right to life, liberty, and pursuit of happiness at least outlawed slavery and promised opportunity for all equally. Those promises neither state nor federal constitutional fathers fulfilled; some of them finally came alive after the Civil War; some, many believe, we have not fulfilled yet.\(^ {18}\)

\(^{14}\) Periodically, the Supreme Court invokes separation of powers, but less on some coherent theory than on a literal reading of particular clauses, as, say, in the Election Campaign Act case of 1976. See notes 48 & 99 infra and accompanying text.

\(^{15}\) Cf. Afroyim v. Rusk, 387 U.S. 253 (1967); see notes 56, 76, & 91 infra and accompanying text.


\(^{17}\) Miller, supra note 3, at 498.

\(^{18}\) See text accompanying note 119 infra.
II

The Constitutional Fathers created a Government of the United States in the stead of a league of states, a federal government joined with the pre-existing state governments in a unique federal system. In that federalism—states and union together—the people were sovereign; government was defined by written constitutions and had limited powers; the powers given to government were separated and fractionized; unalienable natural rights and liberties were preserved and protected. These words are familiar to us. What did they mean to our ancestors? What do they mean to us?

Consider first the Constitution. Our fathers saw a constitution as a contract by the people with each other, to form a government and accept its authority, to define its purposes and powers, to blueprint its structure and procedures. It was, as well, a contract between the people and their government, prescribing what government should, might, or might not do, and how it should, might, or might not do it. Since it was their constitution, the people could, of course, abandon, replace, or alter it at their will.

Consider also "popular sovereignty." For the fathers of American constitutions "the people," though undefined, was a reality, a political entity that could act. The sovereignty of the people meant that government had to be justified in an actual social compact creating government. It meant, in principle, a perpetual right for the people to do it differently, a perpetual right to revolt, to ordain a new constitution and change the government or the system of government. The people—by majority, an unexamined axiom, male, of course, and qualified ("having sufficient evidence of permanent common interest with, and attachment to the community")—govern through representatives, their magistrates, their chosen betters. For the government of the United States most of that magistracy was chosen indirectly. Only the House of Representatives was directly elected by the people, by those qualified to vote for the most numerous branch of the state legislature. Senators were to be chosen by state legislatures, the President by special electors; officials were to be appointed, principally (I simplify)

19. 7 THORPE—VIRGINIA DECLARATION, supra note 7, § 6, at 3813.
21. Id. at art. I, § 3.
22. Id. at art. II, § 1.
Next consider limited government. For our ancestors government was limited inherently, axiomatically, by its foundations in a social compact, in the will of its creator, the people. It was limited also by the original autonomy of the individual, reflected in natural rights—unalienable and retained when government is created. But government was limited also in conception, in that it was created for particular limited purposes. For "the people" feared government and did not wish or ask much of it. Government was essentially a watchdog; and, we have all heard, "that government governs best which governs least." Thomas Jefferson, not strictly a father of the United States Constitution, but surely a father of American constitutionalism, was not idiosyncratic. Recall his first inaugural address:

Still one thing more, fellow-citizens—a wise and frugal Government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government, and this is necessary to close the circle of our felicities.24

Limited government was to be assured, and the dangers of tyranny minimized, by fractionizing governmental power. Unlike the state constitutions, of course, the United States Constitution has its particular form of fractionization in the vertical separation between federal and state authority, preventing dangerous concentrations of power as well as prescribing a preference and presumption for local government. The federal government was limited in that its powers were only those delegated and enumerated, while the rest were reserved to the states. State government was limited by exclusion from foreign affairs and other concerns of union, and by the supremacy of the United States Constitution, laws, treaties, and government in their delegated domain. Of course, in principle and in general, the United States Constitution did not impose on the states limitations not required by considerations of union.25

23. Id. at § 2.
25. The Bill of Rights, soon adopted, did not, of course, apply to the states. See note 11 supra and accompanying text. The relevance to union of some of the limitations on the states in the original Constitution—for example, those which forbid bills of attainder or ex post facto laws—is not obvious and the reasons for their inclusion are not agreed upon.
The principal fractionization of power, in the United States as in state constitutions, was the separation of powers. Separation was an article of faith, the final article of John Adams's Declaration, giving it striking emphasis:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.²⁶

The Constitution says nothing of the separation of powers, but whether what it provides be called separated or "mixed," the principle is reflected in its designations and allocations of authority. The purpose, as Justice Brandeis later put it, was to build in inefficiency to prevent tyranny.²⁷ That was the result, and in part the purpose, of a bicameral legislature; of legislative supremacy, yet with an independent executive; of civilian supremacy over the military; of a blend of other balances and checks (Presidential veto, Senate consent) in a system unique at the time and in history. In addition to being separate, the judiciary was to be independent;²⁸ and to some unknown and uncertain extent the courts were to monitor some or all of the various limitations on government.²⁹

Consider finally that popular sovereignty and limited government implied retained rights, and that some natural rights

²⁶. 3 THORPE—MASSACHUSETTS Declaration, supra note 7, pt. I, art. XXX at 1893.
²⁷. The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). See also The Federalist Nos. 46-47 (Madison). Cf. Madison: "[I]f there is a principle in our constitution, indeed in any free Constitution, more sacred than another, it is that which separates the legislative, executive, and judicial powers." 1 ANNALS OF CONGRESS—GALES' AND SEXTON'S HISTORY OF THE DEBATES IN CONGRESS 604 (1789). See also id. at 516-17.
²⁸. Compare 7 THORPE—VIRGINIA Declaration, supra note 7, § 5 at 2813 with 3 THORPE—MASSACHUSETTS Declaration, supra note 7, pt. I, arts. XXIX-XXX at 1893.
were unalienable. The principal unalienable right of the people was the right of self-government, including the right to determine and to change that government. The form of government they selected, reflecting representative republicanism, was also a fundamental right, and fragmented government was necessary to assure that the people would effectively maintain their sovereignty, their representative government, as well as other, particular, retained and unalienable rights. We have only fragmentary evidence of what these were—what were the purposes of government to which they sacrificed some autonomy and rights, and which were the rights they retained because they did not need to, or wish to, or could not, alienate them. We know that the rights they retained included freedoms we find in the bills of rights (of the United States as well as of the states), notably the political freedoms (speech, press, assembly); freedom from established religion and the freedom to exercise religion; the right to bear arms; some privacy from quartering troops and from unreasonable and unwarranted searches and seizures; and the protection of a fair public trial by a local jury. The Fathers were concerned to maintain the security of property, so that it might be taken only by due process of law, only for public use, and only with just compensation.

I stress one ancestral testament of near-constitutional dimension commonly forgotten. Although the Constitutional Convention rejected an express provision to that effect, Madison's view supporting admission of new states on the basis of equality soon prevailed in fact. I stand today not in the colony, or dominion, or even territory of Minnesota, speaking to "natives," but in the state of Minnesota, addressing equal citizens. These, in a word, were their principal constitutional, i.e., political, ideas. Needless to say, these were the prevailing, "general average"; the Constitutional Fathers, and the rest of

31. See text accompanying notes 54-55 infra.
32. See 2 Farrand, supra note 6, at 454; Coyle v. Smith, 221 U.S. 559, 567 (1911); Escanaba Co. v. Chicago, 107 U.S. 678, 689 (1882); Permoli v. First Municipality, 44 U.S. (3 How.) 589, 609 (1845). In ceding the Northwest Territory to the United States, Virginia and Georgia insisted that in time its inhabitants should be equal citizens in equal states. See Virginia Act of Cession—1783, reproduced in 2 Thorpe, Federal and State Constitutions 955-56 (1911); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 221 (1845). See also The Northwest Territorial Government, July 13, 1787, art. 5, reproduced in 2 Thorpe, supra at 957, 962 [hereinafter cited as 2 Thorpe—Northwest Ordinance].
the generation of "the people" that ordained the constitutions, were hardly unanimous. They had important differences and ambivalences and made deep compromises. Some who were for less government in 1776 doubtless wished for more in 1787, to stay drift and disorder (e.g., Shays' Rebellion). Our ancestors were torn between stability and change, between populism and aristocracy, between union and local autonomy. They were not agreed as to how "people's republicanism" should be reflected, for they were divided between virtual and actual representation; between one chamber and two, representing people or states; between strong legislature and strong executive. All feared tyranny but some feared also the tyranny of majorities, less perhaps from concern about majority passions or prejudices against the deviant or idiosyncratic than from fear of "populism," egalitarianism, "levelism."

It may help grasp what has become of ancestral ideas if I stop to underscore what they did not encompass or imply. For them popular sovereignty did not mean democracy. The Fathers of 1776, as of 1787, were republicans, not democrats. Voting qualifications were left to the states and in no state was suffrage universal; in most it did not mean even all males, not even all free males, not even all free white males.

The Constitution of the United States, and the early constitutions of the early states, did not guarantee essential liberty; the United States Constitution even guaranteed further importation of slaves for twenty years. Our ancestors did not provide for equality, so prominent in the political theory and rhetoric of the Declaration of Independence and of the early state constitutions. The states did not consider that their rhetorical commitment to equality automatically outlawed slavery, and the equal protection of equal laws was not guaranteed even to all free men, or freeholders. The word "equal" is not in the United States Constitution or in the United States Bill of Rights.33

Looking around the world today, we might well be more pleased with a different ancestral "omission," a happy fruit of their political ideas. In a constitution ordained by the sovereign

33. Even the measure of equality implied in the fact that basic rights are enjoyed by all "persons" did not reach slaves. See U.S. Const. art. I, § 9; cf. id. at art. V. But the Northwest Ordinance, adopted by the nearly moribund continental congress during that same summer of 1787 that found the framers in Philadelphia, legislated against the extension of slavery to the new territories. See 2 Thorpe—Northwest Ordinance, supra note 32.
people, constituting its social compact and its instructions to its official trustees and servants, there is no provision for suspending the Constitution or even the laws; no provision for government other than by the people's representatives, for government by decree. There is no provision for suspending any rights. Only the privilege of the writ of habeas corpus (not the writ itself) can be suspended, and only by the people's representatives in Congress, in cases of rebellion or invasion, if the public safety requires it. And, comparing some other contemporary constitutions, there is no mention of the people's duties: the people knew they had duties, to God, to each other, and to their posterity, but these were not appropriate for a constitution.

III

What has our Constitution, our constitutionalism, become? The words we use are the same and the ideas are similar: popular sovereignty, a written constitution, limited government, individual rights, the federal system, separated powers. In the

34. See U.S. Const. art. I, § 9. That the writ is not suspended, only the privilege of the writ, see Ex parte Milligan, 71 U.S. (4 Wall.) 2, 130-31 (1866). The difference is that the writ will issue and on its return the issuing court can pass on the constitutionality and applicability of the suspension.

35. For some of the many examples of duties imposed upon individuals in constitutions, see Constitution of the Arab Republic of Egypt art. V (1972); Constitution of the Philippines art. V (1972); Constitution of the Union of Soviet Socialist Republics ch. 10, art. 130-33 (1936). See also Universal Declaration of Human Rights art. 29 (1948).

36. Our ancestors perhaps taught us not to proclaim change and to mask it under old labels. We were "the united states" from 1776, a plural common noun with a perhaps exaggerating adjective, but an appropriate name for a confederation (cf. "The United Nations"); we have become "the United States," a singular, composite proper noun, a less apt name for a nation-state. Since nouns were capitalized, but capitalization was erratic, when that change occurred is not clear. (One cannot tell whether the Constitution treats "the United States" as a singular or plural noun.)

The change from articles of a confederation of states to a constitution creating a government was also muffled. The articles were also seen as a "constitution" and as providing "government." See the resolution of the continental congress convening the constitutional convention, 3 Farrand, supra note 6, at 13-14. In the Constitution "the government of the United States" is to be found only once (buried in the "necessary and proper" clause, U.S. Const. art. I, § 8, cl. 18) and even there was perhaps used to describe the function (the governance) rather than an entity. As to our different conception of the Constitution, see text accompanying note 37 infra.

Under the Articles, decisions were taken by "the united states in congress assembled," and "the congress" was a gathering of state delega-
federal government, and largely in the states, we have the same
institutions of government—legislative, executive, judicial—in
the unique configuration created by our ancestors. But all ideas
and institutions are somewhat different, and some have been
transformed.

For our ancestors, making the Constitution was a political
act, and the Constitution was a political document serving con-
temporary political purposes. We do not see our Constitution
as a contemporary compact among us, “the people” of today, or
between us, the people, and our government today. Nor do we
see its provisions as reflecting the sovereignty, the will, the
wishes and ideas of people who lived 200 years ago, its authority
long expired and its substance out of date. For us the age of
the Constitution and its origins hallow rather than vitiate its
authority. For us the Constitution is law, the highest law, bind-
ing on the people as well as on the branches of government, and
resisting change, to be modified only by slow and difficult
processes.

For our ancestors, self-government and the forms of republi-
can government were the principal individual rights, and fre-
quently proclaimed as such. We, even our political leaders, are
not much given now to political theory or philosophic discourse;
tions, not a branch of government. “The Congress” is retained in the
Constitution; now “Congress” is the name of the legislative branch of
government and it is an affectation to use the article. For long “Con-
gress” was not commonly capitalized.

The continental congress was presided over by a president. The
Constitution also provides for a “President” although he does not preside
over the Congress, or over anything at all. “Executive” is apt to describe
the President’s responsibility to see that the laws of Congress are
faithfully executed, but hardly for other independent functions which
Hamilton said were implied, and which Presidents assumed, including
the control of foreign affairs. See Hamilton’s Pacificus Letters, 7 Works
of Alexander Hamilton 76, 81 (Hamilton ed. 1861); L. Henkin, Foreign
Affairs and the Constitution 44–50 (1972).

“Federal”—a word not in the Constitution, essentially meaning cre-
ated “by treaty,” and smacking of a confederation—was claimed origi-
nally by those who preferred confederation (as under the Articles) and
opposed the Constitution, but they became the “anti-Federalists” when
the constitutionalists, nationalists, became “Federalists.”

Might the reluctance to admit change and the tendency to mask it
under old labels have slowed change, and contributed to pragmatic, “ex-
periential,” gradual, incremental change?

37. Despite their commitment to self-government, the framers did
not hesitate to bind “the people” of the future. The right to amend the
Constitution apart, the only concession to the future was provision for
a census and for adjusting the number of representatives to changes in
perhaps we take it, and its embodiment in our system of government, for granted, letting it go without much saying. "The people" is commonly referred to only in political rhetoric, and while it remains perhaps a social conception, it is too massive to be a political entity that could act or be activated. The social compact is dismissed as myth or relegated to history. "Popular sovereignty" is too unsophisticated for articulation in public discourse. In fact, it is now domesticated, tightly harnessed in constitutional forms. To less than the whole people, surely, we deny the right of revolution, even the right to write a new constitution; both would doubtless be rejected as "unconstitutional." The Constitution can be amended, but only in accordance with its terms, effectively only if the incumbent Congress agrees.\footnote{A few years ago many were frightened even at the thought that a constitutional convention for a small particular purpose (for example the Dirksen amendment) might be called, not by Congress, but by the legislatures of the states, and some were prepared to treat it as "unconstitutional," although Article V of the Constitution expressly authorizes it.}

On the other hand, popular sovereignty has come to mean to us democracy as well as republicanism. To our ancestors, as to Plato, democracy was a dirty word; we have fought world wars to defend it. For us popular sovereignty now means universal suffrage (virtually without qualifications) and equal vote, and nearly direct election of our magistracy.\footnote{See U.S. Const. amends. XV, XIX, XXIV, XXVI; Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); U.S. Const. amend. XVII. While the President is still elected by electors (U.S. Const. art. II, § 1), their autonomy is largely hypothetical and they almost always vote as instructed by the voters. Cf. Ray v. Blair, 343 U.S. 214 (1952).} The right to hold office is also universal in principle, though the costs of seeking office may have introduced an appalling property qualification. Unlike our ancestors we seem to have the right to elect not only our betters but our equals; indeed, we have been told that the mediocre among us are also entitled to representation in kind.

Limited government remains our hallmark and is what we think of when we think about our Constitution, but we have abandoned a priori notions as to the limited purposes of government.\footnote{See note 86 infra.} Unlike our ancestors we do not—consciously at least—pin our faith primarily on dispersing power through federalism and separation, although separation, surely, is still a substantial safeguard, as the case of Richard Nixon reminded us. Rather, we rely on and resort to the Bill of Rights and other accrued
individual safeguards, now limiting state and federal govern-
ments about equally, and monitored by the federal judiciary
under the leadership of the "nine old infallibles."\footnote{41}

We still have federalism, but we have moved far from
federation to nation, becoming—contrary to early conventional
wisdom—less "federalized" as our territory expanded. So much
of our lives is now regulated from the national center, so much
less is governed by local differences. Our federalism is no longer
defined by enumerated rights delegated to the federal govern-
ment by the states, but rather by what is left to the states by
grace of the federal government. Today there is almost no subject
on which Congress might not legislate, and it has passed laws, e.g.,
the Voting Rights Act of 1965, deeply intrusive on state authority,
autonomy, and governmental integrity.\footnote{42} The courts and the
professors have been looking for limits on federal power but so
far with only small success. In the 40 years since the New Deal
revolution, only two acts of Congress have been held to be
beyond the powers delegated to Congress. In 1970, the Court
(by 5-4 vote) struck down a federal act granting the right to
vote to 18 year olds in state elections.\footnote{43} In 1976, the Court
(again by 5-4 vote) struck down congressional regulation of
wages and hours of state and municipal employees, as imposing
on "essential decisions regarding the conduct of integral govern-
mental functions," and devouring "the essentials of state sover-
eignty."\footnote{44} In largest part we are a federal state politically
rather than constitutionally,\footnote{45} because of state and local influenc-
es in the extra-constitutional party system and in the processes
of electing the President and Congress. The other faces of fed-
eralism—the protection from state infringement of the federal
interest and the interests of other states—are also subject to con-
gressional regulation and are monitored by a federal judiciary.

\footnote{41. "We are not final because we are infallible, but we are infallible
only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953)
(Jackson, J., concurring).}

\footnote{42. The Supreme Court has usually upheld such laws. See, e.g.,
South Carolina v. Katzenbach, 383 U.S. 301 (1966) (provisions of the
Voting Rights Act upheld as a valid exercise of congressional responsi-
bility to enforce the Constitution).}


\footnote{44. National League of Cities v. Usery, 96 S. Ct. 2465 (1976) (over-
ruled Maryland v. Wirtz, 392 U.S. 183 (1968)). The Court did not limit
the reach of the commerce power but held all federal power to be subject
to an essential state sovereign immunity implied in federalism.}

\footnote{45. States rights, something of a radical force during the years be-
tween independence and constitution, now bespeak conservatism, even
reaction.
Separation of powers may never have been an accurate description for our unique, mixed system, but, formally at least, the mix prescribed by the framers still essentially pertains. Indeed, whenever we begin to discount separation as a living constitutional mandate, the Supreme Court comes along—at about 25 year intervals—to confound us; in Myers (1926), upholding the President's power to remove an executive official without the Senate consent which Congress had required;46 in Youngstown (1952), denying the President's power to seize the steel mills when Congress apparently had other plans;47 in Buckley (1976), telling the Congress that only the President can appoint the officials of the Federal Election Commission.48

Much of the change in our system of government reflects the impact of extra-constitutional developments on the constitutional blueprint, modifying the nature and the shape of government. The rise of parties and the change from the ideology that decried factions to one that sees two parties, publicly financed, as essential to our democracy; the growth of population, the proliferation of states, of congressional membership and committees, and of executive bureaucracy; the emergence of a Presidency with an independent national constituency: these have transformed particular institutions, their relation to each other, and the government they provide.

For our Fathers, Congress was first (Article I)—chief, and, I think, also supreme and final; we tend to think and talk of our system as beginning with the Presidency. That office, non-existent under the Articles, born at Philadelphia of uncertain size, grew and grew, until even small presidents are now imperial. We have come from the President as executor of the laws, suggesting congressional agent and servant, to “The Chief Executive,” with connotations of energy, power, independence, and supremacy. The President is initiator, planner, master of the budget and the legislative program, as well as maker of foreign policy, foreign promises, and wars.

Congress too is different, of course. In our federalism, Congress has grown from enumerated to virtually unlimited powers, from one volume of statutes during several years to a

swollen United States Code. But vis-à-vis the President, though
the principal constitutional power in domestic affairs is indis-
putably with Congress, Congress often appears reduced from
representative of the sovereign people, and its principal law-
maker, to competitor, frustrator, nibbler, harasser of the Presi-
dent—or his rubber stamp. 49

The federal courts have remained independent (even if
underpaid). With the growth of federal law the federal judiciary
has swelled in jurisdiction and in business, but its most dramatic
and interesting development, all know, has been from court of
law to constitutional arbiter. (Our ancestors apparently thought
of judicial review, but did not think about it much; we can only
guess what they had in mind, and people guess differently. 50)
In result, we think less about the judiciary as “the least danger-
ous branch,” more about “judicial supremacy.” 51 The courts
are separate, but more than equal. The Supreme Court is
supreme not only over the lower courts but over the political
institutions, federal as well as state; its right to read the Constitu-
tion has become almost exclusive; it is infallible because it is
final. 52

The role assumed by the courts may have effectively changed
the character of the Constitution. I have dared the heretical
question: have we the same conception of the Constitution our
Fathers had? Did they, perhaps, intend it to be selective rather
than complete; immediate rather than eternal; a suggestive guide
for reasonable men of politics in their time, rather than a tight
legal document to be parsed and litigated about for centuries? 53
Whatever the Fathers intended, the courts have given us “gov-
ernment by litigation,” transforming the blueprint of govern-
ment into a higher law, a common law in the hands of
judges, developed by common-law process and in common-law
tradition. 54

49. In one respect we have not served our ancestral principles well.
They gave us legislative supremacy over the executive and coupled it
with civilian, executive supremacy over the military. Now it appears
that the military is not effectively under civilian executive control be-
cause they have found too-good friends in Congress. Our ancestors
feared a standing army; we have a pretty big one and the largest defense
budget in history. They resisted taxation, while our defense program
has helped make us a most taxed people.
50. See note 29 supra.
51. See A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); R. JACK-
SON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941).
52. See note 41 supra.
53. See text accompanying notes 109-110 infra.
54. Having made the Constitution into law, Marshall had to warn
IV.

Perhaps the principal change in the Constitution we have inherited is the character of our unalienable rights. Again, we have largely kept the same words, but we have changed their concept and content. The original Bill of Rights saw self-government as the principal right and other rights as supporting it and deriving from the people's original political autonomy, retained except as voluntarily delegated to government. The rights they protected against governmental invasion were also essentially political, designed to protect "the people" against tyranny. Freedom of speech was principally freedom of political speech; freedom of the press would protect the press's role in the political process. Freedom of assembly was primarily a right of political assembly, joined with the right to petition the government. Even freedom from establishment and freedom of religion principally afforded protection for dissenters. The right to bear arms served for protection against tyrants as well as external enemies. The home was to be private from political oppression by quartered troops and from unreasonable search and seizure. The people were not to be tyrannized by abuse of criminal law and process. They were to be safe from ex post facto laws and bills of attainder. They could not be arrested except upon reasonable cause and subject to review on habeas corpus. They were protected against improper accusation, conviction, and punishment—protected by grand jury indictment; by public speedy trial, once; by the right to the assistance of counsel, to produce witnesses and confront the government's witnesses; by freedom from compulsion to testify, and from cruel and unusual punishment. They could be convicted of treason only subject to special procedural safeguards, and could suffer only limited punishments. Life, liberty and property were all to be subject to the law of the land and to due process of law; property could be taken for public use only with just compensation, and by courts only with the consent of a jury of peers. Men of property doubtless saw in these clauses protection for their property not only against distant tyrants, but also against local, radical populism. Some saw protections for their property also in the limitations on state impairment of contracts and on the issuance of paper money, and on discriminations against nonresidents.

us against being too legalist with it, in that now tired reminder: "it is a constitution we are expounding." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).
If I am correct in my understanding of them, our ancestors
protected largely political liberty; not—someone said—the rights
of man, but of gentlemen. Now we have moved beyond political
rights to civil rights and to personal rights. Being removed from
the social compact both in time and in our sense of our relations
to our government, we see our rights not as implications of the
people's political sovereignty and political autonomy, but as
reflections of essential individual dignity and worth. Now we
have opened our Constitution to every man, and woman, to the
least and the worst of them. We have opened the Constitution
doing new rights and to expanded conceptions of old rights.
We protect personal freedom from slavery and undue incarceration.
We safeguard not only political freedom, but also, in principle,
social, sexual, and other personal freedoms, privacy, autonomy,
and even occasional idiosyncrasy. Not only is there
no establishment of religion, but there is a wall of separation;
not only do we guarantee the free exercise of religion, but one
shall not suffer disadvantages and burdens for exercising it. We
protect not only political speech, and religious speech, but
economic picketing and commercial advertising; not only the
expression of ideas but all "self-expression," even if offensive,
even to near-obscenity. Many rights are also accorded to corporations and associations. Constitutional rights for them cannot be rooted in a concept of original autonomy and retained rights, or in individual dignity. Their rights can perhaps be seen as deriving from the rights of the individuals who compose or create them, or as rights legislated for them by "the people."

55. Roe v. Wade, 410 U.S. 113 (1973) (abortion); Griswold v.
Connecticut, 381 U.S. 479 (1965) (contraception); Meyer v. Nebraska,
262 U.S. 390 (1923) (parental education of children); cf. Wisconsin v.
for the City of Richmond, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd mem.,
Georgia, 394 U.S. 557 (1969) (private possession of obscene matter) with
Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973) (public exhibition of
obscene materials).

1 (1947); cf. Wisconsin v. Yoder, 406 U.S. 205 (1972). See also Sherbert
of Maryland, 96 S. Ct. 2337 (1976).

57. Cantwell v. Connecticut, 310 U.S. 296 (1940); Thornhill v. Ala-
abama, 310 U.S. 88 (1940); Virginia State Bd. of Pharmacy v. Virginia
Citizen Consumer Council, 96 S. Ct. 1817 (1976); Cohen v. California,
493 U.S. 15 (1971); Erznoznik v. Jacksonville, 422 U.S. 205 (1975); Jen-
413 (1966).
"symbolic;" even our money may talk for us almost without limit, as the Supreme Court told us in invalidating limitations on campaign contributions. Not only is there freedom of the press to guard and warn us against abuse of government, but the press has freedom to feed the reader's "right to know"—to know what is worthless or perhaps merely titillating even at the cost of another's public reputation or privacy. The right to speak and publish includes a right of access to a public forum; it includes also a right not to speak and not to publish, or to speak and publish anonymously. Out of these rights we have made also a right to associate, or not associate, or associate anonymously. The fourth amendment affords freedom not only from traditional search and seizure, but also from "bugging" and wiretapping; security against intrusion not only by police but also by health and fire inspectors and social workers, not only in the home but also in the office and the automobile. It implies also a right not to have the fruits of illegal search or seizure used in evidence against the victim. Not only do gentlemen have rights to be protected against tyrannous harassment by abuse of criminal process, but the worst criminal can put the government to its case. He is entitled not only to be

represented by counsel, but to free counsel if he cannot afford his own. 69

We have abandoned old laws lending themselves to official abuse—the vague statute, the overbroad, "chilling" law. Laws against vagrancy, for example, are now void for vagueness, as giving too little warning to the citizen and too much leeway to the official. 70 We may be reading penological assumptions into the Constitution; some courts have questioned capital punishment by demanding proof of its deterrent influence. 71 In continuing to respect property we have included more subtle, more sophisticated forms of taking of property as requiring just compensation. 72

Our principal change has been that we have not only guaranteed freedom from slavery, but we have written equality into the Constitution, and sometimes have put it above all the rest. We require equality from both federal and state government, 73 and demand it not only for whites, not only for males, not only for citizens, not only for the legitimate-born. 74 We require not only equal protection of the laws and equal opportunity, but also some equalization, some removal of the handicaps of poverty, some affirmative action for the underprivileged. 75 And we have extended it to include political equality

71. Compare the various opinions presented in Commonwealth v. O'Neill, 339 N.E.2d 676 (Mass. 1975), which was decided under the cruel and unusual punishment clause of the Massachusetts Constitution, with the discussion of the purposes of the death penalty in Gregg v. Georgia, 96 S. Ct. 2909, 2930-31 (1976). Justice Goldberg once wanted the Court to consider whether a state may impose a death penalty for a crime which did not take or threaten life. Rudolph v. Alabama, 375 U.S. 889 (1963) (dissent from denial of certiorari). In Gregg, supra at 2932 n.35, the Court declined to address this question.
73. But see text accompanying note 16 supra.
("one man, one vote").

In the "Open Constitution" the courts have found for all of us rights where none had been known to exist, e.g., a right to travel at home or abroad. Abandoning assumptions and penetrating stereotypes, the courts have also found rights for those who had none: the child, apart from, and even against, his parent; the pupil, even against his teachers; the soldier, even against his military superiors; the prisoner and the civilly committed, even against their warders. And on the horizon may be rights our ancestors did not dream of—a right to be born and a right to die; rights for the dead and the unborn; rights to security, peace, a healthy environment; rights for the environment, for the animal, even the vegetable and mineral.

We have changed also our conception of rights. It is likely that our ancestors construed their retained rights more narrowly, but absolutely. As Justice Black was to say later, when the first amendment said "Congress shall make no law . . . abridging the freedom of speech, or of the press," it meant that Congress shall make no such law. It is also likely, however, that they had a narrower view of the contours of the freedom of speech or of the press, and a narrow view of what amounted to abridgment. We, having expanded the freedoms of speech and press, have broadened as well the permissible forms of governmental


78. Planned Parenthood of Central Missouri v. Danforth, 96 S. Ct. 2831 (1976). A wife has rights apart from—even against—her husband, for example, the right to have an abortion. Id.


82. Mr. Justice Douglas urged that environmental issues might be litigated "in the name of the inanimate object about to be despoiled," and that "those people who have a meaningful relation with it should be recognized as its "legitimate spokesmen." Sierra Club v. Morton, 405 U.S. 727, 741, 743, 745 (1972) (dissenting opinion).

intrusion upon them. Indeed, we treat rights as only presumptive, not absolute, and the courts, in whose care we have entrusted our rights, balance the private right and the public good in scales of their own fabrication. Some rights, however, weigh more than others, are preferred, or fundamental. Their invasion is suspect and will bow only to a "compelling" public interest after strict judicial scrutiny.84

I have been speaking of constitutional rights. But legislatures have added rights, some of which are so deeply imbedded as to have constitutional sturdiness. For example, the civil rights acts of Congress and similar laws of various states now give protections not only against state action (to which the Constitution spoke) but also against private discriminations and deprivations.85 What might surprise the ghosts of our ancestors most is that we have, by legislation, discarded a priori notions of the limited purposes of government86 and moved from fear of


That constitutional limitations generally apply only to "state action" is commonly seen as deriving from the words that preface the fourteenth amendment's prohibitions: "No State shall . . . ." See also Civil Rights Cases, 109 U.S. 3 (1883). But the prohibitions of the Bill of Rights, which are not in terms addressed to the federal government, also limit only governmental, not private action. (The first amendment is addressed only to Congress but has been held to apply to all who exercise federal authority. See L. Henkin, Foreign Affairs and the Constitution 486-87 n. 7 (1972)). That constitutional limitations apply only to government long antedates the fourteenth amendment and is inherent in the conception of the Constitution as the people's mandate to their government. See text accompanying notes 18-19 supra. In some contexts, the state action requirement serves also to preserve rights of the individual, even, for example, a right to make distinctions which government might not be permitted to make because they would establish religion, deny equal protection, or deprive of liberty or property. Cf. Henkin, Shelley v. Kraemer: Notes for a Revised Opinion, 110 U. Pa. L. Rev. 473 (1962).

86. A priori limitations on the purposes of government were given constitutional sanction much later, in "the Lochner era," when the Supreme Court held that certain social and economic regulations deprived those affected of their "liberty" without due process of law. Lochner v. New York, 198 U.S. 45 (1905). That line of constitutional interpretation ended in 1937. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
government to dependence on it (though not without some abiding fear of it); from political and civil rights against governmental abridgement, to economic and social claims upon government. We are a welfare state. The student of the Constitution will insist, of course, that there is no constitutional right to social security, to health or other welfare payments, or to free education. Indeed, one might recall that we became a welfare state over constitutional resistance, rooted in states’ rights and natural unalienable rights to freedom of contract. But, like our ancestors, we too borrowed from abroad, even from socialism. The welfare society is now deeply rooted, as though in the Constitution. With Jefferson’s ideals of a watchdog government, leaving us alone (“laissez-faire”!), compare FDR’s famous equation of the freedom from want with political freedoms. The end of World War II saw bills in Congress guaranteeing the “socialist” right to work; and full employment proposals are again heard in the land today.

V.

I have stressed the continuity and the change. It would be interesting to explore also why the continuity, why the change, but the reasons are complex if not mysterious—surely a task less for one lawyer than a diverse army of historians, political scientists, sociologists, anthropologists, economists, demographers and others. Doubtless the explanation has something—perhaps everything—to do with growth, expansion, industrialization, immigration, urbanization, diversification; with our having grown from three million to over 200 million, from a fringe on the eastern seaboard to the end of the continent and beyond; from an agrarian-artisan to an urban-industrial society, a post-industrial society with a mixed economy; from a population largely homogeneous to one that is mixed, some of it homogenized, some remaining “chunky”; with our “manifest destiny” to become a world power. With these have come changes in the total context

of our constitutional system; in values and ideology; in the balance of our federalism and the density of our bureaucracy; in the international order of which we are part; in our notions of public policy and in our theories of representative government—patrician, pluralist, populist, participatory.

If I cannot add light on why the continuity and why the change, I would say a word about how—the legal, constitutional how. We have not, I stress, abandoned or replaced the original Constitution; it remains the same, the oldest, the only old constitution intact. Nor, except in the aftermath of the Civil War, have we achieved revolutionary change by revolutionary constitutional amendments. Ours is, with the exception noted, an essentially unamended constitution. In all we have had 26 amendments in 200 years. The first ten may be discounted since they were part of the original package, the price of ratification of the Constitution, and they articulated what was already part of our constitutionalism in the state constitutions. Of the other 16 amendments, two (18 and 21) largely cancelled each other. The rest did not make major modifications in either our system or our principles of government, or in the scope or content of our individual rights. (I include even the 19th, for women should have had—I think would have had—the vote by state law or under compulsion of the 14th Amendment. I include, too, the 25th, although it has given us, temporarily, a President and a Vice President elected by Congress, the scheme which our Fathers long considered, then explicitly rejected.\textsuperscript{89})

My thesis of the unamended constitution, I have said, has one major exception in the Civil War amendments, notably the fourteenth, giving us, some might say, our “second Constitution.” To me the fourteenth amendment is still something of a mystery, for while the defeated states had it imposed on them, the victorious states imposed that radical amendment on themselves. Had they learned the dangers of centrifugalism and come to see the need for stronger central institutions? Was the war for them a great nationalizing experience, somewhat as in our century World War II brought the United Nations system, NATO, the European Community and other internationalizing institutions? Or were the northern states unaware of the implications of the new amendment, unable to foresee what federal courts would find in it?

89. \textit{Farrand, supra} note 6, at 507.
So much of the constitutional change I have detailed built on that amendment. To free the slaves and protect them in freedom we converted, at least as regards individual rights, from a federalism to a nation and paved the way for eventual economic and social integration. The fourteenth amendment effectively nationalized the relations of government to citizen, providing a new basis for federal legislation directly regulating individuals, and for scrutiny of state action by the federal judiciary. It established the principle of equality, not separate; equality between genders, and between citizen and alien, and some between rich and poor; political equality—one man, one vote. It has given us indefeasible citizenship and thereby freedom from expatriation, expulsion, exile. It provided the basis for protecting "natural rights" as "liberty," entitled to substantive due process of law. It effectively made the United States Bill of Rights applicable to the states and enforceable by federal courts. By ways of reading and paths of reasoning obvious only to infallible judges, it has helped make some of its limitations, notably the equal protection of the laws, applicable to the federal government as well.

There is one other amendment I deem to be of major importance, though it effected no systemic or structural change and was made necessary only by a 5-4 decision of the Supreme Court. The sixteenth amendment made the spending power a principal vehicle of our conversion to a welfare state. With the graduated income tax to pay for our welfare system, and "equal protection" to keep it non-discriminatory, we have effectively committed our bourgeois, capitalist United States to the goal that socialism has abandoned: "From each according to his ability, to each according to his need."

90. See text accompanying notes 74-76 supra.
92. While the same clause had long been in the fifth amendment, the impetus for developing substantive due process came from opposition to what states were doing and almost all the leading cases have involved action of the states. See, e.g., Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897); cases cited in notes 56, 86, & 88 supra. But cf. note 12 supra and accompanying text.
93. The principal provisions of the Bill of Rights have been held to be incorporated in the fourteenth amendment and therefore applicable to the states. See, e.g., Duncan v. Louisiana, 391 U.S. 145 (1968); HENKIN, supra note 85, at 501-02 & n.77.
94. See note 16 supra and accompanying text.
96. The 1936 constitution of the Soviet Union declares rather the
If, the fourteenth amendment apart, our Constitution has remained essentially unamended, one must find the ways of change in the Constitution itself, and in its reinterpretation in response to life and experience. As a prime example, one need only consider the tortuous history of the commerce power: how not only the same words, but the same ancestral conception, came to mean something quite different when applied to a continent with a national economy and a people that could not be contained within boundaries of single states. Reinterpretation was gradual, incremental, responding to a conservative national (human?) temperament, with an infrequent leap at time of crisis—for example, during civil war or deep depression. Why that process succeeded without destroying the Constitution—indeed not only left it essentially intact but enhanced its authority—is a well-known mystery. We tend to attribute it to constitutional calibration by the United States Supreme Court, acting in the tradition of common-law judges, with success that can only be called wonderful and is the envy of other countries (some of whom have attempted to transplant it, with uncertain, uneven success).

The judicial role and its development, however, ought not be misperceived. Marshall, as everyone knows, planted the principle that the Constitution was law, a higher law, to be applied by the courts. But the courts' role in maintaining the constitutional blueprint—the demands of federalism and separation—has always been and has remained responsive and secondary; the initiatives to make adjustments in federalism and separation have, of course, come principally from the political institutions. The Supreme Court, I remind you, built its authority by supporting powerful political forces. With small exceptions, Marshall and his successors staked the Court's future (and ours) on the nation as against the states. But the Court did not

socialist principle now to be “from each according to his ability, to each according to his work.” Constitution of the Union of Soviet Socialist Republics ch. I, art. 12 (1936).

97. In fact, the Court created (or found) obstacles to its involvement—the requirements of case or controversy and standing; the nonjusticiability of “political questions.” To this day the states cannot sue the United States to challenge federal transgressions of federalism. Massachusetts v. Mellon, 262 U.S. 447 (1923); cf. Massachusetts v. Laird, 400 U.S. 886 (1970). And the President cannot sue Congress, nor Congress the President, to adjudicate issues of separation. The New Deal Court largely opted out of the political confrontations of federalism, retaining only the authority to monitor state violations, and even those subject to congressional modification. But cf. National League of Cities v. Usery, 95 S. Ct. 2465 (1976); Oregon v. Mitchell, 400 U.S. 112 (1970).
nationalize us; it permitted, and legitimized, nationalizing political forces in Congress and the Presidency. Both Congress and the President were happy to have the Court’s support, and helped reinforce its authority. The Court did not “take on” both President and Congress when they banded together in support of national authority until after the Civil War, after its authority was established; even then it has sometimes suffered serious, “self-inflicted wounds,” as during the early New Deal.

Similarly, the Court has only infrequently become involved in issues of allocation and separation of power between Congress and President. Not many such questions have come to court, and few of those that did have reflected political struggles for power between Congress and President. In most instances, private parties set up issues of separation that did not worry the political branches themselves, as, clearly, in issues of undue delegation by Congress to the President,\(^9\) or, recently, in the federal election campaign case; in some of these, Congress and the President probably welcomed judicial arbitration.\(^9\)

It is in support of individual rights that the courts have come into direct conflict with political power, and that is largely a recent development. For our first hundred years the Bill of Rights remained a “splendid bauble;”\(^10\) perhaps it had deterrent influence—although it did not deter the Alien and Sedition Laws—but it did not come to court.\(^10\) Even after the Civil

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100. This is Marshall’s phrase in another context, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).
101. See note 12 supra and accompanying text.
War the Court was not in the vanguard, widely championing individual rights against political violations; while it advanced the fourth amendment, it gave narrow readings to the first even in this century, and to the demands of equality. What is more, it notoriously narrowed protections which had been afforded by the political branches. It invalidated civil rights acts by finding that they did not meet "state action" requirements in the fourteenth amendment. Its narrow conception of federal power prevented child labor legislation and progressive taxes. Its narrow conception of proper governmental purposes, asserted in the name of individual rights, slowed down movement towards a welfare society for almost half a century.

The courts became protectors of individual rights largely against the states, and principally since the second World War, after judicial power and prestige were established. Now judicial supremacy is firm and neither Congress nor the President dares flout the Supreme Court, although its mandate is carried by one unarmed marshal. Now that it is established, the Court may dare more, even in issues of separation and federalism.

VI.

We celebrate our Declaration (though we are not high on revolution), and we love our Constitution. Indeed, it is sobering to consider that we love the Constitution far more than our
ancestors did. For them it was a close thing. When we ponder on “We the people,” who ordained the Constitution, it is noteworthy that, according to estimates, only five percent of the total population voted for delegates to the ratification conventions, and in half the states almost half of the delegates voted against it. Only in New York were all (i.e., all males) allowed to vote, and the result at the New York convention was close. (In New York City the majority favoring ratification talked of seceding from the state). It was close in other states, and the process was not always edifying: we are told that in Philadelphia dissenters were dragged in against their will to provide a quorum; in Massachusetts procedures were manipulated and in the end ratification squeezed through. Until late, many around the country thought it would be better to break up into two or three confederations.109

For our ancestors the Constitution was an experiment and a gamble. The framers did not even call the new union “perpetual” (as the Articles were labeled), only “a more perfect Union.” Doubtless many assumed it could be abandoned, or made still more perfect, a few years later. There was a move for a new convention even before the Constitution was ratified. The possibility of future constitutional conventions was contemplated by article V of the Constitution. The issue was far from certain when Marshall, hopefully and as a guide to its interpretation, said that the Constitution was “intended to endure for ages to come.”110 Holmes’s peroration later, after union was secure, was more sober:

[T]hey have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or


to hope that they had created an organism; it has taken a
century and has cost their successors much sweat and blood
to prove that they created a nation.\textsuperscript{111}

One lesson they left us we have kept, at least for half of
our 200 years. Said Jefferson in Paris, watching the approaching
French Revolution:

The example of changing a constitution by assembling the
wise men of the state, instead of assembling armies, will be
worth as much to the world as the former examples we have
given them.\textsuperscript{112}

Were the hopes of our Fathers, or the fears of the many who
opposed ratification, realized? Perhaps some of both. The
Fathers hoped to create a nation, and they built better than they
knew. They sought “to establish Justice, insure domestic Tran-
quility, provide for the common defense, promote the general
welfare, and secure the Blessings of Liberty for them and their
posterity.” We, their posterity, seem to think they have done
well.

We ought not, however, forget and depreciate the opponents
of the Constitution. (Even Jefferson, you will recall, was not
an enthusiastic supporter.) Some opposed it as insufficiently
democratic, as we have since agreed. Some feared for states’
rights, which most of us now discredit, but the states were then
closer to the people and more sensitive to popular needs. Some
feared too much government, a fear many share today, even some
of us who are compelled to conclude that the world has changed
to require it. The opponents insisted on the Bill of Rights, teach-
ing us that liberty requires protective institutions as well as
individual vigilance. They, too, left us an important lesson:
there were no “irreconcilables.”

I have emphasized the constitutional changes brought about
by 200 years. Let me, in Bicentennial tribute, summarize what
our Constitutional Fathers achieved.

1. They transmitted to us the elements of constitutionalism
derived from the Declaration and the early state constitutions—
a written constitution, popular sovereignty, limited government,
republicanism, individual rights. They built the framework
which in time established American constitutionalism and democ-

\textsuperscript{111} Missouri v. Holland, 252 U.S. 416, 433 (1920).
\textsuperscript{112} SCHUYLER, supra note 109, at 122.
2. Above all—above the Declaration and the earlier constitutional efforts of the states—the Fathers made us a nation. The principal purposes for which they came to Philadelphia are realized today: a national government; a central power to regulate interstate and foreign commerce and to tax and to spend; a national power over foreign affairs; a central executive and a national judiciary.

3. The institutions they created have remained essentially the same. Separation (if not federalism) keeps government inefficient, but, after Watergate, who can say with confidence that it has ceased to provide protection against tyranny? Today we see recurrent congressional efforts to return to the original conception, as in regard to budget management and the control of foreign affairs, and we hope that these will achieve the creative tensions we think the Fathers intended, not merely paralyzing confrontation. Even federalism, although radically modified, is still politically alive; indeed there are signs that it is regaining some vigor, even for states' rights, even vis-à-vis important federal regulation.

4. Some ancestral ideas seem to be coming back into their own, notably "retained rights." Jefferson thought that certain matters are not the law's business: "[T]he legitimate powers of government extend to such acts only as are injurious to others." Might that be where the new right of privacy is taking us, to outlaw "victimless crimes," morals legislation, other forms of paternalism?

Withal, then, there has been amazing continuity as well as change. We need not apologize to our Fathers for the change: their political theory, surely, recognizes our right to govern ourselves. They may even scorn us for too much attention to them:


114. See note 44 supra and accompanying text.

115. 3 The Writings of Thomas Jefferson 263 (P. Ford ed. 1894). The French Declaration of the Rights of Man and of the Citizen, Constitution of 1791 Title I, art. 3.

116. See note 56 supra and accompanying text; Henkin, Privacy and Autonomy, 74 Colum. L. Rev. 1410, 1431-32 (1974). The judgment upholding a conviction for consensual homosexuality, Doe v. Commonwealth's Atty. for the City of Richmond, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd mem., 96 S. Ct. 1489 (1976), may prove these expectations unwarranted, but the Court's unwillingness to justify that result by opinion leaves the future open.
Jefferson suggested that a constitution expires naturally after 19 years. Some of them surely would applaud us. They felt they had to go slowly, but would have expected that we would move, if not very fast. Some of them surely would be happy that the Constitution governs the states as well, that we are a representative democracy as well as—more than—a republic; that popular sovereignty is universal suffrage and participation-voting is a natural right (almost); that we abolished slavery and established the principle of equality of opportunity; that we have become a welfare state; that we have expanded our rights as well as the categories of those entitled to them; even, that we have developed judicial review and given finality to the courts.

Perhaps they would think we have dishonored their intentions in moving from nation to empire, in having quasi-colonial relations to American Indians, to Puerto Rico, Guam, the Marianas, the Canal Zone. They may be unhappy, as some of us are, that we have grown lax about “separation,” especially in foreign affairs; that we have reinstated the need to be rich in order to hold elective office. Some would be sad that we have yet to fill fully their promises of equality, liberty, and pursuit of happiness to all our people.

“The history of American democracy,” Ralph Barton Perry wrote, “is a gradual realization, too slow for some and too rapid for others, of the implications of the Declaration of Independence.” We continue that process every day, too slowly for some, too rapidly for others. But we continue it. Since 1776 ancient dynasties and empires and systems of government have gone, and many new ones have come and gone. Even France, our sister in revolution, has had many regimes and several constitutions. The constitution of Great Britain, our spiritual ancestor, is radically changed. But the United States constitutional system has survived, changed but not too changed.

I do not begin to know how to answer the question I started with: how have we avoided the fate of other constitutional systems—recurrent revolutions, strong man or military junta, successive constitutions, emergency repressions and government by decree? Was it the wisdom of our Fathers? The genius of

117. 5 THE WRITINGS OF THOMAS JEFFERSON, supra note 115, at 121.
118. Some may be content even that we have effectively abolished the constitutional right to bear arms and the reliance on state armies that contributed to civil war. United States v. Miller, 307 U.S. 174 (1939); Presser v. Illinois, 116 U.S. 252 (1886).
the people we were, became, and are? Or great, good luck? Was it our devotion to ancestral principles, or our conservative temperament? The ingenuity of the system bequeathed us by the Fathers, and its amenability to political and judicial calibration? Was it important that they excluded suspension of the Constitution or of any rights, that they precluded standing armies and insisted on civilian supremacy? That they taught us to elect our military leaders and domesticate them?

What will speakers say at the next centennial? Somehow we do not doubt that there will be another, and others after that, and that they will find our Constitution and institutions not very different. The Fathers have done well by us. Much will depend on us and our posterity, on our wisdom, our genius, our luck.